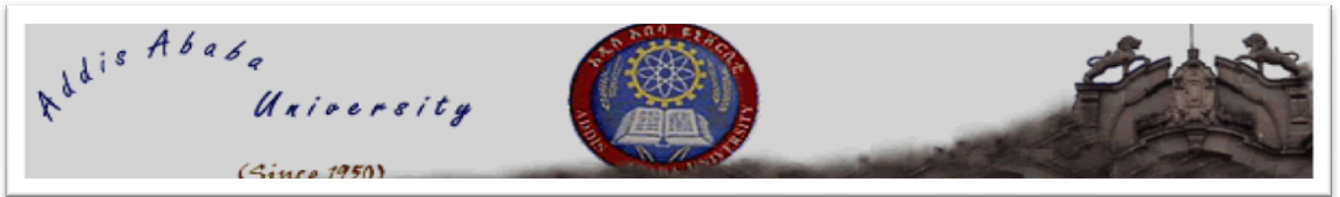


**ADDIS ABABA UNIVERSITY**

**School of graduate StudieS**

**COLLEGE OF LAW AND GOVERNANCE**

# ADMINISTRATIVE AGENCIES POWER IN ETHIOPIA WITH PARTICULAR REFERANCE TO ADMINISTRATIVE RULE MAKING: A COMPARATIVE STUDY

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A THESIS SUBMITTED TO THE SCHOOL OF GRADUATE STUDIES, COLLAGE OF LAW AND GOOD GOverNAnce, ADDIS ABABA UNIVeRSITY, IN PARTIAL FULFILLMENT OF THE REQUIRMENT FOR THE MASTERs OF LAW (LLM) DEGREE IN CONSTITUTIONAL AND PUBLIC LAW.

ADDIS AbAbA

MAY, 2015

## Declaration

I, the undersigned, declare that the thesis is my original work and has not been presented for a degree in any other university and that all sources of material used in the thesis have been dully acknowledged.

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## Acronyms

HPR……………………………………….…House of People Representative

HOF………………………………………..House of Federation

FDRE…………………………..……….Federal Democratic Republic of Ethiopia

Art …………………………………………Article

Proc…………………………………….....proclamation

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**Abstract**

*In any democratic setting, the law making power certainly and indeed, rightly belongs to the legislature. Going through the literature however, one cannot but acknowledge the existence of the practice whereby the executive enjoy considerable law making power in addition to its usual executive power. It is incontrovertible that the practice is a negation of doctrine of separation of powers. But the practice seems inevitable given the exigency of modern governance. As such, certainly, the idea of delegation of law making powers to administrative bodies has come to stay. This is however depends on certain conditions, inter alia, that the power under which the later emanates is that of delegable, the power should properly delegated, and must be exercised within the scope by appropriate authority.*

*Despite this universally accepted and in fact applied principles, legislatures at both federal and Oromia national regional government may not lay down any policy at all, declare its policy in vague and general terms, not set down any standard for the guidance of the executive, confer and arbitrary power to the executive to amend or modified the policy laid down in the parent act, with out reserving for itself any control mechanisms over subordinate legislation. In addition to the lack of a practical limitation on the part of the legislature that give rise to excessive delegation, as well as due to luck of any standards that limits the exercise of delegated power, the problem is more aggravated due to lack of post control of administrative rule making power in Ethiopia. Despite the existence of legal basis, other organs of the government like the court and the higher executive organs have no administrative rule making control mechanisms. Due to these, administrative rules making power have been left with out legal and practical limitation at both federal and state level.*

*With this in mind, this work meant to make a humble attempt at showing the problem with practice and the legal gaps in administrative rule making power, procedure and control mechanisms and coming up with some points of recommendation for policy and law reform.*

***Key words****: administrative rules, excessive delegation, ultra virus, control mechanisms*

# CHAPTER ONE

## GENERAL FRAMEWORK OF THE RESEARCH

### 1.1. Back Ground of The Study

The discussion of separation of powers introduces the three chief authority of government: the legislative, the executive and the judiciary; exist in varied forms in all legal system and is recognized under almost all constitutions of the world. This theory assumes that these three powers of the government must always be kept separate and be exercised by different organs.[1] Accordingly, the legislature is to make laws and frame policies, the judiciary is to interpret laws and to apply them to concrete cases, and the executive is to administer/execute/ the some. As per this classical and pure theory of separation of powers, each government unit must stick to the functions/powers entrusted to it. Thus, neither the executive nor the judiciaries are allowed to perform tasks given to the legislative and vise verse.[2]

However, due to the change of the philosophy as to the roles and functions of the state this traditional separation of powers principle has become loosen accordingly. Under the philosophy of lazier fair, before 19$^{th}$ century, the state has been merely a polity state, exercising sovereign functions like defending a country from external aggression, preserving internal peace and security, delivering justice and collecting a few taxes to undergo these activities.[3] This political theory prevalent at the time, i.e. Laissez faire, however failed to solve the economic ills and social evils which resulted in poverty, ignorance, exploitation and suffering of the mass.[4] Due to this it came to be realized that the state should take active role in social control and regulating individual enterprise.[5] As such instead of confining it self to

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[1] Dr.J.J.R.Upadhyaya, Administrative law,( 6th ed. 2006), Graphic Offset print-Allahabad, at 36. See also M.J.C. Vile, Constitutionalism and the Separation of Powers (2nd ed.1998), published by Liberty Fund, Inc- USA. Available at http://oll.liberty. fund.org/titles/677 (as accessed on 13,0ct 2014).Also see David Herling and Ann Lyon, a Brief Case on constitutional and administrative law, Cavendish publishing limited-London, at 20.

[2] Dr J.J.R. Upadhyaya, supra note 1.See also Hilaire Barnett, constitutional and administrative law (8$^{th}$ ed.2011), Routledge Taylor & Francis group-London and new York, at 80

[3] Mohammed Abdo,2010,Administrative law, Bahir-Dar and Jima university, at 4

[4] Id

[5] Id

defense, public order and few other general services, it undertakes the regulation of much of the daily businesses and welfare of individuals.[6] Accordingly number of functions which were previously left to private enterprise has been taken over by the state so that many schemes for the progress of society are prepared and administered by the government mainly by the executive.[7] Due to this, the governments (the executive) possess judicial and legislative power in addition to its conventional executive power. As such, in a time of rapid economic and social change, the historical separation of powers tends to become unclear and can not define sharply.[8]

In addition to the change of the roles and functions of the state due to the impact of the philosophy of welfare state, the notion of developmental state in some countries also has influence the role of the state tremendously. While neo-classical economics was based on the implicit assumption of a minimalist state, all late-industrializing countries chose to deviate from the prescription, giving rise to the concept of a developmental state which played an active role in promoting the country's development.[9] A recent economic report on Africa describe the notion of a developmental state is "one that has the capacity to deploy its authority, credibility and legitimacy in a binding manner to design and implement development policies and programs for promoting transformation and growth, as well as for expanding human capabilities."[10] In general, it is an image of state led economic growth in which bureaucratic supermen used vast grants of discretion. There was the appearance of substantial *state discretion*, in contrast with conventional economic theory. The administration and the

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[6] *H.W.Wade,*Administrative law,*( 3rd ed. 1991)*,Clarendon press, Oxford, *at 1*.See also Michael T Molan, Administrative law textbook,(16th ed. 1994), HLT publications-London, at 8

[7] David Stott and Alexandra Felix, principles of administrative law (1st ed.1997) *Clarendon* Cavendish Publishing Limited, Sydney London, p28. See also *H.W.Wade,* supra note 6. See also Edwin Borchard, French Administrative Law (1993), Yale Law School Legal Scholarship Repository, Faculty Scholarship Series. Paper 3445,at133.Also found athttp://digitalcommons.law.yale.edu/fss_papers/3445 (accessed on 20-august,2014)

[8] Edwin Borchard, supra note 8

[9] Tesfaye Habisso, The Challenges of Building a Democratic Developmental State (2010). Available at http://www.utna.org/2010%20/august/TesfayeHabisseptember.pdf (visited on 27 December 2014)

[10] UN ECA and AU, Economic Report on Africa 2011: Governing Development in Africa-the Role of the State in Economic Transformation, Addis Ababa: UN ECA (2011) at 7. For further Meaning, Features, and Types/Variants of a Developmental State, see Sehen Bekele and Tsegaye Regassa, Democratization in a Developmental State: The Case of Ethiopia Issues, Challenges, and Prospects, UNDP Ethiopia, No.1/2012, philmon press, at 5. Also Asnake Kefale, Narratives of Developmentalism and Development in Ethiopia: Some preliminary explorations, at 2.

executive possess tremendous power to regulate many aspect of life. Therefore, the emergence of the developmental state also entailed a significant diffusion of normative power into executive and administrative sphere.[11]

As such, the notion of welfare state and then developmental state become as a causal argument linking state interventionism,[12] justified conferring wider powers on governments for the interest of the public. Particularly, although these roles of the state were reflected in the three organs of the government, the executive organ, that was functionally the most suited to shoulder the major part of the new responsibilities, assumed a vital role in this process. This is mainly due to the fact that administration is highly a complicated job, needing a good deal of technical knowledge, expertise and know-how. Moreover, continuous experimentations and adjustment of details has become an essential request of modern administration. Since such a flexibility of approaches is not possible in the case of the legislature and the judiciary process, administration agencies have assumed such an extensive and varied character. Due to this, the administration does not only assume its conventional responsibility but does much more: 'legislative' and 'adjudication'.[13] In other words, administrative efficiency and effectiveness demand the exercise by administrative agency legislative and/or judicial powers in addition to its traditional power.[14]

Due to this, even if in all democratic constitution the legislature is an organ that makes laws, due to different factor it could not make all the law modern government demands. So that it delegated its law making power to some other government organ, particularly to the executive. In some respect, administrative rule making is the most important function of administrative agencies because it produces binding regulations that can have major repercussions for the societies, economy, ecology, as well as the welfare of individuals, groups and industries. As

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[11] Lindseth Peter, the Paradox of Parliamentary Supremacy: Delegation, Democracy and Dictatorship in Germany and France, 1920s-1950s" (2004) University of Connecticut School of Law Articles and Working Papers. Paper 49. Available at http://lsr.nellco.org/uconn_wps/49 (accessed on December 2014)

[12] Sehen Bekele and Tsegaye Regassa, supra note 10.

[13] Dr.J.J.R. supra note 1, at 58.

[14] Solomon Abay, The Court System and Question of Jurisdiction under the FDRE constitution and proclamation 25/96, Proceedings of the symposium on the role of courts in the enforcement of constitution, (2000), at 147. Also see Bernard Schwartz and H.W.R.Wade, legal control of government,(1972) Clarendon press,Oxfored,at 84

such, it has now become almost an every day fact of public administration of the modern welfare state. As a result, today measured by volume, more legislation is enacted by administrative agencies.[15]

However this depends on the condition that the power under which such power emanates is that of delegable and properly delegated, as well as the power is exercised within the scope by an appropriate authority. In other words, the caring out of administrative rules is legitimate only if the empowerment and standards as well as the required procedures are complied with by administrative authority. Otherwise, their action considered as excessive delegation and ultra virus.

Particularly, the rationale fear created by the concentration of the tripartite powers in the hands of the same organ urges for devising legal and institutional devices that are important to control the exercise of powers by administrative agencies. Therefore, it is unequivocally accepted fact the need or necessity of power, simultaneously stressing the need to ensure the exercising of such power within proper bounds and legal limits. Some scholars describe this concept of agency empowerment at the some time agency control as 'the duality of administrative justice".[16] Therefore, in addition to creating various administrative agencies and empowering them with necessary power to carry on specific social, economic and political programs in the interest of the public, there is a consensus as to there should be appropriate controlling mechanisms that restrain administrative agencies within the scope of the powers entrusted to them. There are various legal and institutional mechanisms that may be devised to control the powers of administrative agencies.

Despite the difference in there mode, effectiveness and scope of these controlling mechanisms, all of the control mechanisms have positive contribution in promoting the principles of good governance, democracy and rule of law in general. As a result, the administrative Procedure law of many countries usually establishes procedures that agencies must follow in adopting rules and set out the controlling mechanisms.

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[15] Mohammed, supra note 3, at 67.

[16] Paul Craig, Administrative Justice—the Core and the Fringe,(2000) , Papers presented at the 1999 National Administrative Law Forum, published in Canberra by Australian Institute Of Administrative Law Inc/ AIAL/,at 32.

The principle of separation of power and the notion of limited government has been unknown in Ethiopia history. Ethiopia got its first constitution in 1931 which was revised in 1955. During these times, despite the creation of a system of legislature and courts, which apparently makes the existence of the principle of separation of power, all real power and authority remained firmly entrenched in the emperor and the traditional ruling class. Moreover, there were no legal and practical ground for control and check of the power of government let alone to have systems that specifically deal with administrative rule making power. The arbitrary and unlimited form of government continued after the over through of the Emperor. Therefore, there was no a formal system that deals with administrative rule making power, procedure and control mechanisms in the past three written constitution.

The country has undergone major political and social change since the demise of the Derg regime. In particular, the 1995 FDRE Constitution become a milestone that redesigned and restructured the country into a federal republic[17] based on democratic principles, including extensive and progressive individual and group rights, among others the principle of transparency, public participation and accountability.[18] The Preamble notes that it is strongly committed to guaranteeing a democratic order, and advancing our economic and social development. It is further firmly convinced that this requires the full respect of individual and people's fundamental freedoms and rights.[19] The Constitution further makes all international human rights instruments ratified by Ethiopia an integral part of the law of the land.[20] It further recognizes that human rights and freedoms, emanating from the nature of mankind are inviolable and inalienable and thus shall be respected. It goes on providing that the fundamental rights and freedoms specified in the Constitution shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.[21]

The FDRE constitution in general and these democratic principles in particular has significant effect on laws including administrative law. It is under it fundamental laws are supposed made

[17] The Constitution of the Federal Democratic republic of Ethiopia, Proclamation No. 1,1995,Federal Negarit Gazzeta,1st rear No.1, 21 August 1995,(here after called FDRE constitution),art 1
[18] Id, art 8(3) and 12
[19] Id, Preamble par 2
[20] Ibid, art 9(4)
[21] Ibid, Art 13/1/

and executed, all governmental authorities and the validity of their functioning adjudged. As such, no legislature can make a law and no governmental agency can act, contrary to the constitution, and no act of executive, legislative, judicial or quasi judicial, of any administrative agency can stand if contrary to the constitution.[22] The constitution thus conditions the whole government process in the country.

However rights and freedom enshrined in the constitution cannot be assessed in the abstract on the basis of merely studying the provisions of the Constitution. What is more important and critical is whether there are mechanisms that guarantee these rights, freedom, principles and values from violation. Administrative procedure is one of the mechanism by which government power (the executive) is controlled and checked. There is no administrative procedure in the country history due to which administrative rule making left uncontrolled.

In addition to the constitution, other legislation like Ethiopia's Mass Media and Freedom of Information Proclamation assure the need to promote and consolidate the values of transparency and accountability in the conduct of public affairs, as guaranteed by the Constitution, and to impose a legal obligation on public officials to facilitate access to individuals and the mass media to information so that matters of public interest may be disclosed and discussed publicly.[23] Despite the enactment of this law, public authority usually neglect their obligation at least to facilitate access to individuals and the mass media to information so that matters of public interest may be disclosed and discussed publicly.

The problem of delegated legislation in Ethiopia starts with the manner such power is delegated. Even if it is not the objective of this paper to examine the legality of primary legislation made by the legislature, however it is necessary to see one of the root causes for problems with regard to administrative rule making in this country. There is no clear constitutional stipulation that empower the legislature to delegate administrative rule making. Similarly there is also nothing that prohibit the legislature from delegating is rule making power. Thus delegation of administrative rule making power was, as any other countries of the world, has not been new discovery in Ethiopia.

[22]Id, art 9(921)

[23] Freedom of the Mass Media and Access to Information Proclamation No. 590/2008

However, this does not mean that the legislature's authority to delegate is unlimited one. As a rule, it can be said that the legislature can not delegate its general legislative power and matter dealing with policy. Only subordinate part of the legislation could be delegated. Thus, the legislature, in principle, should act within limited parameters otherwise its act would be considered as ultra virus. The parent act is generally declared ultra virus the constitution in three instances; if it violates: expressed constitutional limits, implied constitutional limits and constitutional rights.

In Ethiopia every proclamation contains a provision that empower the concerned organs to make a regulations and directives in a vague and general way that enable the executive not only filling the detail but also to add a policy. Moreover, it does not contain mechanisms that enable control of administrative rule making. But these provisions are simply enabling acts conferring power on administrative agencies than rules and procedures of manner of exercising power, or in general tools of controlling governmental power.

Once the legislature delegate rule making power, the administration, in principle, is expected to act within the power conferred. Where an administrative agency acts beyond or outside its statutory powers, the resulting action is regarded as being *ultra virus*. When a delegated legislation is beyond the scope of authority conferred on the delegate to enact, it is known as substantive ultra virus where as when a delegated legislation is enacted without complying with the procedural requirements prescribed by the parent act or by the general law, it is known as procedural ultra virus.[24] There are many instance where by administrative rules are made under this defects.

Finally, the concentration of power in the executive and administrative spheres would be tolerated as a constitutional matter, but only on the condition that delegated authority would be subject to a range of political and legal controls that would act as a substitute for the formal structural protections of separation of powers. There is no established control administrative rule making mechanisms in Ethiopia. The judiciary is devoid of from reviewing the constitutionality of administrative rules, there is neither formal nor informal internal reviews of

[24] David Stott and Alexandra Felix, supra note 7, at 81 & 121.Also see Kelli Vakil, procedural deviance of delegated legislation from parent act, at 2. Available at http://ssrn.comabstract=1877247 (accessed on December 2015)

administrative rule making by the supper executive organ, and the principal (the legislature) it self do not have any means of control administrative rule making.

Therefore, this research tries to explore how these potential problems in time of delegating a power to make rules, how the executive an other administrative agencies exercise their delegated rule making power, and the existence and practicability of controlling mechanisms of this power, and the viable solutions in current legal set up, by referring to experiences at federal and Oromia national regional government.

### 1.2. Literature Review

Administrative law in general and administrative rule making in Ethiopia is a subject in which too little attention is given in terms of research and publication. Even if some of them do not directly deal with the issues covered here, there are certain researches have done around this issue. Awel Ahmed examined whether parliamentary oversight in Ethiopia (at the federal level) is effective in ensuring constitutionalism and accountability.[25] It aims at examining whether the existing Ethiopian parliament is effective in discharging its constitutional mandate of overseeing the executive and to what extent oversight ensures constitutionalism and accountability. Even if the whole part of the research talks about the role of the parliament in the oversight of the executive '*action*' and it is not clear which *action* of the executive in which the oversight role of the legislature in is examined it refers, from the whole reading of the research, it could be inferred that it talks all about the *inherent power* of executing the law (administration) excluding the judicial and rule making power. On the other hands, my research focuses on one of the power of administrative agencies (rule making) as well as takes parliamentary control (which the whole of his research is deal about) as only one of the control systems for administrative rule making.

Moreover,Aron and Abdulatif wrote *an article* titled "Administrative Rule Making in Ethiopia, a Normative and Institutional Framework".[26] Except the title resembles my research title, its

[25] Awel Ahmed, parliamentary oversight and its role in ensuring constitutionalism and accountability under the FDRE constitution ( A Thesis Submitted to the School of Graduate Studies of Addis Ababa University in Partial Fulfillment of the Requirements for the Masters of Law (LL.M) in Constitutional and Public Law 2011.(unpublished)

[26] Mizan law review vol.7 no 1 September 2013

scope and content is limited to the 'meaning of and the theoretical issues in relation to administrative legislation followed by the basic procedures and principles that should harness discretion and abuse of authority'. On the other hand, my research tries to show, in addition to the discussion of those issues they try tackle, the practical issues, challenges and prospect of administrative rule making at both federal and Oromia national regional state by comparing rule making power, procedures and control mechanisms of other countries.

On the other hands, there are a lot of researches on quasi-judicial function of administrative agencies in our country.[27] Most of these researches base their work on federal Revenue and Customs authority regulation which give a sole authority to fire its employee to the director as well as which prohibit the review of this decision by regular courts. On the other hand, my research takes judicial review of administrative rule making as one means of administrative rule making control mechanisms.

Generally, an aspect of administrative rule making has been an area that seems neglected or insufficiently considered. My research therefore tries to highlight the main problematic area of administrative rule making mentioned above and suggest the possible solutions in the federal and Oromia national regional state legal set up.

### 1.3. Statement of the Research Problems

As it is said above, administrative authorities in modern state are not merely to administer, but are empowered to legislate, adjudicate and to execute. However, when legislative power is delegated to administrative agency, it has to be exercised fairly and only with a view to attain its purpose. That means, delegation of legislative power to the executive has to be within the permissible limits. Similarly, once administrative rule making is delegated *properly* the agency should also enact rules within the limits of delegation set by the lawmaker, the general administrative procedure or other laws. Moreover, the principle of rule of law obliges that decision of public official have to be subject to the substantive law and should take their

[27] For instance, Tigist Assefa, Judicial Review of Administrative Actions: A Comparative Analysis, (2010). Yamane Kassa,The Judiciary And Its Interpretive Power In Ethiopia: A case study of the Ethiopian revue and customs authority (2011) are some of thesis Summated In partial fulfillment of the request for the masters of law( LLM) for the faculty of law at Addis Ababa university.(unpublished)

decisions according to the formal procedures established in legislation (principle of legality).[28] It becomes *ultra virus* if a subordinate legislation goes either beyond the scope of authority conferred up on it or acts without complying with the procedural requirements prescribed by the parent act or the general law. As such, the delegated legislation may be ultra virus either the constitution, the parent act, the procedure or otherwise abused.

Accordingly, the need for conferring more power on the administration should be accompanied simultaneously by means for controlling these powers. Due to this, in addition to the promulgation of administrative procedure, different countries devised different mechanisms of controlling administrative power.

Although it may be unfair to say that Ethiopia does not have administrative law at all, neither such a broad, uniformly applicable administrative procedure, nor specific law dealing agency procedure exists at all in the country's history. The first attempt was made under the imperial government in 1967.[29] However, it remained a draft. Currently, the justice and legal system research institute has prepared a second similar draft of the administrative procedure which is more or less similar to the 1967 draft.[30] In addition to the lack of this general administrative procedure both at the federal and at regional level, there is no at least a specific administrative procedure that would be govern an individual administrative agencies actions in general and rule making in particular.

However, in principle, public authorities while imposing their will upon individuals have to respect those individuals and citizens' rights and interests. In order for this to happen, the public authorities have to be subject to the law and take their decisions according to the formal procedures established in legislation (principle of legality).[31] This is because, for a democratic government, rule of law is a basic requirement which require that ever organ of the state must act within the confines of powers conferred up on it by the constitution and the law.[32] If the principle of legality is to have any effectiveness, it needs to be made applicable in practice.

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[28] Wolfgang Rusch, Administrative procedure in EU member states, Conference on Public Administration Reform and European Integration Budva-Montenegro, 26-27 March 2009, at 3.

[29] The 1967 Administrative procedure of Ethiopia (draft)

[30] The Draft Federal Administrative Procedure Proclamation (2004)

[31] Wolfgang Rusch, supra note 29, at 3.

[32] J.J.R.Upadhyaya, supra note 1,at 30

Administrative procedures are intended to make effective and operational the principle of legality in the acts and decisions of the administration.

Even if Ethiopia is a democratic republic, and since we are no more in 18th and 19th century when right of the citizens and obligation of the governor is unbalanced and the need and tendency to be regulated, presently the need for such systems that regulate the actions of the administration are beyond necessity. Moreover, Ethiopia has declared itself to be pursuing the path of a democratic developmental state.[33] A government as such, as per the main ideas of the notion, is expected to have a plaintive of discretionary powers and intact with every life of the citizens, it is highly probable that power could be abused and rights may be violated. It is particularly true that the government would implement its policy through implementing laws and policies made by the legislature. It enacts so many regulation and directives to this end. This is not with out challenges: the combination of a strong developmental mission with relatively weak formal legal control would inevitably lead to autocratic form of government with broad power but with out any control mechanisms.

As any country of the world, delegating administrative rule making power is inevitable in Ethiopia. As such, the idea of delegation of law making powers to administrative bodies has come to stay. This however depends on certain conditions, *inter alia*, that the power under which administrative rule making emanates is that of delegable, the power should properly delegated, must be exercised within the scope and according to appropriate procedures, and by appropriate authority as well as the existence of appropriate control mechanisms. In Ethiopia, however, there is no developed principle that guides the scope under which the legislature is allowed to delegate its rule making power to administrative agencies. Due to this, there is excessive delegation that shifts the role of the legislature to the executive organ. At times the administration has been given a power to make rules on areas which in principle is under the mandate of the legislature. In addition to excessive delegation, once the legislature given the power to make rules, there is no a rule that govern how administrative agencies should put the delegated rule making power in practice. This is related to lack of administrative procedures, either general or specific, that govern the exercise of power of administrative agencies. Due to

[33] Fana Hagos, law and Development Paradigm, law and development, and legal pluralism in Ethiopia (2013) JLSRI, Addis Ababa, Ethiopia , p 24

this, agencies make rules that are contrary to either the parent act or the constitution or may abuse it. Finally, there is no formal and developed means of control either in time of excessive delegation or if the administration had made ultra/intra virus rules. Both the legislature and the judiciary do not have a formal means to and experience of controlling administrative rule making power at both federal and regional government.

As a logical extension of the above facts, the research is aimed at evaluating administrative agencies power in Ethiopia with particular reference to administrative rule making power. As such, the extent the legislature delegates its rule making power to administrative agencies, the procedure administrative agencies follow and the control mechanisms of administrative rule making at the federal and Oromia national regional state will be assessed, by comparing the trends of certain other countries.

### 1.4.Research Questions

In democratic system, the governance's process has to be transparent, participatory and accountable. In order for this to happen, the public authorities have to be subject to the law and take their decisions according to the formal procedures established in legislation. The state must act within the confines of powers conferred up on it by the constitution and the law.[34]

But the general question is that is it possible for a country with a nomenclature of democracy form of government to exist without a any formal procedure that specifically designed to regulate its administration actions either by specific procedure that would be applied to individual administrative agencies or a general administrative procedure that applied to all agencies? Even if recently there are some legal and institutional reforms in Ethiopia like BBR, BSC, citizens' charter and the like, there is no any attempt made to regulate the action of the more power full organ of the government: the executive and its agencies. There is no a formal procedure that regulate the power of this organ in general and the power of rule making power in particular either at the regional or at the federal level. Regulations and directives have been enacted with out any legal and practical controls which resemble the current system to the previous era of the Emperors and the military Dergue regime.

[34]J.J.R.Upadhyaya, supra note 1,at 30

Thus, based on the above problems, the study tries to evaluate the constitutional and legal validity of administrative rules at the federal and Oromia national regional state, and its consequence by asking predominantly the following specific questions:

- ✓ Is there any parameter and restriction on the legislature when it delegates power to rule making to administrative agencies? The doctrine of excessive delegation has been invoked to determine the validity of provisions delegating legislative powers to administrative agencies. This question tries to check whether the matter delegated by the legislature is an essential legislative function which could not be delegated under the constitution, if any, and/or whether it contains any provision(s) that violates the constitution.
- ✓ Is there any administrative rule making procedure in adopting these rules? If there is no, how agencies make rules? If any, do they have been complied at the time of rule making? This question tries to assess how administrative rule making procedures relate with certain constitutional principles and contribute for the rules' quality and enforcement.
- ✓ What are available mechanisms, if any, by which delegated legislation could be controlled in Ethiopia? Which of these most suited for each levels of government?

- ✓ What could be a possible challenges and barriers for the country not to have administrative procedural law in the past and in the current system? Is there a possibility for regions to lead the federal in enacting administrative procedure in the current situation?

**1.5.Objectives of the study**

As it is said above, it is very difficult and challenge to talk about the history of administrative law in Ethiopia. It is still not well developed as there is no administrative procedure, either at the federal or state level, and it is an area of law characterized by the lack of legislative reform. It is also characterized by luck of publications and research. Due to this, it is an area given no attention by lawyers let alone known by the public at large.

By acknowledging the above facts, the general objective of this paper is predominantly to assess the manner parliament delegate rule making power, the way the receiver of the delegation acts accordingly, and the control mechanisms in case of ultra virus in these scenarios.

In precise terms, the following are the notable specific objectives of this research:

- ✓ To explore the practice and problem of delegating administrative rule making power. This will covers issues like permissible and non permissible delegation (the doctrine of excessive delegation)
- ✓ To explore the practices and problems of administrative rule making. The issues of substantive and procedural ultra/intra virus will be deal.
- ✓ To analyze whether there is underpinning circumstances for Ethiopia to be both developmental and democratic with out administrative procedural law in general. This all about to explore the practice and problems of administrative rule making control mechanisms.
- ✓ To elucidate recommendations on what shall be done to have better legal frame work that goes inline with democratic form of government and constitutional principles.

## 1.6.Significance of the Study

As it is said above, administrative law in general and administrative rule making in particular is a list studied area in Ethiopia. It is also an area with little emphasis given in terms of legislative reforms and publication. Thus, undoubtedly this study will initiate those scholars and students who have aspiration on the area as well as it create an awareness of those concerned government organs on the administrative rule making area. In particular the study will have the following significances:

- ✓ To contribute its part to the development of jurisprudence on administrative law in Ethiopia. Thus it serves as bedrock for further research in this fertile area of law in Ethiopia.
- ✓ To draw the attention of judges, policy makers, legislative members and human right advocators in this area and make it their areas of concern in discharging their duties.

## 1.7. Research Methodology

The research methodology is largely qualitative one. In the main, the study has attempted to make an appropriate review of the existing literature on administrative powers in general and administrative rule making in particular to set up the proper conceptual, legal and theoretical framework, which serves as springboard to determine the above research questions. Moreover, primary sources like the FDRE constitution, the Oromia national Regional state constitution, varies laws establishing administrative bodies, certain subordinate legislation will be assessed. For the purpose of this study, interviews also will be conducted with governmental officials who have a direct connection with administrative rule making as well as with individuals who are believed to have experience and knowledge about the issues in the study area. Besides, analysis of pending or/and decided cases on the subject matter, are also utilized. Furthermore, though each country of the world has its own history and accordingly its own solutions to the problem of delegated legislation, the basic question are the some. Thus, the approach taken in this study is comparative so that lesson may be drawn from some countries of the world.

## 1.8. Delimitation of the Study

Though administrative powers mainly include executive (administration), quasi adjudication, and quasi legislation, the first two aspects would be used only as a back ground and thus the research focus administrative rule making. Moreover, since the implication of the federal structure is that there is a possibility of the Federal and the state administrative agencies, the research focus on administrative rule making at federal and Oromia national regional state government. Thus, administrative rule making both at federal and Oromia national regional state will be seen by only taking certain administrative rules as an example.

Furthermore, as it is impossible to assess all administrative agencies and rules, the truth of the above assertion can be best seen with reference to certain proclamations made by the HPR and Oromia state council, and certain administrative rules made by the respective executive bodies. Furthermore, this research do not coverer rule making power of independent administrative agencies. Eventually, since administrative rule making includes a wider variety of issues, unless reference to some other issues are made for the purpose of clarity, the research predominantly focus on administrative rule making power, procedure, and control mechanisms.

## 1.9. Limitation of the Study

Undertaking the study was not an easy task; particularly, obtaining information for the purpose of the study has been a demanding and burdensome task. Worst of all, it was difficult to get relevant data to be used as input to the study due to the absence of organized information on the issue in the research area. Particularly, this study will primarily suffer from domestic research and literature resources constraint. Moreover, in my interview with the concerned individuals, they do not have even adequate information on the area.

### 1.10. Ethical Consideration

In the process of data collection due care was taken in order to make this piece of work ethically sound. Respondents will be informed that their contribution was sought for exclusive academic purpose. Their consent would be obtained on the basis of consensus to fully respect their rights, needs, values, and desires as far as the issue of this research is concern. Tape recordings, whenever necessary, will be used based on their prior knowledge and consent. Their privacy will also be protected including their name and kept confidential. As such collective names such as informants, one of the higher officials, etc would be used in the research.

### 1.11. Organization of the study

The study will be divided in to five chapters, each of which has its own sections and subsections. The first (this) chapter is the introduction; introduces the background of the study, literature review, statement of the problem, research question, objective and significance of the study, and research methodology and ethical consideration. Chapter two gives a brief expiation the concept and the power of administrative agencies' in general and administrative rule making in particular. It explores the conceptual and theoretical framework of administrative agencies, their power and administrative rule making, restriction of delegated legislation, the doctrine of ultra virus, administrative desecration and eventually the ideal of control of administrative action. Chapter three deal with administrative rule making in some jurisdictions. Chapter four will be devoted to rule making power of administrative agencies in Ethiopia. Chapter five is about conclusion and recommendations.

# CHAPTER TWO

## ADMINISTRATIVE AGENCIES AND THEIR RULE MAKING POWER:OVERVIEW

## 2.1. Introduction

The growth of the administrative law to large extent may be identified with increase of administrative agencies, not only in number but also in power and function. Due to this, administrative agencies become a major part of every system of government in the world. Accordingly, there is hardly any function of modern government that does not involve, in some way or another, an administrative agency. As such, modern government is said to be predominantly administrative government.[35] Hence, the study of administrative law is mainly interrelated with the study of agencies.

In particular, even if law making is the primary function of the legislature, however, in no country the legislature monopolize the whole of legislative power.[36] As such, a good deal of legislation is made by the administration under the powers conferred by the legislature.[37] However, the granting of such power is not an open ended. The legislature expected to grant this power within the possible narrow limit. The international commission of jurist (ICJ) in its 2nd congress held in New Delhi in 1959 has confirmed this fact. The commission observes that the granting of power by the legislative to the executive should be under taken within the narrowest possible limit and the legislature should define the extent and purpose of such delegated powers, as well as the procedures by which such delegated powers was to be brought into effect, and an independent judiciary should be given the power to review the legislation passed by the executive.[38]

Since executive is given power to supplement the law made by the legislature, the authority making the legislation is subordinate to the legislature. That is the powers of the authority which makes it are limited by the statute which conferred the power and other relevant laws, and consequently it is valid insofar as it keeps within those limits. This fact emanates from the concept of rule of law which require that *inter alia* ever organ of the state must act within the confines of powers conferred up on it by the constitution and other laws. Thus like the

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[35] William F. Fox, Understanding Administrative Law, (4th ed. 2000), Matthew Bender & Company, Inc –USA, at 3. See also Mohammed Abdo, supra note 3 , at 51, M.J.C. Vile, supra note 1

[36] Lindseth, Peter, Agents With out Principals? Delegation in an Age of Diffuse and Fragmented Governance, University of Connecticut School of Law Articles and Working Papers. Paper 18, 2004. available at http://lsr.nellco.org/uconn_wps/18 (accessed on decmber,2014)

[37] Ibid, at 24. See also J.J.R., supra note 1, at 58

[38] The international commission of jurist (ICJ) in its 2nd congress held in New Delhi in 1959

existence of limitation on the part of legislature with regard to the scope of granting administrative rule making power, once power is delegated there are also scopes within which the administration is allowed to act. The executive does not have powers beyond those granted by the law.[39]

The rapid growth of the administrative agencies and the expansion of delegated legislation as well as the above restriction were significant factors that necessitated legislative measures and judicial interference aimed at controlling the manner of exercise of power of these entities so as to ensure protection of individual rights and freedoms. As a result, most countries introduced specific and comprehensive rules and procedures governing administrative adjudication and rule making. Therefore, the need for administrative rule making (delegation) as the some time the need to set up mechanisms of control of such power become the two dilemmas that encounter every governments of the world.

Having these general remarks, we will attempt to make a general overview discussion of each of administrative agencies power below. This is justified by the fact that some kind of preliminary analysis of the doctrine of delegation and its elements is necessary before we step into the major discussion of administrative rule making power, procedure and control mechanisms.

## 2.2. ADMINISTRATIVE AGENCIES POWERS

The modern executive branch has, in parallel with the development of the interventionist welfare state, continually expanded its sphere of function and influence. Today, the executive is not merely to implement a law made by legislature but it make rules and adjudicate. As such, there are very few areas of society today not subject to some form of state regulation.

In order to realize their purpose efficiently and effectively administrative agencies need wider power and discretion due to which they blend together three powers of government.[40] Accordingly, even though in principle rule making and adjudication belong to the legislature and courts, respectively; granting such powers to administrative agencies has become a

[39] David Herling and Ann Lyon, supra note 1, at 8
[40] Dr.J.J.R.Upadhayaya, supra note 1, at 58

compulsive necessity for an effective and efficient administration.[41] Thus, they have the power to make rules that have the force of law, a quasi-judiciary power to pass a binding decision, and an inherent power of administration/ implementing/ the law. It is however difficult to make a water tight distinction between these three powers as there is no plain formula that is evolved to distinguish one power from the other.[42] Due to this, there is general agreement among the writers on administrative law that any attempt of classifying administrative functions or any conceptual basis is not only impossible but also futile.[43]

### 2.2.1. Rule making power

The principle of the separation of powers recognized by modern constitutional states determines the mechanism of the law making and the place of the legislative bodies in it. If the powers are divided between the governmental bodes, and the legislative power is vested in the legislative bodies, the question is whether the executive bodies may adopt laws. This political cultural understanding of the legislative role does not mandate that the elected assembly possess exclusive or even predominant power to produce legislative type norms to govern society. Rather, the prevalent conception of representative democracy has tolerated a good deal of norm production outside the legislative sphere, in particular in the executive or administrative domains.[44]

The predominant justifications are 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*, expertise and other related reasons, the lawmaker will be compelled to delegate some of its powers to the administrative agencies.[45] Many of their lawmaking powers are therefore delegated to

[41] See Solomon Abbay, supra note 14, at 147. also see Bernand Schwartz and H.W.R.Wade, supra note 14,at 84

[42] Dr J.J.R. supra notes 1, at 43. Also Mohammed Abdo supra note 3, supra note, 68

[43] Id

[44] Neil Hawke and Neil parpworth, Introduction to Administrative Law, Cavendish Publishing Limited, London, Sydney (1996) at 2. See also Lindseth; supra note 11.

[45] Lindseth, Peter, Supra note 11, Tom Ginsberg, supra note 13,at 3

administrative agencies. Thus the delegations of law making power to the administrative organ become a compulsive necessity.[46]

When legislative power is delegated to administrative agency, it has to be exercised fairly and only with a view to attain its purpose. This related with the idea of excessive delegation. The agency should also enact rules within the limits of delegation set by the lawmaker. This is the idea of ultra virus. Practically, since it is difficult to avoid instances in which power may corrupt, the lawmaker when delegating power should simultaneously introduce controlling mechanisms to ensure that individual's liberty and freedom is not violated by the administration. Most importantly, the lawmaker, when granting power, is expected to provide specific procedure of rule making. There are many procedures to be followed before, during and after rules are made. These procedures are set out in either the parent act, or in the general or specific administrative procedure. These predominantly include prior notice and consultation, publication, the procedure that enable the legislature its self could check the delegated power and the like.

### 2.2.2. Judicial power

According to the principle of separation of powers justice is administered by court of law. But efficient and effective administration also requires that those entities in charge of implementing the law be equipped with judicial power, to some extent, almost similar to the power of the ordinary courts. This is due to the fact that, in discharging the socio economic responsibility of the modern state, there may be several matters of dispute that can not be efficiently and justly decide by such ordinary judicial process.[47] For this reason a number of administrative tribunals have sprung up which are entrusted with the task of performing judicial or quasi judicial functions. The decision-making or adjudicatory function is exercised in a variety of ways. However, the most popular mode of adjudication is through tribunals

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

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[46] Id

[47] Chris Taylor, constitutional and administrative law (1st.ed. 2008), published by Pearson Longman-England, at 126

may compel an individual or a company to produce evidence, and finally give a reasoned decision. Moreover, the decisions may greatly affect individual's rights and benefits, for example, revocation of license, determining whether an applicant is entitled to some rights are judicial decisions that by nature that affect the rights of individuals.

Like the administrative rule making power, still there is likelihood that agencies may abuse their decision making power. As a result, the lawmaker, while granting such powers, is also expected to provide minimum procedures applicable in the adjudication process as well as other third part control mechanisms like judicial review. Moreover, like the justification for administrative rule making, the general censuses almost among scholars is that administrative tribunals have better technical and expert knowledge, perform adjudication relatively in a cheaper, more rapidly, more flexible and informal manner as well as they are believed to be more acquitted with policy matters and thus less likely to commit prejudice to the interest of the government.[48]

### 2.2.3. Administrative (executive) power

Administrative power is the residual power that is neither legislative nor judicial.[49] It is concerned with the treatment of a particular situation and is devoid of generality. It has no procedural obligations of collecting evidence and weighing argument. It is based on subjective satisfaction where decision is based on policy and expediency. By using this power, administrative agencies execute policies, laws and programs of the government.

Administrative action may be statutory, having the force of law, or non statutory, devoid of such legal force. The bulk of the administrative action is statutory because a statute or the Constitution gives it a legal force but in some cases it may be non statutory, such as issuing *directions* to subordinates not having the force of law, but its violation may be visited with disciplinary action. Though by and large administrative action is discretionary and is based on subjective satisfaction, however, the administrative authority must act fairly, impartially and reasonable.

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[48] See Mohammed, Supra note 3, from 102-103. For further justification, see also .J.J.R.Supra note 1, from pp 127-144

[49] Ibid , at 47

A further division of administrative action is discretionary and ministerial. We have said that due to the contingencies of modern welfare state it become necessary to assign wider power and desecration to administrative agencies. As such, some of the power is that specifically given to the administration where as others are those powers assigned in general manner leaving some room for its judgment. We refer these two scenarios as ministerial power and discretionary power, respectively.

Administrative discretion generally implies power to make a choice between alternatives courses of actions. Administrative desecration is denoted by terms like as for 'public interest', 'public purpose', 'fair', 'fit', 'prejudicial to public safely and security', 'satisfaction', 'believe', 'efficient', 'reasonable', 'expedient', 'proper, sufficient and the like. Wide desecration must be in all administrative activities but at the some time it is necessary to confine structure and check desecration to uphold the principle of rule of law in administration. As such, administrator who does as they like and who are not bound by considerations capable of rational formulation can not be said to act within the framework of the law[50]. Where an administrative agency's powers are discretionary so that it is able to make choices before acting, those choices must be made by reference to lawful factors which are expressly or impliedly recognized by and within the statutory limits under which the powers are exercised[51]. When the mode of exercising a valid power is improper or unreasonable, there is an abuse of power[52].There are various forms of abuse of desecration. These includes: exceeding jurisdiction, irrelevant considerations or leaving out relevant considerations, mixed consideration, male fide, improper purpose are some of the circumstances from which abuse of decoration may be inferred .[53]

The other power within the administration the exercise of which involves no elements of desecration is characterized as ministerial. It is the action of administrative authority which is performed as a matter of duty imposed up on it by the law leaving nothing to the judgment of

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[50] David Stott and Alexandra Felix, supra note 7, at 25. See also J.J.R, supra note 1

[51] Neil Hawke and Neil parpworth, supra note 46,at 187

[52] Ibid, at 265

[53] For the discussion of detail of these concepts and their application in practical cases, see David Herling and Ann Loyn, supra note 1, from pp 122 and ff. Also, Naomi Sidebotham, Relevant and irrelevant considerations, HP Lee, improper purpose, Australian administrative law Fundamentals, principles and doctrines (1st ed. 2007) Cambridge university press, pp 185 & the ff

the authority[54]. In other words, a ministerial action involves the performance of the definite duty with no choice at all. Generally, the distinction between the two types of administrative power is one which relates to whether an administrative agency has an opportunity to make choices in performing its statutory functions.[55]

## 2.3. ADMINISTRATIVE RULE MAKING POWER: GENERAL OVERVIEW

### Introduction

Under many countries legal system, the principle of separation of power is a recognized fact. As such the Parliament has the power to make laws, the executive is responsible for implementing the laws and the judiciary is the body interpreting the laws. However, even if rule making is the inherent power of the legislature, in most cases the legislature enacts a law covering the general principles and policies and leaves detailed rule making to the government to allow for expediency and flexibility.[56] The government/executive/ is required to frame the rules in accordance with the policy laid down by the legislature. There is however certain functions and powers cannot be delegated to the government. Among other is framing the legislative policy.

Accordingly, it is repeatedly said that one of the most significant developments of the present century is the growth in the legislative powers of the executive. As such, measured by volume, more legislation is produced by the executive government than by the legislature. Due to this, virtually every major aspect of contemporary life is affected by regulation. Economic activities such as energy, communications, and transportation; the prices consumers pay for many goods and services, and other list of areas of social and economic activity depends on and affected by the appropriate regulation of key sectors.

Given the importance of regulation, the process by which rules are made raises important implications for democratic values and the advancement of overall social welfare. The increase in quantity and quality of delegated legislation, if not supplanted by clear procedures and effective controlling mechanisms, may ultimately result in arbitrariness and abuse of power,

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[54] Neil Hawke and Neil parpworth, supra note 44,at 52
[55] Id , at 101
[56] Lindseth, supra note 11, at 2

which in turn leads to injustice and violation of liberty. The study of rule making (delegated legislation) by the executive branch of government is thus occupies a significant place in the administrative law.

Since legislation should preferably be made by the parliament and not delegated to non parliamentary entity, delegated legislation is regarded, at best, a necessary evil that is only tolerated because of the growth in functions and requirements of a modern government. A more problematic issue is that delegated legislation might be regarded as a challenging concept regarding the separation of powers in that it is 'legislative in form and executive in source'.[57] In line with the power granted to them by the legislature administrative, agencies can issue rules, regulations and directives, which have a legally binding effect. The rulemaking process can lead to the issuance of a new rule, an amendment to an existing rule, or the repeal of an existing rule.

There are several types of administrative made 'rules': rules of implementation, legislative, interpretative, general statements of policy and rules of agency organization, procedure and practice. These rules which could generally categorized as legislative and non legislative rules. the legislative from have the force and effect of law, which means that they are universally binding, that is, both upon the private parties they are addressed to and the government itself. By way of contrast, non-legislative rules provide only guidance to the public and to the administrative staff and decision makers and are generally not legally binding on members of the public. If rules are promulgated *without the exercise of delegated authority* to create new law, they can only be non legislative. Procedural rules, on the other hand, do not directly guide public conduct; however, they differ from the aforementioned non-legislative rules in that they may often be binding on both the public and the administration, if they can draw upon a certain statutory delegation. In practice, it is not always easy to distinguish between legislative and

[57] Stephen Argument, Delegated legislation, Australian administrative law Fundamentals, principles and doctrines (1st ed. 2007) Cambridge university press, at 135. For further information on arguments in favor of administrative rule making, see Vishweshwaraiah (Prof.), *Delegated Legislation*: pp.2, accessed from www.elearning.vtu.ac.in..pdf, J.J.R, supra note 1, at 60, Mohammed; supra note 3, at 52, Michael T Molan, supra note 6, at 15. For arguments against administrative rule making see William West, Rule making: An Old and Emerging Literature: Public Administration Review, November/December 2005, Vol. 65, No. 6.Also, Stephen Argument, pp 135 & the ff

non-legislative rules if the administration did not state clearly whether it acted legislatively or not. The distinction is important not only because it helps citizens to know their legal position, but also because the administrative procedure attaches different procedural requirements for the promulgation of each category of rules. Even if non legislative rules do not bind members of the public, it remains still to be examined, whether they might possibly bind the agencies that issue them and, thus, have some legal effect.

### 2.3.1. Restrain/Scope/ of Delegated Legislation

Due to different justification we have try to see somewhere above, the executive organ is functionally the most suited to shoulder the major part of the new responsibilities. Due to this, administrator does not only assume its conventional responsibilities, but does legislate and adjudicate. This however depends on certain conditions: the power under which it emanates is that of delegable, properly delegated, as well as exercised by within the scope by appropriate authority. These issues indicates the restriction both on the side of the legislature as well as on delegated organs, which is known as the doctrine of excessive delegation and the doctrine of ultra virus, respectively. I try to highlights the essence of these two concepts below.

#### 2.3.1.1. The doctrine of excessive delegation

Even if assessing the extent of power of delegation from the part of the delegator may seems out of the topic of this paper, in addition to its function to see one of the root causes for a problem related to administrative rule making, assessing the scope of delegation also has an impact on the status of the rules and regulations made under there. The type of the power delegated and the standards lay down with the granting of such power are restrains imposed on the part of the legislature.

It is universally accepted in all constitutional democracies that elected parliament cannot surrender its law making function to the executive. However, it is equally accepted fact the power to assign discretions to the executive as to the execution of the law, which includes the assignment or delegation of subordinate legislative powers. A distinction is thus must be drawn between law as the instrument laying down principles and policies, and subordinate legislation which is seen as a legitimate instrument enabling the executive to implement those principles and policies. Accordingly, delegated legislation that purports to determine principles and

policies would generally be regarded as invalid. This intern will raise the issue of delegable and non delegable legislative powers. However, there is no agreed formula with reference to which one can decide the permissible limits of delegation. But, as a rule, it can be said that the legislature cannot delegate its general legislative power and matters dealing with policy. It means that the legislative policy must be laid down by the legislature itself and by intrusting this power to the executive, the legislature can't create parallel legislature.

This indicates that only the subsidiary part of the legislation could be delegated to administrative agencies so as to enable them fill any available gaps i.e. the legislative body ought to state an the main principles and that the executive branch would merely fill in the details. There are varies forms of delegation of rule making. A statutory basis for a regulation can vary greatly in terms of its specificity, from very broad grants of authority that state only the general intent of the legislation and leave agencies with a great deal of discretion as to how that intent should be implemented, to very specific requirements delineating exactly what regulatory agencies should do and how they should take action. Thus there is a concept of *the doctrine of excessive* delegation which means that legislature can not delegate unlimited legislative power to an administrative authority. We will see how the German basic law is strict in this instance in chapter three later.

Some circumstances are discussed here to illustrate the working of the principle of excessive delegation. These circumstances are classified from the point of view of the nature of the power conferred under following broader categories. These are amplification of policy, modification, removal of difficulty, inclusion & exclusion, and taxation. These categories are not mutually exclusive and the discussion is simply an over view the instances.

One is *amplification of the policy*. In many instances the legislature passes an act in skeleton form containing only the general principles and leaves to the executive the task of not only filling the detail but even that of increases policies. The legislature often uses broad provisions that give wide powers to the delegate to make such rules as it appears to it to be 'necessary' or 'expedient' for caring out the purpose of the act with out lying down any standards to guide the desecration of the delegate, and the delegate is given 'blank check' to do so what ever it likes in the delegated area of authority. In such a case, the delegated authority would become so

broad as to cover almost all administrative rules making power within the particular area of legislation.

The other is *modification of the parent act*. Some times the provision is made in the statute conferring power on the executive to modify the parent act it self. This is really a drastic power as it amount to amendment of the act itself. Even if sometimes such power is necessary for flexibility approach to meet the changing circumstances, it makes the executive supreme over the legislature.[58] The power to modify the underlying policy of the act is an essential legislative function and therefore delegation of power of modifying an act without any limitation is not valid. Even if it would be possible to argue that there should be some room for the power to modify, it should have not import the power to make essential changes and that it has to confine to alteration of a minor character and no change in principle is involved.

In Britain there are no limitations to restrain parliament from delegating the power to amend statute. In fact, the types of delegation about which there has been the most controversies in the British system the so called "Henry VIII clause" which involves essentially the grant of authority to amend acts of parliament.[59] In effect, these clauses have conferred power upon the executive to modify the provision of the relevant enabling acts as far as may appear to it to be necessary for the purpose of bringing the act in to full operation.[60] Because of the supremacy position of parliament, the validity of such delegation has, of course, been beyond question in the British court. But recently the necessity of 'the Henry clause VIII" even in British has been questioned and recommended for its abolishing from enabling statute by British student and even the committee on ministerial' power[61] The third instance by which the principle of excessive delegation arises is by granting a power for *removal of difficulty*. Some times power is conferred on the government to modify the existing statute for the purpose of removing difficulties so that it may be brought into full operation. When the legislature passes an act, it can not foresee all the difficulties, which may be arise in implementing it. Therefore, the legislature introduces the removal of difficulty clause.

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[58] Ibid, at 74

[59] Bernard Schwartz, supra note 14, supra note 22.

[60] Id

[61] ibid, at 6

Since sole purpose of such clause is to enable minor adjustment of its own handworks to be made for the purpose of fitting its principle into the fabric of existing legislation, the government can not modify the parent act nor can make any modification which is not consistent with the parent act.[62] Many argue that this is excessive delegated power as the government is made the sole judge whether any difficulty or doubt had arisen in implementing the act, whether it was necessary and expedite to remove such doubt or difficulty, or whether the order made was consist at with the provision of the act.

The fourth instance of excessive delegation is the granting of power for *inclusion and exclusion* of individuals or some entities from the purview of the parent act. As matter of common practice, legislature passes law to confer power government to bring individuals, bodies, or commodities within, or to exempt them, from the purview of a statute. In this way, the range of operation of the statute can be expanded or reduced through the devise of delegated legislation.

With regard to range of inclusion, some times, the legislature after passing the statute makes its application, in the first instance to some areas and class of persons, but empowers the government to extend the provision thereof to different territories, persons, bodies, etc. this enable the government to expand the range of its operation through methods other than amending the parent act. For instance, if the essential commodity act covers certain specified commodities mentioned in the act and further give power to the government to declare any other commodities as 'essential commodities and thus making the act applicable to it as well. On the other hands, with regard to range of exclusion, there are certain statutes which give power to the government to exempt from their operation any person, institution, etc. For instance; the parent act may states the scope of its application at the some time it may give authority for the concerned government organ to exclude certain individuals or institutions from the coverage of such act by its rule making power. Both the power to include or exclude from the parent act should delegated in care. Otherwise the delegated organ will become the sole judge to determine what to be governed or not in place of the legislature.

[62]Ibid , at 76

Finally, delegation of *taxation* power will give rise excessive delegation. Taxation power is an inherent power of any state. In a democratic system, taxation is exclusively the function of the legislature. That is why there is the fundamental cannon of democracy is 'no taxation without representation' Taxation thus cannot be levied without the authority of Parliament. Hence the executive has no power to impose taxation in its own right. Power may for instance be delegated to the government *to exempt* an item from the purview of tax. Moreover, power *to fix a rate of tax* may be delegated to the executive. The validity of these and other similar provision however would be held provided that *sufficient guidelines* where laid down in the act of the parliament. In other words, if such a power is to exist, it must be clearly expressed in an enabling act with limited instances.[63]

Generally, due to the above instances of excessive delegations, a parent act is said to be ultra virus the constitution. Usually a constitution set out the powers of each branch of government. It prescribes the boundaries within which a legislature can act. A parent act is declared ultra virus the constitution in three instances. If it violates: expressed constitutional limits, implied constitutional limits and constitutional rights. We will see the practical problems in Ethiopia in relation to these issues later in chapter four. Let us see the application of this principle in relation to administrative rule making below.

#### 2.3.1.2. The doctrine of ultra virus

We have seen the scope of the power of the law maker in time it delegate its rule making power to administrative agencies, i.e. the restriction imposed on the law maker while delegating rule making power to administrative agencies. Similarly, once the law maker delegate its rule making power, the exercise of such power by administrative agencies should also have to be within the permissible limit, if not it become ultra virus. Below, we will look at this restrictive principle on the part of administrative agencies.

We have repeatedly said that delegation of legislative powers to the executive has to be conceded within the permissible limit. Similarly, agencies only have rulemaking authority to the extent that the legislature grants it. When power is conferred on administrative body, the instrument conferring the power may itself provide for restrictions on the exercise of power. Such retraction may be procedural i.e. how the power is to be exercised/ or substantive i.e.

[63] David Stott and Alexandra Felix, supra note 7 , at 73

what the power authorizes to be done.[64] The principal characteristic of most administrative powers is that they arise from and can be used by virtue of legislation. Where an administrative agency acts beyond or outside its statutory powers, the resulting action is regarded as being *ultra virus*, that is, no action at all in law.[65] Generally, ultra virus mean beyond powers, and when a delegated legislation is beyond the scope of authority conferred on the delegate to enact, it is known as substantive ultra virus where as when a delegated legislation is enacted without complying with the procedural requirements prescribed by the parent act or by the general law, it is known as procedural ultra virus. The procedural requirements further can be mandatory or directory.[66] The doctrine of ultra virus applied on administrative rule making in a number of circumstances. The following are some of the instances in which this doctrine occurs.

One is *where delegated legislation is ultra virus the constitution.* Some times it happens that the parent act many not be ultra virus the constitution and delegated legislation is consistent with the parent act. Yet the delegated legislation may be ultra virus the constitution. Even if the parent act remains silent or open with regard to the coverage of some issues, the law can not be presumed to authorize anything which may be inconsistent with the constitution.[67]

The second instance is *where delegated legislation is ultra virus the parent act.* We have said that the authority of delegated legislation must be exercised within the authority. The delegate can not make a rule which is not authorized by the parent statute. Thus delegated legislation can be declared valid only if it conforms exactly to the power conferred.

There are different situations in which delegated legislation is said to be ultra virus the parent act. One is delegated legislation *in excess of the power* conferred by the parent act.[68] This is quite simply using the power for unauthorized purpose: doing the wrong thing. The activity is not authorized either expressly or by necessary implication. However, it is accepted that power can be used to achieve objectives incidental to the stated purpose, though not expressly

[64] Id, 81
[65] N.Hawke and N.parpworth, supra note 44,at 106
[66] For more on procedural matter, read Michael T Molan, supra note 6, at 176-182
[67] J.J.R., supra note 1, at 89
[68] Id , at 91

authorized.[69] The other instance where delegated legislation is said to be ultra virus the parent ct is where it is *in conflict with the parent act.*[70] We have said that the principal characteristic of most administrative powers is that they arise from and can be used by virtue of legislation. Where an administrative agency made a rule against the parent act, the resulting action is regarded as being *ultra virus.* The third instance where by delegated legislation said to be ultra virus the parent act is where it *conflict with the prescribed procedure* of the parent act. Some times parent act prescribes a procedure which must be followed by the administrative body while exerting law making power under it. For instance the parent act may required the agency to consult a concerned body before making a rule so that if a rule is made with out consultation, it become ultra virus the procedure established by the parent.

### 2.3.2. Control of the Administrative Rule Making

We have said that the necessity and desirability of administrative agencies' is an accepted tenet of all most all legal system. Again, whether administrative agencies are themselves constitutional has been long settled. As such, it is now recognized that the existence of an administrative agency does not violate the separation of powers principle, nor does the creation of the agency involve an unconstitutional delegation of power. Therefore, legislation and administration are complementary processes which function side by side to perform many complex operations of modern government. Accordingly, through grants of delegated power legislature defines what ends the agency is to guard and what means should be used in regulating both public and private activities to protect and maintain those ends.

Such grants of power, however, require safeguards to insure that agency action is in accordance with legislature’s intent. Acknowledging the inevitability and importance of the delegation of relatively broad discretionary powers to administrative agencies in this complex world, appreciating the resultant possibilities of concentration of tripartite powers in the hands of a government agency, and the possibility these powers may be abused unless checked, there comes the need to devise the mechanism for controlling the powers of these agencies. As such a routine examination of administrative rule making power and its control mechanisms becomes imperative.

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[69] D.Stott and A. Felix, supra note 7, at 83

[70] J.J.R, supra note 1, at 93

Therefore, the increase in administration function has created a vast new complexity of relation ship between the administration and the citizens. It has assumed a tremendous capacity to affect the right and liberty of the people. Due to this, it has increasingly become important to control the administration in such a way that to ensure its function are exercised according to law, on proper legal principles, rule and justice. Due to this, some scholar rightly observed that if exercised properly, the vast power of administration may led to welfare state, but if not, it may lead to administrative despotism and authoritarian.[71] Accordingly, the need for conferring more power on the administration should be accompanied by simultaneously means for controlling these powers.

As the experience of many jurisdictions in the modern democratic world indicates, there are different devices that can be used to control the powers of administrative agencies. That is, there are different controlling mechanisms that can be set in parallel to supplementing each other in checking the powers of administrative agencies. Some of the commonly used controlling mechanisms are: Internal administrative review by superior officials; Parliamentary control; Political control; External administrative review by tribunals; External scrutiny and recommendations by Ombudsmen and other watchdog institutions and Judicial control. The entire machinery of governance as such have been brought to bear in the control of delegated legislation, though how effective are these control devices remain the basic question. Since we will see these control mechanisms in detail when we seen administrative rule making in different legal system in the second part of this chapter, it is not necessary to have an overview of each control mechanisms here.

# CHAPTER THREE

## ADMINISTRATIVE RULE MAKING IN SOME JURISDICTIONS

The comparative method is useful in many branches of law. It is particularly important in administrative law. This is because the nature of the leading problems and related way of

[71] Lord Denning, as cited in the dr.J.J.R. supra note 1, at 205

controlling government according to the interests of both state and citizen is common to all the developed developing countries. However, there is a clear difference with regards to the evolution, development, and the way administrative law applied.

Accordingly whether the authority to exercise delegated power is inherited or not, it differs from one legal system to another, and even country to country within a legal system. This difference also exist with regard to the procedure, either dealing with a particular administrative action within a single agencies or a general administrative procedure applied to many agencies and for many aspects of administrative actions, in which administrative rules are made. In addition to these sources of authority and the procedure, there are also differences with regard to controlling the exercise administrative powers.

Below, we will try to see the experience of administrative rule making in England and Germany (where necessary, reference also will be made to US and France experiences) for the purpose of assessing the variety by referring to the power to make administrative rules, the procedure and the control mechanisms aspects only.

## 3.1. Administrative rule making power, procedures and control mechanisms in England and Germany: General overview

### 3.1.1. Administrative Rule Making Power

The meaning of rules in England is provided according to form. Accordingly in this country delegated legislation takes primarily the form of statutory instruments (SI). There is a large range of terms used for statutory instruments: Orders in Council, regulations, rules, directions, special procedure orders, bylaws, and local authorities' orders.[72]

In England, where the doctrine of parliamentary sovereignty is propounded, parliament as a matter of principle can enact or repeal legislation as it sees fit. The doctrine of parliamentary sovereignty, or parliamentary supremacy, is a product of the constitutional settlement at the end of the 17th century. It has two elements: that Parliament may make or unmake any law; and that a parliamentary statute is the highest law known in the UK, and may not be set aside

[72] Michael T Molan, supra note 6, at 15. See also David Herling; supra note 1, at 38. Also see, Hillarie Barnett, supra note 2, at 158

except by Parliament itself.[73] This doctrine implies that parliament is the supreme and has unlimited power to make any law.[74] Due to this, some even try to assert this fact in its extreme form by stating that '*united kingdom's parliament could make it an offence for a French person to smoke in the streets of Paris.*'[75] Since parliament may delegate powers on any issue as well as adopt act on any issue[76], the problem is that it is very difficult to distinct between the legislation and delegated acts. As the result, the acts of Parliament may be full of details while principal questions may be regulated by the executive bodies.

From this power of parliament, it is logical to assert that the parliament may delegate to any extent its power of law making to an out side authority. The limit of delegated legislation in Britain, if any, remains to be a question of policy and not a justifiable issue to be decided by the court of law.[77] Delegation of rulemaking in England is thus in no way as tightly controlled and pre programmed by Parliament, as it is, for example, in Germany. Legislative power is granted rather generously by Parliament. Sometimes the enabling legislation grants legislative powers in such widely defined terms that the administration ends up determining matters of policy at the broadest level. This is referred as "skeleton act" all of which left various key matters to be determined in regulations.

The wide extent of legislative powers enjoyed by the executive is also apparent in the existing possibility to delegate power even to amend statutes, on the condition that the modification intended are expressly stated in the statutory instruments. Particularly, the administration enjoys the most indefinite legislative power after the enactment of the European community act of 1972, under which it may issue orders in council or department regulations, which may alter the law and prevail over all past or future acts of parliament, in any way that are necessary to implement community obligations or give effect to community rights and matters related thereto exception are only recognized in the case of increased taxation, retrospective operation, delegated legislation and excessive penalty.[78] Thus, previously the doctrine of excessive

[73] Michael T Molan, at 14. See also David Herling, supra note 1, at 38
[74] J.J.R. supra note 1, at 64
[75] David Stott and Alexandra Felix, supra note 7,at 13
[76] In contrast to the British Parliament the powers of the Congress are limited by the Constitution. See Bernard Schwartz, supra note 14,at 5
[77] Bernard Schwartz, supra note 14,at 4
[78] Sect. 2 (2), (4), and 2nd schedule of the European community act of 1972

delegation has no application in Britain. In fact, this types of delegation about which there has been the most controversies in the British system the so called "Henry VIII clause" which involves essentially the grant of authority to amend acts of parliament.[79] In effect, these clauses have conferred power upon the executive to modify the provision of the relevant enabling acts as far as may appear to it to be necessary for the purpose of bringing the act in to full operation.[80] But recently the necessity of 'the Henry clause VIII" even in British has been questioned and recommended for its abolishing from enabling statute by British student and even the committee on ministerial' power[81]

On the other hands, delegated legislation is a firmly established principle in German.[82] Accordingly, not only is the administrative state is thus reflected in the constitution but delegation is even expressly dealt by the Basic law.[83] Its incorporation with a strict formulation in the Basic Law was seen to guarantee the doctrine of separation of powers, and served as a reaction to the well-known abuses of delegated power by the executive during the Weimar Republic.[84] Since the Germany constitution (the Grundgesetz (GG)) is promulgated much more recent (1949) (example, than the United States constitution of 1789), it was framed against the background of a highly elaborated administrative state and contain number of provisions that directly address question of administration.[85] Hence it was not surprising that the question of delegation would also be addressed.

The constitution lays down three basic limitations of form on delegation when statutory regulations are involved.[86] First of all, authorization for their issuance is to be given only by means of formal legislation, that is, by statute. Secondly, this regulatory power can only be conferred on the federal government, a federal minister or the land governments, the three

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[79] Bernard Schwartz, supra note 14, at 6.See also Michael T Molan, supra note 6.
[80] Id
[81] ibid, at 6
[82] Uwe Kischel, Delegation of legislative power to agencies: A comparative analysis of United state and German law, extracted from administrative law review 46(1994) from pp 213-256,at 228
[83] German constitution of 1949,art 80
[84] Lindseth, Peter, supra note 11, at 1361-1371. See also Georg Nolte, General Principles of German and European Administrative Law - A Comparison in Historical Perspective, The Modern Law Review ,Vol. 57, (march 1994), at 200.
[85] See art 83-90 of German constitution
[86] Id, article 80 Para. I

specified authorities or organs, enumerated exclusively in the constitution[87] they, in turn, may sub delegate their power to other executive organs *provided* that the sub delegation is provided for by the enabling legislation and that they achieve it by a specific statutory regulation.[88] Thirdly, the authorizing statute must state clearly the content (i.e. the subject matter of the regulation), purpose (i.e. the program intended by Parliament to be achieved through administrative regulation) and scope (the limits or extent of the regulation)[89] of the powers conferred.[90] These requirements define sufficiently the authorization and what would be the content of the regulations to be issued.[91]

When we see the rational behind of dealing delegated legislation in the German constitution, during the second Reich, prior to 1919, even extreme delegation was considered legal. It has continued in the third Reich. As such during the Weimar republic, the government (Hitler), was sometimes even authorized to promulgate regulation that would infringe upon basic constitutional rights of individuals, even be at variance with the Weimar constitution.[92] Latter on this authorization was extended even further, allowing the government to enact new constitutional law.[93] Against this historical background, it was inevitable for the framer of the constitution not only to deal with delegation but strictly to confine to it. The framers consciously turned away from the practice of Weimar and tried to firm a clear boundary between legislative and executive tasks in the area of legislation. As the result of this historical background, the Grundgesetz provides that:

> The federal government, a federal minister, or the government of the Lander ***may be*** authorized by statute to issue regulations. Content, purpose, and scope of such authorization ***must be*** determined by statute. The statutory basis **must be** specified in the regulation. If the statute provides that the authorization

[87] Id, art. 80 I1

[88] Id, art. 80 I4

[89] Id 19, 354, 364

[90] Id, art. 80 I 2. The provisions of article 80 1 2 of the Basic Law on delegation apply only at federal level, that is, only for regulations based on federal statutes. The majority of state constitutions, especially those that were established after the Basic Law (1949), contain similar provisions. If this is not the case, article 80 12 applies also at state level

[91] BVerfGE 29, 198, 210 (1970)

[92] Lindseth, Peter, supra note 11, at 1361-1371.

may be delegated further, such delegation ***may only be*** effected by regulation[94]

Despite the above strict but with constitutional basis of delegated legislation, there are certain issues which can only be regulated directly by parliamentary enactment. The Germany constitution mansion several of these issues: the transfers of sovereign rights to international institution[95], the budget[96], law that amend the constitution[97] are some of which should be directly regulated by the parliament. The constitutional court confirms this principle and has developed general principles to govern this issue: parliament is obliged to make all *essential* decision itself.[98]

In order to satisfy the requirements of Article 80(1), it is argued that it was the legislature's duty, in the enabling act itself, to decide the precise subject that should be regulated, to determine the boundaries within which the regulation must operate, and to define the goal of the regulation.[99] As such, the statute is able to specific enough to determine the *future content* of the regulations. In the filed of criminal law, the requirements are particularly strict. The primary rules of conduct as well as the penalty ranges, must be foreseeable from the statute it self. In the area of taxation, an authorization to lower tax load does not have to be as specific as one to raise taxes.

Generally, in Germany, the administration can exercise legislative powers only when such legislative powers are *expressly* delegated to it by the legislature or are exceptionally given to it under the Basic Law for well defined and limited purposes.[100] Such expressed constitutional limitation is not common and this stands believed to emanate from their historical experience of misuse of power by the third German empire.[101]

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[94] Art 80 paragraph 1 of the Grundgesetz ( emphasis is mine)
[95] Id, Art 24,paragraph I
[96] Id, Art 110
[97] Id, Art 79
[98] Uwe Kischel, supra note 84, at 231
[99] Lindseth Peter, supra note 11, at 1394
[100] Mohammed Abdo ,supra note 3, at 70
[101] In France, rule making is inherent power of the executive. As such even in the absence of expressed authorization, the agencies are empowered to enforce the statute and thus can make rules to give effect

What is worth mansion here is that the German Administrative Procedure Act[102] (Verwaltungsverfahrensgesetz, herein after VwVfG) contains provisions regarding only individual administrative acts and procedures and makes no mention of administrative rules or rulemaking. According to VWVfG, an administrative act is every disposition, decision or other measure that a public body takes in order to regulate *a particular case* in public law and produces an external, direct legal effect.[103] Administrative decisions that lay down rules again divided into three general categories: statutory regulations or ordinances, administrative regulations or directions and bylaws.

### 3.1.2. Administrative Rule Making Procedures

We have said that unless the granting of power to make rules is not supported by its making procedure as well as control mechanisms, its harm may surly prevail the function. As such, many jurisdiction, believing the inevitable need of subordinate legislation as the some time the potential danger, have provide administrative rule making procedure either in the parent acts, or in their administrative procedure law that applies to any kind of administrative decisions.

Each year, administrative agencies create thousands of new rules that collectively deliver major benefits to society in varies areas of life. Because agency rules have such significant impacts, the procedures agencies use to engage in rulemaking are themselves significant. Depending on how rulemaking procedures are designed, they can affect both the quality and legitimacy of agencies' rules, thereby shaping outcomes for society overall.

Although there are many administrative rules making procedure, the commonly known, which this thesis predominantly focus, includes prior consultation (notice and comment), lying procedures, and publication. Thus, we will try to see administrative rule making procedures both in England and Germany based on these rule making procedures.

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to the primary law. See L.N.Brown and J.S.Bell, *French Administrative Law* (7th ed. 2003), Clarendon Press: Oxford, pp14, and Mohammed, supra note, at 70

[102] German administrative procedure law must be understood in the context of German federalism. So in Germany we have an administrative procedures law in every federal state (Lander), as well as a general administrative procedures law on the federal level. For our purpose, we only considered at the federal level.

[103]German administrative procedure act(VwVfG) of May 25th 1976,no 35

At the out set it have to be know that the procedural rights and protection have traditionally played a less important role in German administrative law than in the United Kingdom.[104] According to the German administrative act, an infringement of the regulations governing procedure or form which does not render the administrative act invalid under section 44 shall be ignored[105] It goes to state that "*Application for annulment of an administrative act which is not invalid under section 44 cannot be made solely on the ground that the act came into being through the infringement of regulations governing procedure, form or local competence, where it is evident that the infringement has not influenced the decision on the matter*".[106] Thus, the codification of administrative law since the 1950s was focused primarily on the judiciary, not on administrative procedure.

#### 3.1.2.1. Prior Consultation

Nowadays there is a compelling requirement to reduce the distance between citizens and decision making centers and increase openness and transparency in governmental processes.[107] In this context public participation in administrative rulemaking acquires particular importance. Citizens can participate in the government action not only through voting and adjudication, but also through participating in the making of rules by administrative. The public could participate only if it has information on what is going on.

From the citizen's post of view, the must beneficial safeguard against the dangers of the misuse of administrative rule making is the development of a procedure to be followed by the delegates while formulating rules and regulations. In England, while delegating powers abstains from lying down elaborate procedure to be followed by the delegates. But certain acts do however provide for the consultation of interested bodies and sometimes of certain Advisory Committees which must be consulted before the formulation and application of rules and regulations. This method has largely been developed by the administration independent of statute or requirements. The object is to ensure the participation of affected interests so as to

[104] Georg Nolte, supra note 84, at 203. See also Hermann Punder, German Administrative Procedure in a Comparative Perspective Observations on the Path to a Transnational, Jean Monnet Working Paper 26/13, at 3.
[105] VwVfG ,§ 45 I
[106] Id, § 46
[107] See Bojan Burgaric, Openness and Transparency in Public Administration: Wisconsin International Law Journal Vol. 22, No. 3

avoid various possible hardships. The method of consultation has the dual merits of providing as opportunity to the affected interests to present their own case and to enable the administration to have a first-hand idea of the problems and conditions of the field in which delegated legislation is being contemplated.

Under English administrative law, the rules of natural justice/fairness[108] do not apply to delegated legislation, and as such failure to consult parties does not entail invalidity of the rules by court.[109] However, even though prior consultation with concerned parties is not a mandatory requirement, in practice, many agencies informally comply with this requirement upon their own initiative. Few statutes may also specifically provide a general process of considering objection, or prior consultation. The Parent Act may, therefore, stipulate that there must be consultation in either general or specific terms. Even though prior consultation with concerned parties is not a mandatory requirement, consultation with interested parties is now become common for the reasons of political expediency as well as legal necessity. Such bodies may be specified in the Act or chosen at agency's discretion but, while agencies may be obliged to consult, they are not normally bound to follow the advice offered. Therefore, where consultation with certain parties is required by the enabling act, the courts are likely to interpret this as being a mandatory requirement so that failure to comply could invalidate any resulting order in this instance.[110]

Similarly German law, as a general rule, does not make public participation in the making of administrative action a mandatory requirement. Even if the act requires that "an administrative act *shall* be made known to the person for whom it is intended or who is affected thereby ….."[111], the subsequent article excludes the non observance of this procedure from invalidation.[112] This seems it is normally at the discretion of the authority to what extent the public is involved in the creation of delegated norms. Contrary to the American understanding, democratic legitimacy and pre judicial legal protection are not seen to be goals of those requirements. Some scholars argue that according to the traditional German perception, the major purpose of such provisions is rather to incorporate experience and expertise in the

[108] For more on issue of natural justice, See David Stott and Alexandra Felix, supra note 7, pp
[109] Michael T Molan, supra note 6, at 17
[110] Id
[111] VwVfG §41
[112] Id, § 44(2)

administrative legislation process and thus enhance its rationality and efficiency.[113] German courts and scholarship even view public input skeptically in that the persons involved represent their interests and not the "common good".[114] Representative democracy is considered as the only "proper form of democracy".

The procedural rights and protection in German administrative law plays less important role than in the United Kingdom. This approach is understandable if one considers that the German legislature (*Bundestag*) is, unlike the Britain parliament, obliged to make the "significant decisions" itself and when delegating legislative competence to the executive branch of government, the German federal legislator must define "content, purpose and scope" of the delegated authority in comparatively precise terms.[115]

#### 3.1.2.2.Laying procedures

Laying the instrument before Parliament is another procedural requirement of administrative rule making that the legislature may use to check the legality of an agency's delegated legislation at various stages. It affords an opportunity for the legislature to control the exercise of the power of delegation by subordinate bodies. It is an effective mechanism to ensure legality and fairness in delegated legislation.

The laying system originated in the English political system.[116] Although there has never been a statute of general applicability requiring all administrative regulations to be laid before Parliament,[117] most British statutes which delegate certain powers to agencies require that regulations promulgated in pursuance of such statutes be laid before Parliament.[118] In this form, the laying system allows Parliament to annul or modify a given regulation if the promulgated rule, or subordinate legislation as the English term it, does not accord with Parliament's intent. This system of review has been modified slightly in recent years, but the

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[113] Id, at 9
[114] Id
[115] See Art. 80 I 2 GG
[116] Carr, Legislative Controls of Administrative Rules and Regulations: II. Parliamentary Supervision in Britain, 30 N.Y.U.L. REV. 1045, 1045-46 (1955).
[117] Boisvert, A Legislative Tool For Supervision Of Administrative Agencies: The Laying System, 25 Fordham L. REV. 638, 639 (1956).
[118] Id at 738-639

principle of control remains the same: to supervise the administration of delegated powers where such a grant may be misconstrued, overstepped, or abused by the administrative agency.

In England an instrument is usually presented before both Houses, with the exception of financial matters, which are only laid before the Commons. Laying procedure may assume different forms in England. That is there are different levels of scrutiny applied to secondary instruments that come before Parliament. Below we will try to see the six form of laying procedure in England.

**One** is Bare Laying Procedure[119], also known as Laying simplicitor. According to this form of procedures, no further procedure is necessary for the instrument to become effective.[120] The statutory instrument is drawn to the attention of members the parliament and can come into operation once laid. This mainly because sometimes Parliament may decide that it doesn't need any control over the exercise of a power, e.g. over the closing of a main road for roadwork.[121]

This lying with no further directions is, in effect, an informational device. Under this method the subordinate legislation is valid when made. Members of Parliament are not empowered to move for the rule's annulment, nor are the government required to obtain a resolution before the subordinate legislation becomes operative. This control device simply reports the agency action and does not provide Parliament with any power to hold the agency accountable.

The **second** form of laying procedure is Negative Resolution Procedure.[122] In this case, there are two types of procedures. The first is that the *final instrument* to be laid down before the parliament will automatically come into force after 40 days, unless before the expiry of that time either the Houses passes a resolution that the instrument be annulled. In other word, as per this procedure**,** the legislative instrument once it is laid before parliament may be annulled if there is a request (usually known as prayer) to this effect. Within those forty days either House of Parliament may pass a resolution requesting Her Majesty to annul the subordinate

[119] See s4 of the 1946 statutory instrument act
[120] Michael T Molan, supra note 6,at 19
[121] House of Lords, briefing looking at the small print: Delegated legislation (2009).
[122] S5 of the 1946 statutory instrument act. See also House of Lords, supra note 126. See also Ruth Fox and Joel Blackwell, The Devil is in the Detail: Parliament and Delegated Legislation (2014) Published by the Hansard Society-London, at 77
[122] Id

legislation. Her Majesty then revokes the instrument by an Order in Council. The second form of this procedure is that an order may also be laid in *draft form* subject to a similar resolution that no further proceedings is be taken – in effect a direction to the minister is not to make the instrument.[123] In both cases of negative resolution procedure, no amendments can be made so that it can only be accepted or rejected. Moreover, the annulment of the instrument does not invalidate retrospectively actions taken under it as well does not prevent the creation of new rules [124].

Generally, the negative laying provisions were embodied in the enabling acts and provided that all rules promulgated in pursuance of Parliament's grant of power be laid before Parliament for a given number of days, or that rules be laid before Parliament in draft form with Parliament having the power to halt further consideration on the drafted rule.[125]

The **third** form of laying procedure is Positive Laying Procedure[126]/ Lying subject to an affirmative resolution/ in which the enabling act requires the instrument to be laid before parliament can only become law if it receives the affirmative approval of the parliament.[127] Affirmative laying procedures theoretically are designed for important substantive legislation. There are two types of affirmative laying procedures. First, some enabling acts provide that subordinate legislation shall be of no effect unless approved by a resolution of each House of Parliament. By this procedure an instrument which is not approved within 40 days of its being laid before the House will not come into effect. Second, other enabling acts provide that subordinate legislation shall cease to have effect on the expiration of a given period unless, before such period expires, it has been approved by resolution of each House of Parliament.
The instrument can be laid down in one of the three forms: Laying of draft instrument before the parliament and requiring affirmative resolution *before* instrument can be made; Laying instruments *after* it had been made to come into effect only when approved by affirmative

[123] Melville, supra note 58. See Carr, supra note 116
[124] Statutory Instruments Act, 1946, 9 & 10 Geo. 6, c. 36, § 5 (2). See also Michael T Molan, supra note 6,at 19
[125] Melville, supra note 58. *See also* Carr, *supra note 121*
[126] s6 of the 1946 statutory instrument act
[127] Carr, supra note 116. See also Ruth Fox and Joel Blackwell, supra note 122, at 79

resolution; and Lying of instruments that take *immediate* effect but requires approval by affirmative resolution within a stated period as a condition for its continuance[128].

One main distinguishing feature between the negative laying system and the affirmative laying system is that with the latter the government must find time to make and debate a resolution. Another distinguishing feature is that a substantive law made under the negative laying system is not operative until approved

In addition to the above three forms of laying procedure, there are some instances that require a draft rules be laid subject to affirmative resolution or annulment, as well as one laid with legal effect but subject to annulment. Those rules laid in draft and made subject to either affirmative resolution or annulment within forty days involve subordinate legislation not yet made. As such the **forth** laying form is if enabling act using the affirmative method will provide that an order shall not be made until the draft has been approved by resolution of each House. The **fifth** form of lying is that enabling act may also could provides that a rules to be laid in draft subject to annulment within forty days. If not annulled the order shall be made.[129]It is less common. The **six** forms is laid with legal effect and made subject to annulment. This is in case circumstances may arise which require a rule to take effect before Parliament has an opportunity to review it. To meet this situation a variation of the affirmative laying system has been developed whereby certain notice requirements must be met. Once these notice requirements are filed the rule becomes effective subject to parliamentary annulment.

Except in some cases, delegated legislation in England normally requires the direct approval of Parliament[130]. As such most important delegations of power are subject to positive resolutions in which the instruments cannot come into effect until both Houses have approved a draft secondary instrument in a vote[131].This is because under the negative resolution procedure, parliament time may not be available for the prayer necessary to bring about annulment of the instrument[132].The affirmative method was used where matters of contemporary importance were delegated, and generally these matters consisted of levying taxes or modifying a statute's

[128] Id
[129] Statutory Instruments Act, 1946, 9 & 10 Geo. 6, c. 36, § 6.
[130] Nehil Hawke and N.Parworth, supra note 44, at 121
[131] House of lord, supra note 126.
[132] Michael T Molan, supra note 6,at 23

terms.[133] As a result, the affirmative laying system emerged as a more effective and powerful control device than its negative counterpart because procedurally affirmative approval required greater parliamentary effort. The government had to make a motion to approve the subordinate legislation, thus requiring the movement to find time for debate and to make sure that an adequate number of supporters were present[134].

To sum up, as a general rule, British enabling or parent acts require that subordinate legislation promulgated under such an act be laid before Parliament. The laying system usually takes one of six forms. The subordinate legislation is either: laid before Parliament with no further directions; laid and made subject to annulment within forty days; laid and made subject to affirmative resolution; laid in draft and made subject to affirmative resolution; laid in draft and made subject to annulment within forty days or laid with legal effect and made subject to annulment. [135]Moreover, there are still situations, ever so rare, where no laying requirement exists. Generally, these involve enabling acts of specific applicability where the danger of administrative abuse of a parliamentary grant of power is slight

The six above methods describe the various types of laying systems employed in Britain. The effectiveness of many of these methods can be attributed directly to the parliamentary committees, which have taken the enormous burden of reviewing every regulation off the shoulders of each Member of Parliament. Since the members of Parliament did not have time to consider adequately the flood of regulations issuing from British agencies, as a result of reform studies the Parliament established the Select Committee on Statutory Rules and Orders, popularly known as the Scrutiny Committee. We will see the power and function of this organ when we deal with parliamentary control over administrative rule making below.

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[133] Carr, supra note 116

[134] With the negative laying system, any single member of the House of Commons may move for annulment

[135] The US Congress has used the laying system as a legislative control over administrative agencies *only* when it determined that a special policy interest was present which required its special attention and review. Thus, the utilization of the laying system at the federal level does not resemble the pervasive use of the laying system in England; and, the federal laying system does not employ scrutinizing committees as does England. See Melville, *supra note 58.*

The laying of regulations before Parliament (Bundestag), which in different cases can offer its consent, correct, veto, or simply require notification of their issuance and the reasons therefore, is not unknown to German constitutional practice, although there is only one express provision in the Basic Law. In this exception, the constitution provides that the Bundestag can revoke a statutorily regulation concerning the obligation of the federation and the states to maintain interest free deposits in the German federal bank.[136]

#### 3.1.2.3.Publication

The other procedural requirement in administrative rule making is publication. The general basis of the requirement of the publication is that if every person is to be presumed to know the law, then the contents of the law must be accessible to him/her. This is the principle of ignorance of the law has no excuse. However, giving the great volume of delegated legislation, this doctrine can only operate so as to cause several hardships.[137]

Adequate publicity of delegated legislation is absolutely necessary to ensure that law may be ascertained with reasonable certainty by the affected persons. Further the rules and regulations should not come as a surprise and should not consequently bring hardships which would naturally result from such practice. If the law is not known a person cannot regulate his affairs to avoid a conflict with them and to avoid losses. The importance of these laws is realized in all countries and legislative enactments provide for adequate publicity.

Under English administrative law, there is difficulty and argument as to when a statutory instrument is "made" due to which there is no uniform procedural requirement of publication. One view is that the statutory instrument is 'made' as soon as it is signed by the appropriate minister, and becomes effective from that time onwards notwithstanding that any publication or lying requirements have not been complied with.[138] The second view is that the statutory instrument is 'made' when it is signed, but only comes into effect on a certain date, on the order itself.[139] Third it is said that it becomes after it is signed and become into effect on some specified date in the future, after one of the various laying procedures has been complied

[136] Art 109 Para. 4 of GG
[137] Michael, supra note 6,at 20
[138] Ibid ,at 18
[139] id

with.[140] These differences of time on which the rule is considered made will affect the requirement of publication procedure. Despite these different arguments, however, two alternative approaches may be taken with regard to publication. Either the enabling act may itself lay down the procedure that must be followed for publishing any instrument made there under or it may provides that the procedure of the 1946 act to be followed[141].

In any way, the Statutory Instrument Act generally provides that after a statutory instrument has been *made*, it shall be sent to the Queen's Printer of Acts of Parliament[142]. There it is printed, numbered and usually made available to the public at Her Majesty's Stationary Office as soon as possible. Certain instrument may be exempted in whole in part from the publication requirements of the act.[143] In addition, the Statutory Instrument Regulation of 1947 also exempted certain instrument from publishing.

Generally, the scheme of the Act is to divide delegated legislation into statutory instruments and other legislation. The Act then provides a procedure for the publication of statutory instruments. It follows, therefore, that the Act does not affect the rules relating to the publication of delegated legislation other than statutory instruments. So far as statutory instruments are concerned, all such instruments are to be sent to the Queen's Printer immediately after they have been *made, and numbered*.[144] There is no exception to *these two* requirements. By themselves, however, these two steps clearly do not constitute publication. Two further steps are contemplated by the subsection, but to these latter requirements exceptions are permitted: *except in such cases as may be provided by any Act passed after the commencement of this Act or prescribed by regulations made under this Act, copies thereof shall as soon as possible be printed and sold by the King's printer of Acts of Parliament*." It is clear then that, in the context of publication, the Act recognizes two kinds of statutory instrument: those which must be published in their entirety in the statutory manner and those which need not be so published.[145]

[140] id
[141] Section 2 and 3 of The Statutory Instrument Act 1946
[142] Section 2 of The Statutory Instrument Act 1946
[143] Section 8 of The Statutory Instrument Act 1946
[144] Statutory Instruments Act 1946
[145] D. J.Lanixam, delegated legislation and publication, the modern law review Volume 37, Issue 5, pages 510–524, September 1974

As we try to see above, German administrative act do dot directly deal with administrative rule making. Thus we do not find a specific law that deal with administrative rule making. However, the act provides that "*An administrative act may be publicly promulgated where this is permitted by law. A general order may also be publicly promulgated when notification of those concerned is impracticable*."[146] But even under this instance the act did not make the violation of publication as aground of invalidation. This is inferred from the absence of of publication as one ground of invalidations listed under the act.[147] As we have seen above, the German legal system do not seem gives much emphasis on the procedure. As such the act states that "Application for annulment of an administrative act which is not invalid under section 44 cannot be made solely on the ground that the act came into being through the infringement of regulations governing procedure, form or local competence, where it is evident that the infringement has not influenced the decision on the matter."[148] The constitution do not prescribed administrative procedure. The mistrust toward the executive branch, which rose out of the ashes of the *Adolf Hitler*'s dictatorship (1933 – 1945), is reflected only in constitutional guarantees concerning *court protection.*

### 3.1.3. Administrative Rule Making Control Mechanisms in England and Germany

As the experience of many jurisdictions in the modern democratic world indicates, there are different devices that can be used to control the powers of administrative agencies. Some of the commonly used controlling mechanisms are: Internal administrative review by superior officials, executive/political/ control, Parliamentary control, review by tribunals, External scrutiny and recommendations by Ombudsmen and other watchdog institutions and judicial control. The diversification of the controlling mechanisms is partly justified by the perceived inadequacies of each mechanism to check the ever increasing involvement of the government in matters that affect the interest of the citizens. But it should be noted that all these controlling mechanisms may not appropriate for administrative rule making control for different legal system context.

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[146] VwVfG ,§ 41 (3)
[147] Id, 44 (2)
[148] Id 46

These administrative rule making control mechanisms may be categorized as either internal or/and external. The term internal control refers to the type of controlling mechanisms that are set within the organizational structure of the various administrative organs of the government where by original decisions of the authorities within the lower structure of the administrative hierarchy are subjected to review by those in the next upper hierarchy. In other words, an internal review is a process by which original agency decisions are reviewed *on their merits* within the responsible government agency. This type of review gives opportunity for agencies to reconsider their decisions and rectify the mistakes, if any. The enabling legislation or the executive order by which the agency is created may include a formal system for the internal review of agency decisions. In the absence of such formal mode of controlling, the agency using its discretion can set informal controlling mechanisms in place.

On the other hands, The term 'external control' in administrative law context refers to the various limitations imposed upon the powers of administrative agencies by other authorized bodies that are found outside the structure of such agencies. These types of controlling mechanisms include executive/political/control, parliamentary/legislative/control, judicial control, control by administrative tribunals, control by watchdog institutions and the mass media and the like. Below, we will try to see only parliamentary and judicial rule making control mechanisms in England and Germany.

#### 3.1.3.1. Parliamentary control

We have said that no modern state can be governed effectively without the legislature delegating some of its legislative powers to the Executive to make subordinate legislation. Having regard to Parliament's mandate, it is necessary that Parliament creates a legislative framework within which such delegated exercise of lawmaking takes place. That explains Parliament's mandate to monitor and regulate the use of the delegated law-making power by the Executive. Accordingly, the legislative organ of many countries devised mechanisms by which it could control administrative rule making.

The British parliament control subordinate legislation in three ways. First, Parliament has the opportunity to examine the power of the agency to make subordinate legislation when it considers the merits of the proposed enabling act. Second, many subordinate laws are required by enabling acts, what the British call parent acts, to be laid before Parliament. Third,

Parliament, with aid of selected committee on statutory instrument, may consider motions which specifically question agencies concerning certain subordinate laws. Since lying before parliament in England has been discussed above[149], there is no need to repeat here so we will see control of SI during making of the parent act and through the use of its committee.

As with primary legislation/enabling act/, it is the first real opportunity for the extent and purpose of the delegated legislation to be discussed, both in the parliament and at the committee stage.[150] In this case, members can consider whether a an agency need to be given power to issue delegated legislation, if so, the form the delegated legislation will take, the procedure to be followed and the like.

However, though the usual procedures of both Houses may be employed, the very pressure on parliamentary time which in the first place necessitates delegation may actually prevent any really effective consideration at this stage in the first place. Due to this problem, parliamentary control may also be exercised through procedural requirements like laying the instrument before the parliament, or through scrutiny by the Select Committee on Statutory Instruments

We have seen the various types of laying systems employed in Britain. The effectiveness of many of these methods can be attributed directly to the parliamentary committees, which have taken the enormous burden of reviewing every regulation off the shoulders of each Member of Parliament. We have said above that the members of Parliament did not have time to consider adequately the flood of regulations issuing from British agencies. As a result of reform studies the Parliament established different kinds of Scrutiny Committee that solved this problem. As such, scrutiny by committee is another important controlling mechanism of agency rulemaking widely used in Britain.

The House of Lords has two committees which complement each other and keep a watchful eye on delegated legislation. One is delegated Powers and Regulatory Reform Committee (DPRRC) which *examines* delegated powers in *primary legislation* to see what powers ministers are asking for.[151] This committee's role is to advise the House of Lords whether the provisions of any Bill inappropriately delegate legislative power, or whether they subject the

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[149] Supra note 18,19

[150] Michael T Molan, supra note 6,at 22

[151] House of Lords, supra note 126. See also Ruth Fox and Joel Blackwell, supra note 122, at 73

exercise of legislative power to an inappropriate degree of parliamentary scrutiny. The Committee makes its recommendations to the House and it is for the House to decide whether or not to act on those recommendations. The Committee has considerable authority and even the Government usually tries to accept the Committee's view[152].

The other is Secondary Legislation scrutiny committee (formerly known as Merits of Statutory Instruments Committee (Merits Committee) which *examines the secondary legislation* which results from the exercise of those powers.[153] This Committee performs a complementary function: when a minister uses one of the powers he/she has been granted, the Merits Committee *looks at the policy* in the Secondary Instrument and draws the attention of the House to any it considers. It has no power to block the passage of a Secondary Instrument. In considering the policy implications of Secondary instruments, the Merits Committee complements the legal technical scrutiny undertaken by the Joint Committee on Statutory Instruments. From the Merits Committee's various levels of action, the mains are: clearing an instrument without comment; mentioning the instrument so that Members are aware of it, and drawing the instrument to the special attention of the House. The Merits Committee welcomes comments on individual Secondary Instruments from interested groups[154]

On the other hands, there is what is known as The Joint Committee on Statutory Instruments (JCSI) which has Members from both Houses.[155] It considers whether each *secondary instrument* complies with *the legal requirements* set out by the parent Act. It does not look at the policy but at legal compliance. It scrutinizes statutory instruments and draft instruments where appropriate[156]. It is required to consider whether the attention of each House should be drawn to the instrument.

Parliament has formulated eight specific guidelines which the Committee uses to decide whether the special attention of the House should be invoked. Under these eight guidelines the Committee may investigate a regulation and call Parliament's attention to it if the regulation: imposes a pecuniary obligation on the public revenue; is not open to challenge in the courts; appears to make unusual or unexpected use of the powers conferred; purports to have

[152] House of lord.
[153] Ruth Fox and Joel Blackwell, supra note 122, at 83
[154]Id
[155] Ibid , at 87
[156] Nehil Hawke and Nehil Parpworth, supra note 44, at 121

retrospective effect where the enabling act grants no such authority; is delayed unjustifiably in being laid or published before Parliament; is delayed unjustifiably in notifying House officials in the case of an order not effective until laid; is deserving of special attention due to its form or purport; or is drafted defectively[157].

The Committee has the power to require written or oral testimony from the agencies, and must give the administrator a chance to explain himself, before the Committee draws the attention of the House. Thus the Committee, in essence, is a screening device, which reports to the House that a given rule is satisfactory or that the regulation requires Parliament's attention as judged by the Committee's set frame of reference.

All these committees ensure that delegated legislation is thoroughly checked. There is no similar process for scrutinizing ministerial powers in the Commons. The committees give advice to the House, they have no power themselves: it is for individual Members of the House to pursue any Secondary Instruments through tabling questions or motions for debate. The House spends a lot of time debating secondary instruments and asking ministers to explain and justify their policy[158]

One thing which should have to mention here is that all Secondary Instruments that are subject to a parliamentary procedure are accompanied by an explanatory memorandum (EM). This document, written by the Government, explains in plain English what the Second Instrument does and why and gives basic information on the policy, costs and consultation. It is available to the public, along side the text of the Secondary Instrument, on the Office of Public Sector Information (OPSI) website[159].Furthermore, *no formal parliamentary scrutiny* exist for the scrutiny of other form of delegated legislation such as circulars, guidelines and code of conduct. However, it should be remembered that the traditional methods of control, such as question to ministers and etc may be used to highlight apparent irregularities or excess.[160]

On the other hand, direct political control over German administrative rulemaking is exercised in the case of statutory regulations and administrative regulations by the two Houses of

[157] J. Griffth & H. street, principle of administrative law. (5th ed.1973), at 88-90.

[158] Michael, supra note 6, at 23

[159] www.opsi.gov.uk

[160] Michael, supra note 6, at 24

Parliament. Both the Bundesrat (the Upper House of the Federal Parliament)[161] and the Bundestag (the Federal Diet or Parliament) get involved in the production of statutory regulations in many ways. The Constitution requires the consent of the Bundesrat for the majority of statutory regulations.[162] These include, unless otherwise provided by law, all regulations issued by the federal government or a federal minister laying down basic rules for the use of facilities of the federal railroads, postal and telecommunications services as well as charges therefore, all regulations issued pursuant to federal laws that require the consent of the Bundesrat and the regulations executed by the Linder as agents of the Federation or as matters of their concern.

#### 3.1.3.2. Judicial control

Administrative agencies are creatures of law, and like ever one else must obey the law. the court have jurisdiction to hear claims that the agencies have overstepped their legal authority or have acted in some unlawful manner. When parliament confers power upon public body by way of statute, it will normally have set limits to the power given. If public body acts beyond the legal limit (express or implied) of its power, it is said to be acting *ultra virus*. The literal meaning of the term *ultra virus* is beyond powers. Such restriction may be thus procedural *ultra virus* or substantive *ultra virus.*[163]

We have said that parliament is the supreme law making authority in England. As such, it can make or unmake any law whatever. Due to this, it not the judiciary function in the UK to challenge the validity of primary legislation. One can find a lot of judicial pronouncement that confirm the accuracy of this approach. In one case it is stated that

> *If an act of parliament has been obtained improperly, it is for the legislature to correct it by repealing it; but so long as it exists as law, the courts are bound to obey it*[164].

There are however another extreme approach in the judicial pronouncement with regard to the role of the court in reviewing the act of parliament in UK. This approach is based on a believe

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[161] As per art 51 if the basic law, the members of the Bundesrat are not directly elected; they are state ministers, appointed to the Bundesrat by the state governments, whose representation is proportionate to the population

[162] Article 80 2 of

[163] For more information for these two concepts, see David Stott and Alexandra Felix, supra note 7, from pp 81-190

[164] Id, supra note 7, at 13

that the court have an obligation not to apply an apparently 'unlawful' parliamentary acts. They affirm their position by taking an example of Nazi law:

> *A Nazi law which deprived German Jewish resident abroad of their nationality and confiscated their property to be so grave an infringement of human rights that the court of this country ought to refuse to recognize it as a law at all*[165]

They goes to state that since there is imbalance of power, at least within the parliament, due to lack of strict separation of power as a result of the existence of parliamentary executive, the role of court in the context of judicial review must be considered as an essential feature of this balance of power.

Due to constitutional tradition that obviously did not permit the judiciary to enforce any delegation constraints, initially the Britain courts appeared to be reluctant to assume judicially enforceable constraints on delegation. However, the British courts showed a remarkable degree of deference toward the exercise of normative power outside the parliamentary realm and they arguably came to serve a legitimizing function especially after WWII. The judicial approach changed significantly, however, in the decade after the passage of the Tribunals and Inquiries Act of 1958, in which the courts abandoned their deferential attitude in favor of more active scrutiny of delegated normative power.[166]

What is important for our purpose is, unlike the power of court with regard to reviewing primary legislation discussed above, delegated legislation is reviewable by the court and can in some case be completely invalidated in the UK.[167] The grounds on which an individual may seek to question the validity of delegated legislation varies from procedural and substantive ultra virus to abuse of powers.

The "*Grundgesetz*" (GG), enacted in 1949, contains no provisions for administrative procedure. The mistrust toward the executive branch, which rose out of the ashes of the *Adolf Hitler*'s dictatorship (1933 – 1945), is reflected only in constitutional guarantees concerning *court protection*. Examples can be seen in the right to judicial review of administrative actions

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[165] Id,at 14

[166] Lindseth, Peter,supra note 11, at 1410 See also Chris Taylor, supra note 47, at 112

[167] Michael, supra note 6,at 24

(Art. 19 IV GG), rules regarding the independence of the judiciary (Art. 97 GG) and in the right to be heard before a court (Art. 103 I GG). Thus, the codification of administrative law since the 1950s was focused primarily on the judiciary, not on administrative procedure. More significant than the codification of administrative procedure law in Germany have been decisions reached by the Federal Constitutional Court since 1970s.[168]

We have said that the German constitution lays down three basic limitations of form on delegation when statutory regulations are involved.[169] These are authorization possible only by means of formal legislation, it is only conferred on the three specified federal organs who could sub delegate to other organ provided that the enabling act specifically permit this, and authorizing statute must state clearly the content, purpose and scope of the delegation.

The federal constitutional court has interpreted the constitution as placing substantive delimitations on the types of the decisions that parliament may delegated. The first question that the court asks is whether delegation is at all possible, in other words, whether the issue at hand must be decided entirely by parliament or whether in part in may be left to administrative rule making. If the answer is positive, then the court proceed to ask how much decision making power may be given to the administration and how much decision making may be made by statute. In order to provide an answer to these questions, the Court has developed its so-called theory of essentials. The Constitution also mentions explicitly several issues which can only be regulated directly by parliamentary enactment; these are the transfer of sovereign rights to international institutions (Article 24, para. 1 GG); the budget (Article 110); and the law that amends the Constitution (Article 79). According to this theory, when the legislature seeks to regulate for the first time an area that involves the exercise of fundamental rights, it is obligated by the principle of democracy and the principle of the rule of law found in the Basic Law to make the essential decisions itself and not leave them to the discretion of the administration[170]

The controlling courts can make this determination based not only on the language of the clause authorizing the regulation, but also on the legislative aim and history of the whole

[168] German Constitution, at 5
[169] Id,Article 80 para. I
[170] BVerfGE 47, 46, 78 (1977).

statutory scheme, in connection with the other provisions of the authorizing statute[171]. The German court becomes stricter when delegation to the executive may violate individual rights, which may usually occur in the area of criminal and tax law. In this case courts require even greater clarity in the statutory language, as to what can be required of a citizen.[172] By way of contrast, courts tend to relax the limitations they place on delegation, when the regulation concerns technical and highly complex sets of facts, like environmental law, or areas subject to rapid growth and change, like economic life; here practical considerations deriving from the need for technical expertise justify wide delegation.

[171] 68, 319, 332 (1984).

[172] BVerfGE 58, 257, 278 (1981).

# CHAPTER FOUR

## ADMINISTRATIVE AGENCIES POWER IN ETHIOPIA WITH PARTICULAR REFERACES TO RULE MAKING POWER

### 4.1. Administrative Rule making pre 1994: an overview

Looking back on the rise of brutal dictatorships and the devastating experience, the Germany constitution recognized how unchecked delegation had undermined both the democratic deliberative function of legislatures and emergent conceptions of constitutionally protected rights of individuals. As a consequence, the drafters German Basic Law of 1949 attempted to define, in the constitutional text itself, both the fundamental rights of individuals and the core normative responsibilities that the legislative branch could not lawfully delegate to the executive or administrative sphere. Moreover, administrative do not make rule unless the legislature specifically delegated. The country also eventually established a body *external* to the legislature, the Federal Constitutional Court, to enforce delegation constraints *against the legislature itself*, thereby concretely signifying the abandonment of the unchecked parliamentary supremacy and abuse of delegated legislation.

On the other hands, Britain previously retained the notions of parliamentary supremacy as a fundamental Constitutional doctrine. But even in British, the necessity of excessive delegation what they usually call ‘the Henry clause VIII" has been questioned and recommended for its abolishing from enabling statute by British student and even the committee on ministerial' power.[173] Moreover, the Statutory Instruments Act of 1946 with its laying procedure and the court's roles in shaping the form, substance and scope of the administrative law has developed after 1945.

When we come to Ethiopia, it is very difficult to talk about the emergence and development of administrative law. We don't have any formal legal jurisprudence that enables us to study the history and development of administrative law in general and administrative rule making in particular. Since the history of our country's was all about authoritarian monarchy and military forms of government with out any legal and practical means of control, it become foolish to expect the history and growth of administrative law as such. Due to this, the subject is not

[173] Bernard Schwartz, supra note 14,at 6

known by judges, lawyers, the legal profession and administrative officials, let alone by the public at large. It is also an area characterized by the lack of legislative reform. Except the two draft administrative procedure, we do have neither a general administrative procedure nor agencies specific. It is also a subject in which too little attention is given in terms of research and publication. Even though there are specific provisions in every proclamation, they are enabling acts only conferring power on administrative agencies than rules and procedures of manner of exercising power, or in general tools of controlling governmental power.

Since administrative procedure is in essence the mechanism of controlling power, the history of administrative power in Ethiopia however could be studied in terms of the legal and practical power of the administrator, and process of legislative and judicial movement to curb the excess of such power. This task becomes the study of the constitutional history of Ethiopia, as the administrative law could not be significantly different from its constitutional history. This is because, the conventional understanding is that the fields of constitutional and administrative law share similar purposes of protection of rights, control of agency, and limitation of government.[174] With regard to this limiting function, it is quite obvious that administrative law overlaps a good deal with constitutional law, and has a wider scope in the sense that it touches far more behavior. The concept of constitutional or limited government was not the political culture of the Ethiopian rulers. The experiences of the past three pre 1994 written constitutions illustrate these facts very to show if there is any departure currently from our past experiences.

On 16 June 1931, Ethiopia got its first constitution. Even if the 1931 constitution was drafted with the involvement of prominent scholars from Europe and particularly from German and Japan[175] and was considered of its time and contained basic principles having to human rights, it did not reflect any ideas of constitutional government. Despite the creation of a system of legislature and courts, which apparently makes the existence of the principle of separation of power, all real power and authority remained firmly entrenched in the emperor and the

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[174] Tom Ginsburg, "Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law" (University of Chicago Public Law & Legal Theory Working Paper No. 331, 2010).Available at http://ssrn.com/abstract=1697222 ( downloaded on November,2014)

[175] Bahiru zewude, a history of modern Ethiopia :1985-1991( 2nd ed. 2001),Oxford-James currency, at 110

traditional ruling class. Accordingly, the emperor is the law maker, the chief executive and the supreme judge.[176] Thus the expressed intention of the Constitutions and the actual practice revel absence of real separation of power. The constitution was considered by many as generally a step towards centralization and modernization of the system of governance in Ethiopia. Since administrative procedure mainly intended to control the administration while rule making, this would become controlling the executive, in this case the Emperor. Due to this, neither the constitution nor other statutes did deal with administrative rule making. Thus, administrative rule making seems  the types and form of government of that time.

The 1955 revised constitution showed little improvement with regard to separation of power as it tries to define and distribute powers of government. It also included provisions entitling the citizen‘s fundamental rights and freedoms. In theory the constitution was the supreme law of the land governing even the emperor.[177] Moreover, it contemplated an independent ministerial government responsible for the monarch and the parliament, and an elected chamber and independent judiciary.[178] The introduction of the principle for the chamber of disputes, whose members were elected on the basis of universal adult suffrage, makes it different from its predecessor. Due to these, the revised constitution seems a change in the organization of the system of governance, limiting the power of the emperor to a certain extent and a relatively better recognition of rights and freedoms.

But all these liberal provisions were overshadowed by the executive prerogative reserved to the emperor.[179] The constitution failed to do away with the accumulation of power in the hands of the Emperor. The Emperor still retained law making power sharing it with parliament, and judicial powers, which were ill defined in the constitution as the power to maintain justice‘ and the essential executive powers were vested directly on him.[180] Despite the resurrection of the parliament, the emperor promulgated a number of laws in the form of proclamations and decrees. Parliament was granted no power to control over the ministers' rule making. It

[176] The 1931 Ethiopia constitution, Art 3 of
[177] The 1955 revised constitution of Ethiopia, Art 122 of
[178] Ibid, Art 110
[179] Ibid, from art 26-36
[180] Getahun Kassa, Mechanisms of constitutional control: A parliamentary of the Ethiopian System, Africa Focus, Vol. 20, Nr. 1-2, 2007, pp. 75-104

remained responsible to the Emperor and law approved by both house could not override the position of the Emperor, let alone to control the rules made by the Emperor.[181]

Accordingly, there was no any practical and legal restriction imposed on the parliament on the extent it can delegate the power to make rules, the extent and the procedure administrative agencies make a rule. It is also impossible to talk about mechanisms of control. By simply observing the provision of the constitution and the actual practices, it become naive to talk about the role of the parliament and the court in controlling the administrative rule making power. Since the main objective of administrative law in general is a means of control of power of government (the executive), due to the nature and form of the government and the development of the concept of democracy at that time, one could not expect the emergency and development of administrative law. However, some attempts of creating mechanisms for control of governmental power with such system of government at that time have been surprising. The establishment of the office of ombudsman, the need to revise the constitution, and particularly the drafting of administrative procedure are some of these attempts.

The arbitrary and unlimited form of government continued after the over through of the Emperor. After many revolution and struggle against the Emperor, the 'Derg' suspend the revised constitution and dissolve parliament by a proclamation that was promulgated for the establishment of the Transitional Military Government /Dergue / that lasted for more than 13 years.[182]

After the promulgation of the 1987 constitution, National *Shengo* (parliament) were elected. Even though the *Shengo* was formally the highest legislative body, in practice it seat only once a year.[183] Due to this, the role of the *Shengo* was undertaken by the state council which is the visible administrative, executive, and legislative organ.[184] The council of the state is an organ of state power functioning as a standing body of the national *Shengo*.[185] It had the power, inter

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[181] The 1955 Ethiopia constitution, art 88

[182] Transitional Military Government establishment Proclamation, 1974, Proclamation no 1, Neg. Gaz., Year 1 No 1, Art 5(a). There is a debate among scholars as to the status of the proclamations that suspend the constitution.

[183] The 1987 constitution of the people's democratic republic of Ethiopia, Art 67

[184] Ibid , Art 82

[185] Ibid, art 81(1)

alia, to interpret the constitution and other law, revoke regulation and directives issued by state organs accountable to the national *shengo*, whenever these are contrary to the law enacted by the national *shengo*, the council of the state and the president of the state.[186] It has the power to issue decrees and special decrees.[187] The president of the republic has the some power to issue decree and special decree.[188] Despite these powers, there is no any means by which these powers could be checked and controlled. Rather, the administration has taken many measures even with out legal basis let alone to expect the existence of procedure for lawfully established actions. This makes the practice during this times like that of the emperor era.

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

Generally, during the era of the above constitutions, there were no underpinning circumstances for the development of administrative procedure to flourish as a means of control of government in general and administrative rule making in particular. There were no any limitation and delegation standards with regard to extent the legislature was able to delegated to administrative agencies, there is no procedure administrative agencies expected to follow, as well as there is no viable administrative rule making control mechanisms. What is the trend the current Ethiopia? We will see below.

## 4.2. Administrative Rule making During the Federal Democratic Republic of Ethiopia Era: (1995-present)

### Introduction

Ethiopia has undergone major political and social change since the overthrow of the *Dergue* in 1991. Particularly, the country ushered in a new era for the country's legal institutions with the adoption of a new constitution in 1995. The Constitution was a milestone that redesigned and

[186] Id, art 82 (1)
[187] Id,82(3) and 83(1)
[188] Id, 86(4) and 87(2), respectively.

restructured the country into a federal republic based on democratic principles, including extensive and progressive individual and group rights.[189]

Moreover, compared to the previous constitutions, the FDRE constitution has significant effect on laws including administrative law. It is under it fundamental laws are supposed to be made and executed, all governmental authorities and the validity of their functioning adjudged.[190] As such, no legislature, in principle, can make a law and no governmental agency can act, contrary to the constitution. In general, no act of executive, legislative, judicial or quasi judicial, of any administrative agency can stand if contrary to the constitution.[191] The constitution thus conditions the whole government process in the country. Moreover, there are constitutional principles that directly related to administrative law. These include the principles of transparency, accountability, rule of law and democracy. We will see how these principles have been and should be applied in practice in this country later.

The other departing feature from previous government is the establishment of federal structure. The Constitution establishes a Federal and Democratic State structure.[192] As such, the federal democratic republic is composed the federal government and of nine state members.[193] Both levels of governments have their own legislative, executive and judicial organs. As such the federal structure has the implication for a possibility of the Federal and the state administrative law. Since the constitution envisages for the establishment of the executive branch at the state level as one organ of government[194], it is be up to the states to formulate their own administrative law. This means that the decision-making and rule making procedure of one regional state may be different from that of the other state, or even from that of the federal state.

Having these short general remark, it is better to see some common concepts with regard to administrative agencies and administrative rule in Ethiopia context below.

[189] The FDRE constitution, supra note 17, from art 13-44
[190] Id, Art 9(1)
[191] Ibid
[192] Id, art 1
[193] Id, art 47 cum 50(1)
[194] Id Art 50(2)

### 4.2.1. Models of Establishing and Forms of Administrative Agencies in Ethiopia

Before rushing to see administrative rule making in the present Ethiopia, it is better to see the mode of establishing administrative agencies and the forms in which they exist. This enables us to have a general over view about the nature of administrative agencies we are going to investigate their rule making power. In most countries, there are varies class of administrative agencies either on the basis of their relative independency or by whom they are established. In Ethiopia context there are three models for establishing administrative agencies. Those are administrative agencies established by the constitution, those agencies established by HPR, and administrative agencies established by the regulation of council of ministers. The some types of administrative agencies exist in the national regional states. Moreover, each agencies name and forms varies. Let us see each mode and forms of administrative agencies in Ethiopia.

With regard to models of establishing administrative agencies, the first types of administrative agencies are those established by the constitution. There are three administrative agencies established by the FDRE constitution. These are the Auditor General, National election Board, and Population Census Commission.[195] These administrative agencies are accountable to the HPR. They are required to be independent of the executive branch for different reasons. As we have seen on scope of the research in chapter one, it is not my intention here to discuss rule making of independent administrative agencies in Ethiopia. There is only the auditor general at the regional level.[196]

The second classes of administrative agencies are those established by the HPR at the federal level and by the state council at Oromia national regional state. Although there is no clear constitutional provision that grant power to the HPR to establish administrative agencies, most of administrative agencies we find at the federal and regions are established through proclamations. The HPR, for instance, established administrative agencies using it general power to issue proclamations.[197] The most important proclamation in this regard is a proclamation enacted for the organization of the executive organ of the federal government by which different ministers, authorities, agencies and other administrative agencies have been

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[195] Id, Art 101, Art 102 and Art 103,respectivelly

[196]The Oromia Regional State Constitution, Megeleta Oromia, 2001 (here after called Oromia constitution), art 110

[197] Id, Art 55(1)

established.[198] Similarly, the Oromia state council (*caffe*) has established varies administrative agencies by proclamation enacted for the re organization of the executive organ of the Oromia regional government.[199]

Unlike the first kind of administrative agencies established by the constitution, these kinds of agencies enjoy lesser independence. As such, the legislature may establish or close these types of administrative agencies as the case may be. For instance, recently, the minister of information was found to be not much necessary where as some other new ministries like ministry of communication and technology is established at the federal level.

The third categories of administrative agencies are those agencies established by regulation of issued by the respective highest executive organs. The council of ministers has been enacting regulations pursuant to the constitution[200] and the express authorization of the HPR.[201] By using such power, it has established a number of administrative agencies or public enterprises for instance justice and legal system research center and Ethiopia conferences center.[202] These agencies are under the mandate of the council of ministers.[203] As such, the ministers may dissolve these agencies. For instance the Engineering design and tool Enterprise, the Addis Metal Pressings Enterprise, and Lalibela Engineering and Construction Enterprise have been dissolved by the council of ministers regulations.[204] Similarly, the Oromia state administrative council enacts regulation as per the region's constitution or the express authorization of the state council (caffee).[205] By using such power, it has established a number of administrative agencies.

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[198] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation, proclamation No 691/2010, Negarit Gazzeta, 17th Year No. 1,2010.

[199] Definition of Powers and Duties of the Executive Organs of the The Oromia National Regional State Proclamation No.163/2011 for the establishment of the executive organ of the Oromia national regional state.

[200] The FDRE constitution, supra note 17, art 77(13)

[201] You can see ever proclamation under the provision 'power to issue regulation and directives'

[202] The Council of Ministers Regulations No. 22/1997

[203] The FDRE constitution, supra note 17, art 77(2)

[204] See Dissolution of the Engineering Design and Tool Enterprise Council of Ministers Regulations No. 15/1997, Dissolution of the Addis Metal Pressings Enterprise Council of Ministers Regulation No. 10212004,and Dissolution of Lalibela Engineering and Construction Enterprise" Council of Ministers Regulation No 11312004,respectively.

[205] The Oromia constitution,supra note 196, art 55(6) and, You can see every proclamation of the region

In addition to varies modes of establishment, administrative agencies also may have varies forms and name such as ministry, agency, authority, Board, Municipality, corporation, commission, center and the like. It may not be easy to identify the power of the agency by merely observing its form. But generally at federal level, organs designed as 'ministry' are vested predominantly with the power and responsibility of organizing and directing policy matter.[206] On the other hand the form agency, authority usually refers to those regulatory and supervisory activities. For instance the Ethiopia standardizing authority is responsible for the quality of good and service in the country.[207] Hence the later exercise administrative power over specifically defined jurisdiction. Other forms of administrative agencies like board, commission and committee are usually perform tasks out side of the above stated one. Due to this it is clear that one can not come up with clear cut distinctions and definition among varies forms of administrative agencies in Ethiopia predominantly due to lack of developed jurisprudence of administrative law.

### 4.2.2. FORM OF ADMINISTRATIVE RULES IN ETHIOPIA

We have seen there are a large range of terms used for secondary legislation (statutory instruments) in England: Orders in Council, regulations, rules, directions, special procedure orders, bylaws, and local authorities' orders. On the other hands, even if the administrative procedure do not deal administrative rule making, in German administrative decisions that lay down rules are divided into three general categories: statutory regulations or ordinances, administrative regulations or directions and bylaws.

The most common format for administrative rule in Ethiopia is regulation and directives.[208] The former is issued by the council of ministers at the federal level and state administrative council at the regional level, where as the later is issued by the concerned ministers or other administrative agencies like commissions, agencies, authorities etc.[209] If it is only regulations and directives that is said to be administrative rules or subordinate/delegated legislation in

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[206] See Common Powers and Duties of Ministries under proclamation no 691/2010, art 10

[207] Quality and Standards Authority of Ethiopia Establishment Proclamation No. 102/1998,art 5

[208] These are by far the most common names under which delegated legislation is permitted. Like other countries for instance the US APA, there is no law that defines what "rules" is and what is not in Ethiopia.

[209] See the FDRE constitution, art 77 and the Oromia constitution art 55(6), and provision termed as 'power to make regulations and directives' at the end of every proclamation of each level of governments.

Ethiopia, it is inevitable to raise a question as to the status of by law, ministerial order, department circulars, guidelines, and code of conduct? This is because causation should be exercised with these matters as it is questionable to what extent, if at all, they have any legal effect. The distinction between statutory and non statutory rules is not always clear cut as regards their legal abidingness in Ethiopia. However, even though it is not always easy to distinguish between legislative and non legislative rules, the distinction is important not only because it helps citizens to know their legal position but also because different procedural requirements *may b*e attacked for each category of rules.

The status of circulars, guidelines and order are the most challenging 'administrative rules' in Ethiopia as there is no developed administrative procedure. Due to this, the legality and abidingness of these materials is subject to scholars' debate as well as subject to controversies in the court of law. By leaving scholars arguments for a moment, let us see some practical court case with regard to these points at one of Oromia Supreme Court.

In one case, the Oromia anti corruption commission prosecutor has instituted a criminal charge on twenty eight defendants under art.32 (1A & B), 33 and 407 of the FDRE criminal code.[210] The charge states that the defendants being government employs with different position at Finfine surrounding Oromia special zone Burayu town administration having intent to procure them selves or another unlawful enrichments, by violating the ***order*** that prohibit to give residence land[211] as well as regulation no 99/99, gives a resident land to unknown and non residences people. After the reading of the charge, among many primary objections attorney of the defendants have raised, the one which is relevant for our purpose was that the 'order' the defendants have said have violated do not have a legal status. The reasons the attorney states is that 'rule could not have a legal effect unless published in Gazeta. Since this order is not published in Gazeta, it is not a legal rule which could be said have violated.

The court state that the defense attorneys, except arguing that this order is not a legally binding rule, they nether present evidence to that effect nor request judicial notice to be taken. The court goes to state that black law dictionary and other related material describes the term 'order' as to include all kinds of order that passed from the higher administration in hierarch

[210] Finfine Surrounding Oromia special zone high court file No. 07893
[211] Order No. 01/Dh-162/2783/01 dated 16/08/2001(E.C)

with out requiring *any special procedure*, and become a binding rules on the person or body to whom it refers. Thus the court conclude that even if such order is not published in the gazetta or translated to the working language would have a force of law and violating such rules will entail legal responsibility, by referring to the federal Supreme Court cassation division's decision and finally struck out the primary objection of the attorney of the defendant. The region's Supreme Court has confirmed the decision.[212] In fact the federal supreme court cassation division similarly has decided in a case Mr. Daniel Mekonnin vs. Ethiopian revenue and customs authority that un publication of directives made by executive bodies do not prevent it from having a legal effect.[213]

But the two court's decision rests on different administrative action. In the Oromai high court the issue raised is about an administrative order where as the issue at the federal decision is about administrative directives. What makes both decisions similar is that both courts, argue that neither the order nor the directives need to publish in the official gazette to be taken as legally binding rules. Even if the two administrative actions, i.e. an order and directives would be taken by the executive organ they are the result of different source of authority. Thus, administrative 'rules' could be categorized as legislative rules which performed by the express authorization and has legal effect on any bodies where as non-legislative rules may not binds third parties out side that organization.

But since we do not have an administrative procedure that define the term administrative 'rules', it is difficult to decide which administrative actions would be considered as a 'rule'. Moreover, the some problem will exist with regard to the procedure these administrative 'rules' have to follow one of which is about their publication. As we know, administrative directives do not formally published in Ethiopia. But how the principle that states "Ignorance or mistake of law is no defense" should apply to a person who does not have deemed to saw a law? How one could now said administrative 'rule' is a rule or some other thing in a place where there are no some formal laws that tell him what is legally binding rule what is not? And other similar questions would be raised due to lack of formal administrative procedure. But

[212] The Oromia Supreme Court file No. 178094

[213] The Federal supreme court cassation division decision file no 43781 ( available on federal cassation decision volume 10, at 225)

generally, it is know that administrative action may be statutory, having the force of law, or non statutory, devoid of such legal force. The bulk of the administrative action is statutory because a statute or the Constitution gives it a legal force but in some cases it may be non statutory, such as issuing *directions* to subordinates not having the force of law, but its violation may be visited with disciplinary action.

There are also other administrative actions that show us the gravity of the problems of lack of formal administrative procedure in Ethiopia due to which power is being abused. The Oromia Justice Bureau has distributes a ***circular*** that prohibits representations as per art 2205 of the civil code on unfinished residence house construction and on empty land.[214] Even if it is intended to minimize the transfer or sell of town residence land with out any constrictions on it, it could be taken as repeal or suspending of an existing laws (the civil code) which should have to be taken by the concerned legislature organ. We know that regions could enact laws on state matters.[215] Accordingly, states have enacted many laws like family, succession and the like. Even though they could enact civil matters including that concerns representation, it is only the legislature that is capable of formulating or enacting such law. There is no any legal basis for the Oromia Justice Bureau to prohibit by an order such an already existing legislature made rules.

Many practitioners have questioned the legality of this order that impliedly repealed the principle that is included in the civil code. One of my interviewee has said that even if the regions have the right to enact civil laws as per the constitution, it is only the state council of the region (caffee) not an administrative organ that could do so.[216] He goes to state that the order is purposeless, as people has been taking representation from the federal and use in the region, as well as it illegal as it is issued with out lawful authority.[217] However, by acknowledging the illegality of the circular, the bureau has been revoked now by another circular.[218]

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[214] Letter No. X/A/A/507/02 dated 29/10/2002 E.C.

[215] The FDRE constitution, Art 50(5)

[216] Undisclosed interviewee, on march 15,2015

[217] Id

[218] Letter with Ref.No. 02/wG-12/210 dated on 09/12/2006 E.C The literal translation of this letter to English language state that " *As it is stated on the subject, based on the request of Landa and Environment protection bureau of Oromia, it has been prohibited to give representation on*

The other similar issue in this regard is the status the recent reforms in all sectors (BBR). Particularly, its application in the justice sector has brought legal consequences in the oromia national regional state. This is due to the fact that it directly 'repeals' certain formal legal principles particularly criminal procedure. For instance the power and duties of both public prosecutor and crime investigating police as per the criminal procedure of Ethiopia[219] have changed and made to be governed by as per this reform. Both the public prosecutor and the investigating police will investigate a crime together.

In my interview with crime investigating police and district Oromia justice bureau public prosecutor at Sendafa-Bakke town, although it has solved certain problems the reform has many practical challenges especially with regard to the legal relation between the prosecutor and crime investigating police.[220] The public prosecutors usually cites art 8 of the criminal procedure code for their leading and instruction role over the criminal investigating police where as the police argues that this reform have made the status of both organ equal with regard to investigation. Due to this usually there is disagreement and some times conflicts between these two organs.

These problems predominantly emanate due to luck of legal status. Due to this there are different practices and legal challenges here and there on many issues. Generally there is no clear and precise division of power so that the role of the prosecutor and police is blurred as no one could raise the any legal ground for his position/argument except the reform. This reform in fact tries to come up with better solutions especially interns of dalliance, law cost and other similar objectives for the public at large. How the reform has change or overrides a formal legal provision? Many practitioners have questioned the legality of this reform that repealed the legally established procedures. But recently even if there are some attempt to redefine the application of the reform by formal statute enacted by the region's state council that empower the prosecutor to release unlawfully detained person, in my undisclosed interview with the

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*unfinished house constriction and on empty residence land. However since the problem related to land sell has been corrected, as well as the prohibition of representation has violate individual right to property, the previous order have been revoked by this circular"*

[219] Criminal Procedure Code Of Ethiopia, Imperial Ethiopia Government Proclamation No.185 Of 1961

[220] Interview with Inspector Teshoma Rata and Habebe Guta, respectively, on March 1, 2015 at their office. The researcher has been the region's public prosecutor before 2012 so that have personal observation on this matter

region's public prosecutor have told me that the two institution has agreed to 'snatch' this statutorily given power to the prosecutor.[221]

Generally, all the above orders, circulars and reforms, if they lack the status of law it would, strictly speaking, become a misnomer to include them under the heading 'legislation'. The effect of this is that if, under the parent act, these matters are not stated as being exercised by statutory instrument, those provisions, if we have any, which deal with notice and comment (participation) public publication, lying and the like, if any, do not apply.

### 4.3. ADMINISTRATIVE RULE MAKING POWER,PROCEDURES AND CONTROL MECHANIZMS AT FEDERAL AND OROMIA REGIONAL GOVERNMENT

Even if many constitutions permit legislature to delegate the legislative powers to the executive bodies (first of all to the Government), it is challenge to find a clear constitutional provision to this effect in Ethiopia. The constitution only provides that the HPR shall have the legislative power over matter that fall under the federal jurisdiction.[222] The some constitution list down some of the matters over which the house shall have legislative power.[223] However, since the legislature in Ethiopia could not be exception for the reason that necessitates delegation of rule making, it is a long trend in the country history to delegate rule making power to certain administrative agencies. As such, despite the lack of clear constitutional stipulation about delegation of administrative rule making, there is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law making. It is implicit in the power to make laws for the country.

Similarly even if the state council is the highest legislative organ in the regional power division[224], it could not neutral from delegating its law making power to state executive and other administrative agencies. The constitution does not directly deal with regard to the power of the council to delegate administrative rule making, except the provision that empower the state administrative council to enact necessary regulation to implement a law enacted by the

[221] interview with Undisclosed Oromia Justice Bureau prosecutor, January 12,2015
[222] The FDRE constitution, art 55(1)
[223] Ibid, Art 55(2)
[224] The Oromia Constitution

state council.[225] From much power the constitution grant to the council one is enacting regulations according to the power given *by the state council*.[226]

However, this does not mean that legislative organs in both level of government could delegate their law making power to administrative agencies with out any limitation. We will see this issue when we see *the doctrine of excessive delegation* later.

Even if there is universal consensus about the power of the legislature to delegate administrative rule making power, the sources of authority for administrative rule making power varies from country to country. In some country, for instance France, administrative agencies have inherent rule making power.[227] Due to this whether administrative rule making power is delegated or not, agencies would have inherent rule making power to implement such statute. On the other hands, we have seen that the German constitution lays down three basic limitations of form on delegation when statutory regulations are involved.[228] One is that authorization possible only by means of formal legislation ......and authorizing statute must state clearly the content, purpose and scope of the delegation. As such, the administration can exercise legislative powers only when such legislative powers are *expressly* delegated to it by the legislature or are exceptionally given to it under the Basic Law for well defined and limited purposes.

There is no clear constitutional stipulation with regard to administrative rule making power at both the FDRE constitution or in the revised Oromia national regional constitution. Except the provision that provides that the council of ministers the power to declare a state of emergency[229], issue whether administrative agencies have inherent rule making power is not expressly dealt with under the constitution.[230] Due to this the only source of authority for administrative rule making is the legislature. If this statement is true, there is another question that would be raised immediately is that what if the parent act remains silent with regard to administrative rules necessary for the implementation of the statute? Or what if a proclamation

[225] The Oromia Constitution, art 55(6)
[226] Ibid
[227] L.N.Brown and J.S.Bell, supra note 105, at14.
[228] Article 80 Para. I of German Basic law
[229] The FDRE constitution, art 93
[230] Mohammed, supra note 3, at 71

delegate for instance the power to make regulation but remain silent with regard to directives. Do the concerned organs automatically would have a power to enact directives to implement a proclamation and the regulation made pursuant to the proclamation? Or do in such instance, the only organ that has been given the power to enact a regulation could re delegate to enact directives to implement its regulation? Based on what?

There could be two possible answers for this question in Ethiopia. One is if it is said that administrative agencies do not have inherent rule making power, except the power granted by the legislature, it could be possible to conclude that if the parent act do not provides the power to enact rules, the council of ministers or administrative agencies could not have such power as of right. Thus, it is through delegation that the executive makes rules. Ato Abbat G/Tsadik, official at legal studies, drafts and dissemination director at the Ministry of Justice, support this argument.[231] Ato Abbat goes to state that if a proclamation is silent with regard to delegated legislation; other government organ may not have a power to make a detail law for the implementation of the proclamation. The silence has to be taken as that the legislature wants to regulate the matter it self.[232] Due to this, he argues that the only area where the executive would assume inherent rule making power in Ethiopia is that related to declaration of state of emergency.[233] Even in this case the exercise of such power itself is at the mercy of the HPR as it is subjected to the approval of the house.[234]

On the other hand, one may argue that such power would exist even in such circumstances as inherent power to implement the law made by the legislature must need making of some specific rules. Ato Werku Damise argues that even if a proclamation do not stipulates administrative rule making power for the implementation of the some proclamation, the concerned government organ will assume the power to make a subordinate legislation to implement that proclamation.[235] He goes to state support his argument by the provisions of the constitution that deal with the power of the prime ministers and the council of ministers.[236] From these provisions of the constitutions, it is clear that in all cases the implementation of

[231] Interview with Ato Abbat G/Tsadik, on March 12, 2015.
[232] Id
[233] The FDRE constitution, art 93 of the constitution
[234] Id, 93(2)
[235] Interview with ato werku Damise, a public prosecutor at Finfine surrounding Oromia Special zone, on December 23,2014
[236] The FDRE constitution, art 74(3) and 77(1),respectively

laws enacted by the HPR demand the making of detail rules, the executive has a function of implementing the primary laws enacted by the house and to do this they inevitably assume power of making rules *with a view* to implementing the primary laws. Thus he conclude that even if we did not find clearly power delegated to the prime minister or to the council of ministries rather, it is impliedly that the executive has a natural and indispensible function *to implement* laws enacted by the legislature and thus inevitably assumes power to make rules with a view to implementing respective laws.

The first argument seems sound. If we agree that the only source of authority is the legislature, it is this organ that decides whether the granting of the power to make administrative rule making for the implementation of its work is necessary or not. Accordingly if the parent act is remaining silent, no one could have a power to enact a rule to implement the proclamation. This is because how an organ intended to make rules know the extent of its power? What if other organ has the some interest and capacity? What two different organs want to enact a rule and there is inconsistency between these rules? And other question could be raised.

### 4.3.1. SCOPE OF DELEGATION OF RULE MAKING POWER

We have said that it is universally accepted in all constitutional democracies that elected parliament cannot surrender its law making function to the executive. However, it is equally accepted fact that inherent in the law making function is the power to assign discretions to the executive as to the execution of the law, which includes the assignment or delegation of subordinate legislative powers. However, a distinction is must be drawn between law as the instrument laying down principles and policies, and subordinate legislation which is seen as a legitimate instrument enabling the executive to implement those principles and policies. Thus despite universal consensus as to delegating legislative power, there is also consensus that the legislature could not surrender its inherent power to the executive. As such, it is only power to make rules for the purpose of implementing its basic principles and policies provided in the parent act should be delegated.

We have seen how conceptions of unlimited parliamentary authority to allocate normative power within the state before 1933 left the parliament in Germany vulnerable to its own growing propensity to abandon its constitutional function as the democratic representative of the people. The practice of unchecked delegation in that country led ultimately to the collapse

of the parliamentary system into one in which all effective governmental power would be fused in the person of the national leader. From their experience, the drafters German Basic Law attempted to define, in the constitutional text itself, both the fundamental rights of individuals and the core normative responsibilities that the legislative branch could not lawfully delegate to the executive or administrative sphere.[237]

Below, we will see the practice and the legal basis, if any, the extent the legislature normally allowed to delegate its rule making power.

The problem of delegated legislation in Ethiopia starts with the manner such power is delegated. Even if it is not the objective of this paper to examine the way primary legislation (proclamation) is enacted or its legality, however it is necessary to see it in its delegation aspect as it is believed to be one of the root causes for problems with regard to administrative rule making in this country.

Even if it is said that a modern legislature could not monopolized the rule making power, however, this does not mean that the power to delegate legislative powers is open ended. As such there are limitations. We have said that where an organ acts beyond or outside its powers, the resulting action is regarded as being *ultra virus.*[238] One instance is in this regard is when the parent act is ultra virus the constitution. Again, the parent act is generally declared ultra virus the constitution in three instances if it violates: expressed constitutional limits, implied constitutional limits and constitutional rights. We will see the application of this principle in Ethiopia to show how the problem of delegated legislation starts with the time of delegation.

The first instance is that the parent act said to be ultra virus the expressed constitutional limits if it violates express limits prescribed by the constitution. For instance, the legislative powers of the federal and regional governments are distinguished under the FDRE constitution.[239] If either legislative encroaches upon the exclusive spheres of the other, it becomes ultra virus the constitution. This is only to show one of the way in which the legislature enact a law that violate this constitutional division of power. So it is not my intention here to show each and every proclamation that has been enacted in this way.

[237] Art 80 of German Basic law

[238] Neil Hawke and Neil parpworth, supra note 44 , at 106

[239] The FDRE constitution, art 55 and 52

The other instance, which is my main concern, where by the parent act ultra virus the constitution by violating the *implied* constitutional limits. It is universally accepted principle that legislature can not delegate *essential* legislative function to any agency and if it does so the parent act will be ultra virus the constitution. Accordingly, the legislature after formulating the fundamental laws, can delegate to administrative agencies the authority only *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. Legislature can not delegate essential legislative function which comprised the formulation of policy and enacting into a binding rule of conduct. Thus, the legislative body ought to state an intelligible principle that the executive branch would merely fill in the details. Scholars on this area agree that a misunderstanding of this basic concept can lead to erroneous assumptions about an agency's ability to deal with a particular issue or problem.[240]

As such, there is a concept of *the doctrine of excessive delegation* where by a legislature said to be exceed its authority of delegation. This doctrine has been invoked to determine the validity of provisions delegating legislative powers to administrative agencies. We have seen various instances of forms of delegated legislation to illustrate the working of the doctrine of excessive delegation. We will try to see now delegation of rule making power at both federal and Oromia national regional government to see how this doctrine practically existed in our country.

One of such instance in which delegation becomes excessive is if it leads to *amplification of policies*. Many times the legislature passes an act in skeleton form containing only the barest of general principles and leaves to the executive the task of not only filling the detail but even that of amplifying policies. The legislature at both federal and Oromia national regional state often uses broad provisions, giving wide powers to the delegate 'to make such rules *'necessary'* for the purpose implementing the act with out lying down any standards to guide the desecration of the delegate, and the delegate is given '*blank check*' to do so what ever it likes in the delegated area of authority. It is not necessary to see some selected proclamations' provisions to illustrate this argument because all proclamations, both at the federal and regional proclamations, contains a provision that states that "The Council of Ministers may issue regulations *necessary* for the implementation of this Proclamation" as well as "the concerned

[240] William F. Fox, supra note 35, at 3

organ may issue directives *necessary* for the implementation of this Proclamation and regulations issued pursuant to this proclamation." Some scholars argue that these words make the authority the sole judge of what are its powers as well as the sole judge of the way in which it can exercise such powers as it may have'.[241]Some practitioner also supports this argument. One of my undisclosed interviewee argues that these kinds of delegation do not give a clear picture to decide what the agency is allowed or not.[242] He goes to state that this make control of such administrative power, if any difficult

On the other hands, Ato Abbat do not seem that this kind of delegation do not have an impact on time of the making of administrative rules.[243] He believe that even if it is better to set a scope over which he concerned organs are going to make a detail rules, such kind of delegation should not be taken as the subordinate organ could enact any rules as it likes. Rather, it is expected to enact only a detail rules within the scope of the parent act as well as with the intention only to implement the some.

The second instance in which the power of granting the power to make administrative rule making is excessive is when provision is made in the statute conferring power on the executive to modify or amend the existing statute it self. But the power to modify the underlying policy of the parent act is an essential legislative function and therefore delegation of power of modifying an act without any limitation is not valid.

We have seen the experience of other countries in this regard; it is possible in British to delegate such power of modifying or amending the parent act due to supremacy of the parliament. A provision in a statute which gives an express power to the Executive to amend or repeal any existing law has been described in England as Henry VIII Clause because the King came to exercise power to repeal Parliamentary laws. The said clause has fallen even into disuse in England nowadays. Moreover, even if explicit recourse to judicially enforced constraints on delegation has been out of the question after an initial period of quiescence, the British courts began to take an increasingly activist role in the scrutiny and control of executive

[241] Neil Hawke and Nehil Parpworth, supra note 44, at 3

[242] undisclosed interviewee, Oromia supreme court cassation division judges and member of the region's judicial council, on march 15, 2015

[243] Interview with ato Abbat, supra note 231

and administrative power. In Germany, on the other hands, the framers of the constitution consciously turned away from the practice of Weimar and tried to set up a clear boundary between legislative and executive tasks in the area of legislation.[244]As such, the administration can exercise legislative powers only when such legislative powers are *expressly* delegated to it by the legislature or are exceptionally given to it under the Basic Law for well defined and limited purposes. Thus, administrative agencies do not have a power to modify or amend the parent act. What is the experience in Ethiopian in this regard?

There are many instances where by a proclamation give, either directly or indirectly, the concerned authority the power to modify or amend the proclamation. The powers to amend or modify the parent act an essential legislative function as enacting the statute itself. Even if it would be possible to argue that there should be some room for the power to modify for different reasons, it should have not import the power to make essential changes and that it has to confine to alteration of a minor character and no change in principle is involved. The power delegated to the Executive to modify any provisions of a statute must be within the framework of the statute giving such power.

The third instance of excessive delegation is in case of inclusion or exclusion. As matter of common practice, the legislature at both federal and Oromia national region state passes law to confer power on the government to bring individuals, bodies, or commodities within, or to exempt them, from the purview of a statute. In this way, the range of operation of the statute can be expanded or reduced through the devise of delegated legislation.

One example with regard to exclusion is trade competition and consumers protection proclamation.[245] The provision of the proclamation which states the scope of application states that the proclamation shall apply to any commercial activity or transaction in goods or service conducted or having effect within the FDRE.[246] However, the some article give the power to council of ministers to exempt some trade activities *it deems* vital in facilitating economic development from the reach of the application of part two of the proclamation.[247]Similar

[244] Lindseth, Peter, supra note 11

[245] Trade competition and consumers protection proclamation No 813/2013

[246] Id, art 4

[247] Id, art 4(2)

exclusionary authority could be found in the labor proclamation.[248] According to this proclamation, the council of ministers may decide by regulation that the provision of the proclamation *shall not apply* for employment relation between Ethiopian citizens and foreign diplomatic missions or International organizations operating within the territory of Ethiopia.[249] Moreover, the some proclamation provides that "the Council of Ministers may, by regulations, determine *the inapplicability of this Proclamation* on employment relations established by religious or charitable organizations"[250]

On the contrary there are statutes which empower the council of ministers to include those organs/persons under the jurisdiction of the statute. For instance "Federal Government of Ethiopia Financial Administration Proclamation states that "The Council of Ministers may from time to time issue the list of public bodies to be governed by this Proclamation."[251] This means, it applies to public bodies listed but the council of ministers is empowered to add any other public bodies thereto and thus extend the operation of the act to that bodies. In this proclamation, the legislature has not laid down any standards on which the government may exercise its power to add any public bodies.

One could also see the problem of excessive delegation with regard to the power of taxation. It is said that taxation power is an inherent power of any state. In a democratic system, taxation is exclusively the function of the legislature. In this regard the fundamental cannon of democracy is '*no taxation without representation*'. However, some times delegation has been permitted even in the area of taxation. As such, when legislature passes the statute to leave a tax, it leaves some elements of taxing power to the executive. As such, power may be delegated to the government *to exempt* an item from the purview of tax. But the validity of these kinds of provisions would be held only *if sufficient guidelines* where laid down in the act of the parliament. In other word, if there is no sufficient guidelines in delegating such power, the validity of such parent act fall in to question.

[248] Labor Proclamation No. 377/2003.
[249] Id, art 3(1a)
[250] Id,3(1B) (emphasis added)
[251] Federal Government of Ethiopia Financial Administration Proclamation No. 648/2009,art 3

The other instance whereby the parent act considered being ultra virus the constitution is in case it violates the constitutional rights. No legislature has competency to pass law that violate the constitutional rights of citizens. On the other hand the FDRE constitution provides that "Every Ethiopian has the right to choose his or her means of livelihood, occupation and profession"[252] For instance the constitutionality of the Oromia's advocate proclamation has been fall in question.[253] The proclamation states that any one of the criteria to get any level of advocate license where he is six months or more after he left his job. [254] But recently, this proclamation has been amended by repealing such strange criteria.[255]

### 4.3.2. SCOPE OF EXERCISE OF DELEGATED LEGISLATION

We have seen the extent the legislature is allowed or expected to delegate its rule making power to administrative agencies by taking some examples of instances of excessive delegation in both level of governments. We have also seen whether the power of administrative agencies in both federal and Oromia national regional level as one of inherent or a mere delegation. Under this part, which is the main part of the research, we will see once rule making power is delegated to administrative agencies, the way they are expected to act within the permitted scope and prescribed procedures.

Where an administrative agency acts beyond or outside its statutory powers, the resulting action is regarded as being *ultra virus*. When a delegated legislation is beyond the scope of authority conferred on the delegate to enact, it is known as substantive ultra virus where as when a delegated legislation is enacted without complying with the procedural requirements prescribed by the parent act or by the general law, it is known as procedural ultra virus. In other words, while the statutory procedure determines the steps to be taken in pursuing the exercise of administrative powers, substantive statute defining the scope of any functions conferred on an administrative agency.

[252] The FDRE constitution, art 41(2)

[253] Proclamation Licensing and Administration of Advocates and Paralegals Of Oromia National Regional State Proclamation No. 182/2013

[254] Id, art 10 ( 1H)

[255] Proclamation No. 189/2015

In this section, we will try to see both instances of ultra virus by referring to a certain administrative rules. Accordingly, we will see substantive ultra virus in two instances: when the delegated legislation is ultra virus the constitution and when the delegated legislation become ultra virus the parent act. Then we will try to look at procedure ultra virus in detail when we deal with administrative rule making procedure at the federal and Oromian national regional state.

### A. WHEN ADMINISTRATIVE RULE IS ULTRA VIRUS THE PARENT ACT

We have said that the granting of power by the legislative to the executive should be under taken within the narrower possible limit and the legislature should define the extent and purpose of such delegated powers, as well as the procedures by which such delegated powers was to be brought into effect. Thus, it is accepted principle that the authority of delegated legislation must be exercised within the authority. The delegate can not make a rule which is not authorized by the parent statute. Thus delegated legislation can be declared valid only if it conforms exactly to the power conferred by the parent act. Other wise it become ultra virus the parent act.

There are different instance where delegated legislation could be considered as ultra virus the parent act. These are: when delegated legislation in *excess* of the power conferred, where it is in *conflict with the parent act*, and where it *conflict with the prescribed procedure* the parent act. We will see the former two instances below and the third instance will be deal separately under rule making procedure.

The first instance delegated legislation is considered ultra virus the parent act is when delegated legislation is ***in excess*** of the power conferred by the parent act. The activity is not authorized either expressly or by necessary implication. However, some argues that it is accepted that power can be used to achieve objectives incidental to the stated purpose, though not expressly authorized.[256]

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[256] Stott D. and Alexandra Felix, supra note 7, at 171

Let us see one of the regulations enacted by the Oromia national regional state administrative council which have inspired me for this work.[257]The FDRE constitution divides the power of the federal and regional governments. Accordingly, one of the powers of federal government is to enact laws for the utilization and conservation of land and other natural resources, historical sites and objects.[258] Accordingly the some constitution empower the HPR to enact a specific law on utilization of land and other natural resources, of rivers and lakes crossing the boundaries of the national territorial jurisdiction or linking two or more States[259]where as states have the power to administer land and other natural resources in accordance with Federal laws.[260]

Based on this constitutional division of power, the Oromia national region has enacted a proclamation for the use and administration of rural land.[261] This proclamation, as any other proclamations, has authorized Oromia Regional state Council to issue ***the necessary*** regulations for the implementation of this Proclamation.[262] As we have seen, the parent act has given the state council unlimited powers necessary for the implementation of the proclamation.

However, when one sees this regulation, the parent act did not set up any limitations or standards how the state administration council made rules; i.e. the extent of power and the procedure followed. Due to this, the oromia sate administrative council has enacted regulation for the purpose '*implementation*' of this proclamation.[263] However even if a regulation is, in principle, a law that is enacted merely to implement, fill the detail of the principle laid in a proclamation, this regulation has come up with its own policy and new principles that is not directly or indirectly mentioned in the parent act. Among others, it has made a crime a person who has invaded another person's plot of land.[264] The federal land use and administration proclamation which all regional laws on the issue of land administration is expected to comply

[257] The Oromia Administrative council Regulation no 151/2013
[258] The FDRE constitution, art 51 (5)
[259] Id art 55 (2a)
[260] Id art 52 (2D)
[261] Proclamation to amend the Proclamation No. 56 /2002, 70/2003, 10312005 of Oromia Rural Land Use and Administration Proclamation No. 130/2007.The constitutionality of the proclamation it self have been subjected to debate as it do not refers the federal land use and administration proclamation as its source.
[262] Id, art 29
[263] The Oromia Administrative council Regulation no 151/2013
[264] Ibid

with[265] do not provides any criminal provision except a provision that provides "*Any person who violates this Proclamation or the regulations and directives issued for the Implementation of this Proclamation shall be punishable under the applicable criminal law"*.[266] The Oromia Land use and administration proclamation it self state that "*any land user who violates the provision of this proclamation or regulations issued for the implementation of this proclamation shall be tried under the applicable law*". [267] If this the case, where do the regulation have its power to make a criminal legislation? Many question this in the region.

Similarly, the regulation makes a person who has possessed others plot of land even unlawful as a right holder if it possesses it for more than twelve years.[268] Thus make period of limitation to twelve years by impliedly repealing the general period of limitations provided in the civil code.[269] This regulation is clearly in excess of power conferred by as well as conflict with the proclamation. Moreover, the regulation come with some issues that was not even directly or indirectly mentioned in the proclamation like renting irrigation land, with regard to common property, as well period of limitation.

In one of recently held workshop with the region's Supreme Court judges, which I am one participant at Adama, on the title "criminal legislation by special laws and challenges on their application".[270] From many issues and discussion, the one that have got the attention of almost all judges and which have taken the main time of the meeting, was problems related to this regulation. Even of there was agreement as to the regulation clearly ultra virus the parent act, whether it is also ultra virus the constitution have not given attention as it deserved. Moreover, the main debates and disagreement has predominantly focused on the role the judiciary in these instances. I prefer to discuss how the regulation violate the constitution when we see when administrative rules ultra virus the constitution, and issues that have raised in connection with the court when we deal with administrative rule making control mechanisms by the judiciary.

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[265] As per art 52 (2) (d) of the FDRE constitution and 49 (3) (A) of the revised Oromia constitution
[266] Proclamation No.456/2005, art 19
[267] The Oromia land use and Administration proclamation No. 130/2007, art 27
[268] Ibid
[269] Civil Code Of The Empire Of Ethiopia Proclamation No. 165 OF J960, art 1845
[270] Workshop held at Adama on the title "criminal legislation by special laws and challenges on their application, April 6-7, 2015.

The issues and problems with regard to this regulation have not remained as merely a theoretical debate. In one case, the Oromia public prosecutor has charged a person with this regulation for possessing other person's plot of land. The district court have found guilty and sentenced the person for two years and six months impressments and a fine of 2000 birr.[271] The zone court by modifying the impressments' penalty to one year and has confirmed the decision of the court on guilty.[272] The defendant appealed to the region's Supreme Court and the court has released the defendant free by reasoning that the parent act did not give the regulation an authority to make a regulation with criminal penalty prescription.[273] The public prosecutor applied to the region's Supreme Court cassation division stating the Supreme Court's decision has contains a basic error of law.[274] The main idea the prosecutor raised in his petition, which is relevant when we deal with judicial control of administrative rule making alter, is that the court do not have such power.[275]

These clearly show how the problem of delegatated legislation has become a major issues and challenges in the country due to problem that start with when the legislature delegate rule making power, lack of a law that regulate administrative rule making procedure, as well as luck of any means of control.

The second instance where delegated legislation is said to be ultra virus the parent act is where it is ***in conflict*** with the parent act. The exercise of any power will be limited by the substance of that power. If the parent act entertains a certain issue in some ways where as the subsequent subordinate legislation entertains the some issue in a different manner. If delegated legislation is in conflict with the parent act, it is said to be ultra virus the parent act. This regulation also could be taken as example for this as well. When the Oromia land use and administration proclamation provides 'Without prejudice to Article 7(1) any peasant, pastoralist or semi pastoralist has the right to rent out up 10 half of his holding'[276] where as the regulation enacted

[271] Sodo Dachi wereda criminal file No 02097
[272] The south west showa high court file No 30579
[273] Oromia supreme court file No 178665
[274] Oromia supreme court cassation division file No 187692( pending case)
[275] This case is bending at the region's supreme court cassation division
[276] Oromia Rurla land administration and use proc.No 130/2006, Art 10 (1)

for implementation of the proclamation extend the size of the plot of land beyond that of half.[277]

The third instance is when delegated legislation conflict with the prescribed procedure of the parent act, and we will see this instance under separate section while we deal with procedural ultra virus later.

**B. Where delegated legislation is ultra virus the constitution**

We have seen one of the instances of substantive ultra virus in case when the administrative rule is said to be ultra virus the parent act. The other instance of substantive ultra virus is when delegated legislation is ultra virus the constitution. There is a time the delegated legislation is within the power granted by, consistent with the parent act as well as made in accordance with the prescribed procedures. However, it substance may be against the constitution.

The Oromia national region council's regulation discussed above also show this kind of ultra virus .[278] The regulation has includes not only which is not authorized but also many issues that are not mentioned even in the parent act. We have seen how the regulation becomes ultra virus the parent act. In this part, my attention is with regard to the constitutionality of the regulation. The FDRE constitution has divides the federal and states jurisdiction including law making power.[279] Accordingly, one of the powers of the HPR is to enact a penal code.[280] The States may, however, enact penal laws on matters that are not specifically covered by Federal penal legislation.[281] Accordingly, the HPR have enacted the FDRE criminal code of Ethiopia. As per the above mentioned provision of the FDRE constitution, it is the jurisdiction of the federal government to enact a criminal law. The some provision of the constitution stipulates that states could enact their own criminal laws *only on the area that are not specifically covered by the federal criminal legislation*.[282] When we see whether matters relating to possession of other person's plot of land is covered by the federal criminal legislation or not, the federal criminal

[277] regulation No. 155/2013
[278] The Oromia National state Administrative council Regulation No 151/2011
[279] The FDRE constitution, art 51 and 52
[280] Id, art 55(5)
[281] Ibid
[282] Ibid

code have already answer. Accordingly, the criminal code states under its provision entitled as "Disturbance of Possession" that:

*Whoever unlawfully, with intent to procure a profit or benefit; a) Encroaches on or occupies land or buildings the possession of another; or b) In any other manner, interferes with the quiet possession of another, is punishable, upon complaint, with fine or simple imprisonment.*[283]

Moreover, the other area the HPR is constitutional authorized to enact a law is in area on "Utilization of land and other natural resources, of rivers and lakes crossing the boundaries of the national territorial jurisdiction or linking two or more States"[284] Accordingly, the HPR has enacted the FDRE rural land use and administration proclamation.[285] This proclamation does prescribe penalty for the possession of other plots land. If it has any, it is all about a general provision that protect the violation of the proclamations, the regulation and directives made under. Accordingly, its sole criminal stipulates that:

"*Any person who violates this Proclamation or the regulations and directives issued for the implementation of this Proclamation shall be punishable under the applicable criminal law*"[286]

Even in this instance it does not prescribe penalty itself rather it refers to a punishment on the appropriate criminal code's provision. Let alone the regulation we have mentioned, the parent act it self (proclamation no 130/2005) is expected to be inline with the FDRE rural land use and administration proclamation.[287] Unfortunately, this proclamation restrains its self from prescribing a penalty provision except a general provision as indicated some where else above. This proclamation does not say 'under the regulation issued for the implementation of this proclamation'. Even if one can boldly argues that the criminal code do not cover all areas related with land use and administration, it is an appropriate organ of the state that would have a power to enact such law. so, where do the regulation have get this power of prescribing sever

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[283] The Criminal Code Of The Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, 9th of May, 2005,Addis Ababa , art 686(1)
[284] The FDRE constitution, art 55(2) (a)
[285] The Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation No.456/2005
[286] Id, art 19
[287] The FDRE constitution ,art 52 (2)(d)

criminal penalty? Many have questioned this! We have seen a practical court case in this regard above.[288] Therefore, the regulation is not only ultra virus the parent act but it also violate the constitution. Undisclosed Oromia Supreme Court judges agree on this.[289] These judges argue that the proclamation do not have an authority to enact such kinds of criminal sanctions as this kinds of crime have been covered by the federal criminal law, let alone the regulation.

### B. PROCEDURAL ULTRA VIRUS

In addition to the above to instances of substantive ultra virus, the third instance in which administrative rules is said to be ultra virus is procedural one.[290] We have seen that when a statutes grant power to administrative agencies to perform a certain task, it is expected to also lay down a procedure that body should follow in performing its functions. In addition to the procedure prescribed in the parent act, there is also general administrative procedure that lay down minimum procedural standards to all agencies. Furthermore, the concerned authority may also have its own procedure rules for performing a certain task. These all kinds of procedures ranges from requiring matter to be recorded in writing to the requirement of notice, right of appeal, consultation, publication, time limits and the like. These procedural requirements moreover may be either mandatory in which failure to observe such requirements normally rendering any subsequent action void, or the requirement is directory failure to observe such a requirement will not normally be fatal to the validity of the decision. We will see these types of ultra virus in detail below.

### 4.3.3. ADMINISTRATIVE RULE MAKING PROCEDURE

Usually, an administrative action has to be carried out through a number of steps, which should be known in advance.[291] An administrative procedure is the formal path, established in legislation, which an administrative action should follow.

The view is prevailing that a modern administration needs systematized (or even codified) and publicized procedural rules for decision-making. The current trends in administrative law are

[288] See note 100-1003
[289] Interview with undisclosed Oromia Supreme Court judges, March 19, 2015.
[290] David Stott and Alexandra Felix, supra note 7 ,at 121
[291] Wolfgang Rusch, supra note 28, at 3.

towards a codification of administrative procedures through a General Law, as a modern administration is considered as needing codified and published procedural rules with a view to limit the bureaucracy. On the other hand, there is a view that general administrative procedure would be so general and imprecise that would leave plenty of room for different and contradictory developments through ministerial secondary regulations and finally it did not prevent ministries from multiplying their special procedures. Thus, the dilemma arises, though, between the tendency to codify the administrative procedure into a single general procedure on the one hand and on the other the proliferation of specific procedures for decisions that are to be taken in this or that administrative or ministerial spectral field. In any way, we don't have either a general administrative procedure or specific procedures for decisions that are to be taken by specific agencies.

Let us see the legal basis and objectives based on the FDRE constitution before rushing to see administrative rule making procedure.

#### 4.3.3.1. The Legal Basis and Objectives of Administrative Procedure under the FDRE Constitution

Once we have seen the source of and the manner of delegating administrative rule making power as well the scope of delegated legislation, it is now time to see the procedure to be followed before, at the time and after the making of such rules by the administration. We have said that these procedures may be found either in the form of general procedure applicable to all administrative agencies, in an agency specific procedure or the procedure stated in the parent act.

We have said that administrative law generally regulates administrative actions. In democracies it will promote public participation in agency rule making by facilitating representation of stakeholder and other interested parties, as well as promote transparency, accountability, fundamental fairness and other democratic values like principle of legality. Due to this, the Administrative Procedure Act of many countries usually establishes procedures that agencies must follow in adopting rules.

We have seen the issue of participation, lying before the legislature and publication in England and German. The present Federal Democratic Republic of Ethiopia of the 1995 has laid down

the constitutional framework for the development of the administrative procedure. It contains key principles of government administration like accountability, transparency, legality, rule of law and public participation in the affairs of government.[292] The principle of *transparency* is one of the constitutional principles applied when any government organs including administrative agencies are exercising their power and discharging their duties.[293] It is a principle emanated from the idea that the public's right to know the activities of the government as in democratic system of government, the relationship between government and society is a principal-agent relationship. As the history of this country reveals, the activity of the government were inaccessible to the public. People can not participate unless they have given adequate information about the function of government.

Similarly, the *principle of public participation* is the other principle of the constitution related with the former principle. Since sovereignty resides on the Ethiopian nation, nationality and peoples[294] their sovereignty 'shall be expressed through their representatives elected in accordance with this Constitution and through their direct democratic *participation*"[295] It is clear by which they indirectly participate through their elected representative. But one of the instances they directly participate could be among others in time regulations and directives have been made by a government bodies. The democratic legitimacy of rules promulgated by administrative agencies is ensured by the fact that the agencies are acting pursuant to authority delegated from the elected branch. This is not enough, individuals and organizations be consulted during the drafting of regulation/directives so that this participation in rule making come to serve as a devise for democratic legitimating. Participation must also be seen as a right of citizens.

To sum up, transparency refers to public access to information held by government rule makers as well as information about their decision making whereas Public participation encompasses varied opportunities for citizens, nongovernmental organizations, businesses, and others outside the federal government to contribute to and comment on proposed rules. Accordingly, Both transparency and public participation can promote democratic legitimacy by strengthening the

[292] See of the FDRE constitution, art 8, 12 and the preamble
[293] The FDRE constitution, art 12(1)
[294] Id, art 8(1)
[295] Id, art 8(3) (emphasis added)

connections between government agencies and the public they serve. Both can also help improve the quality of agency rulemaking.

Furthermore the constitutional *principle of legality or rule of law* also would necessitate the existence of administrative rule making procedure.[296] Public authorities while imposing their will upon individuals has to respect those individuals and citizens' rights and interests. In order for this to happen, the public authorities have to be subject to the law and particularly should take their decisions according to the formal procedures established in legislation (principle of legality).[297] Usually, an administrative action has to be carried out through a number of steps, which should be known in advance. Even though the 'rule of law' is an ephemeral phrase which is used to mean a variety of things according to the context in which it is being used, the principles of accountability and the absence of wide discretionary power on the part of government are of particular significance in administrative law.[298] Administrative procedures are intended to make effective and operational the principle of legality in the acts and decisions of the administration. This principle is important for establishing of the law making process. It must be based on legal backgrounds. The law determines the law making process free from arbitrary activity.

The principle of *accountability* is also another Principe of the FDRE constitution.[299] The principle of accountability requires that there must exist forums in which decision makers may be called to account to justify their actions.[300] Such accountability may be political or legal. A minister should be accountable to Parliament at the political level to justify[301], for example, that decisions taken are necessary for the implementation of the intent of the parliament as stated in the parent act. On the other hands, the principles of judicial review enable the courts to call decision makers to account for the legal propriety of their decision making. Since

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[296] See the FDRE constitution preamble

[297] Wolfgang Rusch, supra note 28, at 3.

[298] David Stott and Alexandra, supra note 7, at 23

[299] The FDRE constitution, art 12

[300] David Stott and Alexandra, supra note 7, at 24

[301] The FDRE constitution, art 55(17), and art 4(2) of Federal Democratic Republic of Ethiopia House of Peoples' Representatives Working Procedure and Members' Code of Conduct (Amendment) Proclamation No. 470/2005

administrative procedure is the formal path which an administrative action should follow there by, in case of faller to follow it, exposing an administrative authority to these accountability.

In addition to *the constitutional principles* prescribed above, the recent freedom of information and mass media proclamation has also paves the way for openness of the government there by for the development of administrative rule making procedure.[302] According to this proclamation, except justifiable limits, citizens have the right to access, receive, and impart information held by public officials.[303] Particularly, the proclamation obliges any public body *to publish* information concerning, *inter alia*, "regulations, directives, policies, guidelines and manuals, which govern the operation and activities of its various organs, along with a description of any amendment or repeal of such provisions"[304] In addition to obligation of publication, the proclamation also facilitates the way in which any body could obtain information on request.[305]

Once we have seen principles of government administration like accountability, transparency, legality, rule of law and public participation in the affairs of government under the FDRE constitution and freedom of information and mass media proclamation when we see the objectives and legal basis of administrative procedure in Ethiopia context, let as see the practices of administrative rule making procedure, if any, at the federal and Oromia national regional government.

#### 4.3.3.2. ADMINISTRATIVE RULE MAKING PROCEDURES AT FEDERAL AND OROMIANAL NATIONAL REGIONAL STATE

Administrative rule making procedure predominantly includes notice and comment, participation and publication. We have seen the experience of England and Germany with regard to the application of these procedures. We have also seen the objectives and legal basis of these procedures under the FDRE constitution as well as the freedom of information and mass media proclamation. However, despite these underpinning legal bases, there is no any

[302] Freedom of the Mass Media and Access to Information Proclamation No. 590/2008
[303] Id, art 12(1)
[304] Id, art 13 (1(F & g))
[305] Id, art 14

specific law that regulate administrative rule making procedures both at the federal and Oromia national regional state.

With regard to notice and comment, and participation, there are no such experiences and specific legal grounds neither at the Oromia region nor at the federal level. The bodies who directly affected by the directives or regulations only know the rules after they are made, let alone the public at large participation. The Oromia Justice Bureau legal drafting department's members states that a draft of directives or regulations prepared by only a certain officials of a concerned organ and some times may be presented to Oromai Justice Bureau legal drafting department for its comment. There is neither a rule nor experiences of prior notice and comment as well as participation at least the concerned bodies. Due to this most directives and regulations become a law after they are already made. Moreover, except a few cases, there is no experience of consulting and participating at least a concerned organ. The impact of lack of this procedure may result not only violating the constitutional principles and values but also the making of administrative rules with poor quality as well as challenge to enforce. It is enough to see the case of a directive by Oromia police commission and the minister of agriculture and rural development with different contents on the some issue to show the challenge on these issues. The Coffee Quality Control and Marketing Proclamation state that the ministry of agriculture and rural development "determine the amount of commission paid to whistle blowers who report illegal coffee transactions.[306] The proclamation empowers the council of ministers to issue regulations to implements the proclamation. The council of ministers enacted a regulation to this effect.[307] Ministry of Agriculture and Rural Development has enacted a directive which enables a police officer to get a commission paid to whistle blowers who report illegal coffee transactions.[308] Similarly, the Land and Environment protection Bureau of Oromia Region has enacted similar directives.[309] Unexpectedly, the Oromia police commission has issued directives that prohibit the payments of commission for a police who report or capture illegal coffee transaction.

[306] Coffee Quality Control and Marketing Proclamation, No. 602/2008, art 13(9)
[307] Council of ministers regulation No.161/2002
[308] Ministry of Agriculture and Rural Development
[309] The Oromia land and environment protection Bureau directive No. 1/2004 E.C

If at least the concerned organs have been consulted, there may not be such conflicting directives between the federal and regional government as well as among bureaus within one level of government. Participant could contribute a lot for the quality of the rules and effectiveness of its enforcement as well.

With regard to the experience at the federal level, Ato Abbat has states that currently there are experiences of consulting the concerned body via inviting to comment by a letter or sending a copy thereof.[310] He goes to state that even if there is no a general mandatory administrative rules to this effect, the council of ministers demands the regulation submitted for its approval with prescriptions the procedure the draft rules has passed through. Some of these procedures may be research conducted for making the rule, participation of concerned organ and the like. But he boldly states that there is no any procedure administrative directive is made so that the practice of directives making varies from one organ to another.[311]

The other procedure that raises even practical court challenge is with regard to publications. We have seen some where else that the basis and justification for this procedure. Mainly, the principle of ignorance of law has no excuse presupposes the existence or at least accessibility of the law for the public. As such once the law is made accessible, it is up to the person to find and see what the law says and regulate his behavior accordingly. But what if the law was already enacted but did not published on the appropriate place? This seems do not matter in Ethiopia and people are subject to the law whether such law is published or not once it is enacted. According to both Oromao Justice Bureau legal drafting department kuri Getu and Adisu Bayisa there are a lot of regulations that has been enacted before two and three years ago and have been in force but still do not published.[312] Even some times, they goes to state that, unpublished regulation but which is in force may be amended or repealed in such status. Ato Tsegaye Negasa similarly confirms this fact.[313] He goes to state that there are instances where by even regulations that are not published may be in force for a long period of time.

[310] Interview with Ato Abbat,supra note 231

[311] Id

[312] Interview with kuri and Addisu, Oromia justice bureau legal drafting department January 3, 2015.

[313] Interview with ato Tsegaye Negasa, head of the region's president office legal department, January 3, 2015.

The some goes at the federal level. Ato Tesfaye Daba states that there is no a consistent and mandatory procedure for publication.[314] Similar to the practice in the Oromia regional state, there are instances where by regulations and directives may be enforce with out actual publication. Due to this, certain government organs applies the proclamation in its general prescribed for. This inter give rise to abuse of power. Ato Abbat similarly states that that once each concerned organ enact a directives, it remains to be on it shelf.[315] He goes to state that the root cause for this problem is that while proclamation and regulation are published under the mandate of the HPR, there is no an organ responsible for the publication of directives.

From the aforementioned discussion we can infer that in Ethiopia, there is no developed and consolidated administrative law and procedural requirements regarding the process delegated legislation should pass through as the procedure like lying before the parliament, participation, notice and comment, and publication of administrative rule making we have seen in other jurisdiction. There are two attempts of having an administrative procedure in this country's history. One is the Procedure Act of the 1967 and the second is the recent 1997 FDRE Draft Administrative procedures Code. Both attempts remain as a draft. Most legal and organizational reforms undertaken in the country do not dare to touch this area.[316]

As we have said repeatedly, there is no any procedural rule in every proclamation made by the respective legislatures. Every proclamation both at the federal and Oromia national regional state merely states the power of the concerned government organs to make regulations or directives, as the case may be, *necessary* to implement the specific proclamation. It does not stipulate the scope of the power as well as the procedure it should have follow in exercising such delegation power. Thus, we can't find any procedural stipulation in the parent act.

If there is neither general administrative procedure that applied to all administrative agencies nor the parent act provides any procedure, the only option we have left with is if there is any agencies specific procedure with regard to administrative rule making. In my interview with

[314] Interview with Ato Tesfaye Daba, the head of legal, Justice and administrative affairs standing committee at the HPR, on 28 march,2015, at his office

[315] Interview with ato Abbat,supra note 231

[316] Reader advised to see the political aspect of administrative law, see Mcnollgast, the political origin of administrative procedure act, journal of law, economics and organization. Vol. 15, No.1 JLEO bureaucracy confesses, published by oxford university press. Available at, http://www.jstor.org/stable/3554948

Oromia Justice Bureau legal drafting department as well as the region's president office legal department, there is no any procedure that regulate regulations and directive making process in the region.[317] Due to this, they goes to state that, there is no a single procedure through which regulations and directives making process pass through. As such the practice of administrative rule making procedure differs from time to time and from case to cases. There is an attempt to have directives with regard to directive making procedure at the federal level. In my interview with ato Abbat, directive no 12/2004 has been made to regulate directive making process within the ministry of justice. Unfortunately, I am unable to find this directive due to unsystematic filling of documents which make to find the directive very difficult.

To sum up, due to lack of any procedural control, the activity of administrative rule-making at both federal and Oromia national regional state guided by no formal rule making procedure. The practices of rule making therefore differ between the federal and regional, as well as among different administrative agencies within each level of government. Despite, this practical difference, it also give rise to violation of some of the constitutional principles relating to administrative law, *inter alia*, the principle of participation, transparency and rule of law.

### 4.3.4. Administrative Rule Making Control Mechanisms

Even if there is now general agreement about the necessity for delegated legislation, the real problem is how this legislation can be reconciled with the process of democratic consultation, scrutiny and control. In other words, the concentration of power in the executive and administrative spheres would be tolerated as a constitutional matter, but only on the condition that delegated authority would be subject to a range of political and legal controls that would act as a substitute for the formal structural protections of separation of powers.

The main concern of administrative law is regulating the powers of administrative agencies. Accordingly, in addition to creating various administrative agencies and empowering them with necessary power to carry on specific social, economic and political programs in the interest of the public, it is necessary to puts appropriate controlling mechanisms that restrain administrative agencies within the scope of the powers entrusted to them. As any other countries of the world we have try to see above, even if the degree in which it is applied as

[317] Interview, with kuri Getu & Adisu Bayisa , and Tsegaye Negasa,

well as the practical experience varies, there are also some *theoretical* controlling mechanisms of administrative rule making in Ethiopia. As such, there are various legal and institutional mechanisms that may be devised to control the powers of administrative agencies in various circumstances.

From the outset it has to be clear that even if there are different institutions used to control administrative power in general, the institutions of ombudsman and human right commission, the mass media, and the like, due to lack of space and time as well as their relevancy as mechanisms of administrative rule making, I believe it is enough to see the three main and viable means of control in Ethiopia below.

#### 4.3.4.1. Legislative Controlling Mechanisms of Administrative Rule Making in Ethiopia

No modern state can be governed effectively without the legislature delegating some of its legislative powers to the Executive to make subordinate legislation. Having regard to Parliament's mandate, it is necessary that Parliament creates a legislative framework within which such delegated exercise of lawmaking takes place. That explains Parliament's mandate to monitor and regulate the use of the delegated law making power by the Executive.

The controlling power of parliament is mainly important regulating the activities of the executive. It is the parliament which enacts laws for the executive to discharge its responsibility. We have seen parliamentary control of administrative rule making powers in different countries. Particularly, the British Parliament may exercise the previous and posterior control. For that purpose it organized the Committed for control over delegated legislation which previously examined these acts from the point of view of correspondence to parliamentary legislation. The committee decides to present or not an act to the chamber.

The FDRE constitution and other laws provide a number of powers to the HPR to control the activities of the executive branch of government including all the dependent agencies established under the umbrella of the executive and those independent agencies that fall outside the organizational structure of the executive organ of the government. The power to exercise supervisory power over the administrative organs emanates from the legislatures highest authority.[318] Being the highest organ of the government, the HPR has the power to

[318] The FDRE Constitution, art 50(3)

exercise supervisory power over the administrative organs of the federal government. We will see some of these supervisory powers of the HPR, then the Oromia national regional state later.

The first instance in which the HPR could control the executive is through *statutory means*. Although the constitution states that the HPR has the power to enact laws in all matters assigned by the constitution to the federal jurisdiction, detail laws are necessary for the execution of the primary laws.[319] As such, the house delegate the power to make such detail rules to other organs of the government. The first possibility for the HPR to control an agency is thus on the time when the extent and purpose of the delegated legislation to be discussed, both in the parliament and at the committee stage. Accordingly, the house could enact laws that limit the power of the executives. There are two instances to do so. One is since many administrative agencies are formed by acts of the parliament, 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 the parent act that establish that organ. The second instance is when it delegates the power to make detail rules for the execution of *specific primary legislation*. In this regard, the legislature can play a great role in controlling the agencies by clearly defining their respective powers, procedures and other standards. However, the problem with this second mechanism of control is the problem which in the first place necessitates delegation may actually prevent any really effective consideration at this stage in the first place.

There are also other possible mechanisms by which the house could control administrative rule making. These include; procedural requirements for laying the instrument before the parliament, or through scrutiny by the legal standing Committee. With regard to the laying procedure control mechanisms, we have seen the experiences in Britain. We have seen how effective legislative control over administrative rule making through the laying procedure in England. The effectiveness of these methods can be attributed directly to the parliamentary committees, which have taken the enormous burden of reviewing every regulation off the shoulders of each Member of Parliament. Prior to the creation of these parliamentary committees, commentators viewed the British system as less than desirable because legislators did not have time to consider the plethora of subordinate legislation promulgated by the various agencies. However, later the parliamentary committees solved this problem. The

[319] Mohammed, supra note 3, at 42

committees now inspect the rules and give Parliament notice to consider a specific rule when the rule comes under one of the committees' eight guidelines. Parliament has formulated eight specific guidelines which the Committee uses to decide whether the special attention of the House should be invoked. Thus the Committee, in essence, is a screening device, which reports to the House that a given rule is satisfactory or that the regulation requires Parliament's attention as judged by the Committee's set frame of reference.

There is no such formal procedure for the HPR to control the legality and constitutionality of regulations and directives in federal government. As we have said some where, except providing a provision(s) that authorize a concerned body the power to make a regulation or directives, there is no any instance to provide a procedure for lying the regulations or directives before parliament or other means of parliamentary control, either before it comes into effect or after. Ato Tesfaye Daba confirms this and states that even if the essentiality and importance of these systems of administrative control mechanisms, there is no such system in the HPR that enables the house to control administrative rules.[320] He also states that the council of ministers is obliged to control particularly regulation as per its rules and code of conduct regulation.[321] He generally argues that there is no means for the house even to know at least the existence of regulations or directives that was enacted for the implementation of its own work: the proclamation.[322]

The some problem exists at the Oromia national government state. The state council has no means of checking the legality and constitutionality of regulations and directives made by executive organs of the government. Like the federal experience, the overall working procedure of the state council talks about the primary legislation.[323]

In fact, there is other mechanisms by which parliament may control administrative rule making even though its practical affectivity subject to debate. One of the means by which the HPR control the executive is through *budgetary control*.[324] The constitution states that, the HPR has been granted with the power to approve the federal budget.[325] Usually the executive organ of

[320] Interview with ato Tesfaye Daba, supra note,314
[321] The council of ministers rules and code of conduct regulation No. 3/2006
[322] Interview with Tesfaye Daba
[323] Work procedure and code of conduct of Oromia national state council proclamation No. 153/2009
[324] Mohammed, supra note 3, at 42
[325] The FDRE constitution, Art 55(11)

the government and some of the other administrative agencies prepare and defend their budget before the parliament. Since the budget proposal that may be prepared by the executive branch of government is subject to the approval of the HPR, it enable house to control the executive. Furthermore, the house has also the power to control budget utilization through the Auditor General.[326] Thus, when the parliament is not happy with the performance records of the past and /or the current fiscal year, *in principle*, it may resort to cutting off the proposed budget of the concerned agency for the next fiscal year. The some set up and control mechanisms exist at the Oromia region.[327] These mechanisms seem less effective both at HPR and at the region. Since the legislature in both levels is compassed of the party which has a majority seat, it is illogical to think of the legislature of the majority which punishes its own executive organ by cutting of its budget which indirectly means punishing its self.

The other power of the HPR is Questioning power. The constitution provides that the HPR has the *power to call and question* the prime ministers and other officials and to investigate the executive's conduct and discharge of its responsibilities.[328] Since the executive and council of ministers are accountable to the HPR, when the house believe that the executive is abusing its power or could not discharges its responsibility it can call and question. The constitution even grant the house the power to take any measures it think necessary which may includes vote of no confidence for the cabinet as a whole. The constitution also dictates the legislature to discuss any matter pertaining to the powers of the executive "at the request of one-third of its members and to take decisions or measures it deems necessary".[329] Similarly the house working procedure proclamation provides that "As enshrined in Article 55( 17) and (18) of the Constitution, the House has the power to call and to question Federal officials and to oversight the executive as well as it has the power to discuss on any matter pertaining to the power of the executive and to take decisions or measures it deems necessary"[330] to check, among others, activities are carried out in accordance with rules and regulations and democracy and good governance prevailed.[331] Furthermore, the Prime Minister is required to submit *periodic*

[326] Id, Art 101(2)
[327] The Oromia constitution, art 49 (3)(j)
[328] Art 55(17) of the FDRE constitution and art 4(2) of HPR Working Procedure and Members' Code of Conduct, supra note 301. See also Mohammed at 42
[329] The FDRE constitution, Article 55(17) & (18)
[330] The HPR Proclamation, supra note 301, art 7(1)
[331] Id, art 7(1) A and D

*reports* of the activities accomplished by the executive as well as its plans and proposals to the HPR[332].

Similar stipulation found in the Oromia regional revised constitution as well as its working procedure proclamation. The region's constitution provides that the state council has the *power to call and question* the president and other officials and to investigate the executive's conduct and discharge of its responsibilities.[333] Like wise, the council's working Procedure and Members' Code of Conduct proclamation provides similar provision[334]

The other possible means by which the HPR could control the executive is *through appointment of higher* officials'[335] The HPR has a key power of approving the appointing of the prime ministers and other government officials. The prime ministers shall be elected among member of the HPR[336] The house also responsible for approving other ministerial post and top officials nominated by the prime ministers ascertain whether the nominees have necessary qualification, experience and leadership qualities. If it thinks that the nominees do not satisfy the requirements, it can reject the nomination.[337] In the some vein, the Oromia revised constitution stipulates similar provision with regard to the power of the state council to appoint higher official which probably give it the chance to control the executive.[338]

The other possible means of checking the legality of administrative rule is through establishment of an organ within the legislature that could check delegated legislation. We have seen the role of committee (what they have called committee on secondary instrument) within the legislature in England in controlling administrative rules. At the federal level of Ethiopia, from different standing committee established in the HPR one is the legal and administrative affair standing committee.[339] The main objective for the establishment of the Legal and Administration Affairs Standing Committee is "*to supervise the organization and implementation of the judiciary and* administrative working *mechanisms of the Federal*

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[332] The FDRE constitution, Art. 74(11)

[333] The Oromia constitution, art 49(3)(q)

[334] Caffee working procedure and members code of conduct proclamation No. 153/2009

[335] The FDRE constitution, art 55(13), and art 4(3) of the HPR working procedure proclamation. See also Mohammed, supra note 3, at 42

[336] The FDRE constitution, Art 73

[337] Id, Art 74(2) and art 55(13)

[338] The Oromia constitution, art 49 (3) (e)

[339] The HPR proclamation, art 18(g)

*Government in accordance with the Constitution as well as to study the problems that may face the sector and submit recommendations....*"[340] Even if one of the general Working Procedures for all the Standing Committees, which also apply to the legal and administrative affair standing committee, is having received a draft law, subsequent to the first reading, shall itemize the matter in its agenda and give notice, invite resource persons and bodies directly concerned with the matter,[341] the power and responsibility of the committee in this regard does not include rules made by administrative body.

But this does not mean that there is no any room for the committee to question and check the concerned federal government bodies. The proclamation provides that "Any member of the Federal Government bodies shall present their reports to the pertinent committees in the allotted time"[342] This report may give the committee a chance to question whether their activities are carried out in accordance with rules and regulations and democracy and good governance. Moreover, the standing committees 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.[343] 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. Furthermore, the legal standing committee could control administrative rule making at two stages. First when the house enacts the parent act. At this stage, it could comment the manner in which the power is delegated. That is the extent of delegation as well as the manner such power could be exercised. The second is to set up the means by which it could see the draft or after it is made.

Despite these possibility for the committee to control administrative rule making, there is no experiences where by delegated legislation is known by the legislature at least for the seek of information about the existence of the rules.

Despite these constitutional powers of legislature, there are no experiences and possibilities of utilizing this power to control administrative rule making. These means of control mechanisms seems impossible to be applied in the current legal and political set up. Generally, I doubt

[340] Id, art 30(1) (emphasis added)
[341] Id, art 22(1)
[342] Id, art 7(4)
[343] Proclamation 450/2005 art 19(2)

whether the legislatures at both level it self has fully realized how extensive the practice of delegation has become thereby how easily it might be abused. It may not lay down policy at all, it may declare its policy in vague and general terms, and it may not lay down any standard for the guidance of the executive. These problems aggravated lastly with the luck of reserving for it self any control over subordinate legislation. Generally, in Ethiopia, unlike in the countries discussed above, there is no formal procedure by which the legislature can control the rulemaking power of the administrative agencies. Even if the supreme authority resides on parliament in Ethiopia, there would be an important question about Parliament's capacity and means to control the executive. For so many different purposes the reality is that the executive government of the day influences and controls Parliament and all proclamations both at the Oromia national regional state and federal government gives the executive the power to make any rules as it think fit with out laying any standards and procedure to control whether the delegated legislation are according to its intent

#### 4.3.4.2. Executive Control of Administrative Rule Making

Executive control refers to the system of internal control by which the head of executive control the activities of administrative agencies. In the parent act or an executive order, as the case may be, a mechanism for *internal review* may be established. The enabling legislation or the executive order by which the agency is created may include, in that act, a *formal* system for the internal review of agency decisions. In the absence of such formal mode of controlling, the agency using its discretion can set *informal* controlling mechanisms in place. The FDRE constitution grant different powers to the PM and the council of ministers to this ends.[344]Accordingly, by using such constitutional powers entrusted to them, the prime ministers and the council of ministers oversee the different activities of administrative agencies. The following points are worth mentioning in this regard:

The executive organ of the government has the power to oversight the activities of the various government offices in different modalities. As it was discussed somewhere else, there are possibilities whereby some administrative agencies may be formed by executive order without the blessing of the parliament. Those agencies or bureaus formed under the executive hierarchy are subject to the supervision of the executive organ of the government. So, the concerned

[344] The FDRE constitution, Art 74 and 77

ministry of the government can put different modalities of control to ensure whether or not the authorities formed under its hierarchy are acting within the bound of the law. In relation to this, the constitution, which deals with the powers and functions of the Council of Ministers states that the Council of Ministers "*shall decide on the organizational structure of ministries and other organs of government responsible to it; it shall coordinate their activities and provide leadership*".[345]This gives the council the possibility to control the decision of an organ accountable to it including their administrative rules making.

On the other hands, as it can be inferred from the constitution, the Council of Ministers is made jointly accountable to the Prime Minister and to the HPR.[346] Thus, in the exercise of the powers entrusted to it by the constitution and other legislations, the prime minister can oversee the activities of the council of ministers including various administrative agencies of the government responsible to it. This may give a chance for the PM or its office to see regulations made by the council of ministers.

However, it pose a question as to whether the upper executive organs, i.e. the Prime Minister and the council of ministers, have set up a mechanism through which administrative rule making of lower administrative organ would be revived by the upper executive organ at the federal level. There is no any difference at the Oromia national regional state government in this regard. As such no mechanisms in which the state administrative council could check the legality of administrative made rules, particularly directives, in the region. There is no such formal internal review of administrative rule making by the Oromia state administrative council. The council's work procedure regulation exclude these matter from presented to the council.[347] From many matters allowed to be presented to the council one is proclamation and regulation; do not include directives made by subordinate administrative agencies. The Oromia national regional states' president office legal department head confirm the non existence of either formal or informal internal review mechanisms for reviewing lower administrative rule making.[348] Similarly, in my interview with members of the Oromia justice bureau legal draft department, except certain directives that related with financial matters or which have series

[345] Id, Article 77/2/
[346] Id, Art 76(2) & (3) respectively
[347] The Oromia state administrative council work procedure regulation No. 131/2011,art.14(2)
[348] Interview with ato Tsegaye Negasa ,supra note 313

consequences on the region at the whole, there is no experiences by which directives would go to the states administrative council for check up or approval.[349]

From the aforementioned discussion we can conclude that there is no formal and informal means of internal review of administrative rule making both at the federal and Oromia regional government. Thus, despite the clear constitutional stipulation stated above, there is no executive internal review of administrative rule making both at the federal and at the Oromia national regional state.

#### 4.3.4.3. Judicial Control of Administrative Rule Making

Basic features of democratic governments like, separation of powers, supremacy of Constitutions, independency of judiciary, rule of law, principle of check and balance and the concept of constitutionalism are all reflected in a certain state's Constitution. Hence in order to ensure constitutionalism, having constitutional text with its democratic elements does not suffice, unless it is backed by an impartial and independent tribunal which is empowered to adjudicate constitutional or/and administrative issues. The judiciary ensures that the executive act within the limits of their powers, and that they use those powers for proper purposes and in a proper manner. It is perhaps the principal check and balance[350]

Broadly speaking, there are two modalities by which the judiciary can exercise supervisory role over the powers of administrative agencies. These are appeal and judicial review. The striking difference between appeal and judicial review is that the former is statutory in origin whereas the latter is the inherent power of courts. Accordingly, judicial review is a *technical review* whereby the court tests whether an agency decisions are legal or illegal. On the other hands, appeal is *merit review* of a certain decision. As such, an appellate court may substitute a new decision by overruling the decision of the lower body where the appeal was brought.[351]

There are two sides of arguments in Ethiopia with regard to the power of court to review administrative actions. Some argue that courts in Ethiopia have an inherent power of reviewing administrative action on the other hand there are other people who are argue that they have no

[349] Interview with Kuri Getu and Adisu Bayisa, supra note 312
[350] David Herling & Ann Lyon, supra note 1, at 78. See also Hillarie Barnett, supra note 2, at 722.see also Chris Taylor, supra note 49, at 109, Also see David Stott and Alexandra Felix, supra note 7, at 4
[351] Hillarie Barnett, supra note 2, at 729

inherent power specifically conferred on court by the legislature. There are many researches done with regard to the power of Ethiopian court to review administrative action most of which base their work on federal revenue and customs authority regulation which give a sole authority to fire its employee to the director as well as which prohibit the review of this decision by regular courts.[352] But there is no one on judicial review on administrative rule making.

Despite these difference sides of arguments, the explanatory documents of the draft FDRE constitution it is clear that judicial review is presumed to exist in Ethiopia.[353] It recognizes the right of every Ethiopian to bring a justifiable matter to obtain decision by a court of law. In addition, there are other provisions of the FDRE constitution that justify the existence of judicial review power of court in Ethiopia. One is the provision of the constitution that grant all judicial powers in courts.[354] As per this provision of the constitution, although there are matters to be seen by administrative agencies the final say should be reserved for courts.

Despite the aforementioned constitutional justification of the inherent power of judicial review of administrative action, though their constitutionality remains debatable, proclamation no 250/2001 and proclamation no 251/2001 seems to have closed the door to regular courts to declare unconstitutionality of any regulations, directives and decisions of administrative agencies. This is because even if the constitution vested the power to declare the law enacted by administrative agencies unconstitutional in the regular court,[355]the proclamation of CCI has taken this power away from the court and conferred to the HOF.[356]

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[352] see more on the role of judiciary in reviewing administrative action in Ethiopia could see: Yemane Kassa (2011), the judiciary and interpretative power in Ethiopia: a case study of the Ethiopian revenue and customs authority, Tigist Aseffa (2010) Judicial Review of Administrative Actions: A Comparative Analysis (all are Thesis Submitted To the School Of Graduate Studies, School of Law, Addis Ababa University, In Partial Fulfillment of the Requirements for the Masters of Laws (LLM) Degree in Constitutional and Public Law (unpublished)

[353] Art 37 of the draft of the FDRE constitution

[354] The FDRE constitution, Art 79(1)

[355] Id, Art 84(2). This argument emanate from the provision of proclamation that establishes council of constitutional inquiry whose power is, as per art 2(5), limited to proclamations and regulations. If this does mean that the power of the council does not extend to administrative directives, it impliedly reserved to the judiciary.

[356] Proclamation no 250|2001, Council of Constitutional Inquiry Proclamation, July 2001

As it is indicated above, rights and freedom enshrined in the constitution cannot be assessed in the abstract on the basis of merely studying the provisions of the Constitution. What is more important and critical is its enforcement. The issue of who shall interpret the constitution and whether the power of interpreting the constitution shall be assigned to the judiciary or to an organ other than the judiciary has been the subject of debate.

The practice of constitutional interpretation in Ethiopia follows a different pattern. Ethiopia has adopted a system that gives such mandate to a political organ, thus making the process of constitutional interpretation a political matter.[357] The constitutionality of laws enacted by both by HPR at federal and by state legislator at regional level could only be challenged before the HOF, not by the court[358] However, if one stick to the terms employed by art 84/2/, the Constitution does not seem to wipe out the role of the judiciary completely.[359]

The fist instance where the courts could interpret the constitution is, according to Assefa, with regard to the constitutionality and compatibility of *the act of the executive* either with the constitution or with enabling act is concerned. This argument emanate from the provision of proclamation that establishes council of constitutional inquiry.[360] According to this proclamation, "Law" shall mean the Proclamations and Regulations issued by the Federal Government or the states as well as international agreements which Ethiopia has endorsed.[361] If this does mean that the power of the council does not extend to administrative directives, it impliedly reserved to the judiciary. The argument is thus people may challenge such acts before ordinary court. Thus courts could interpret the constitution in this sense. On the other hands, Mohammed argue that the judiciary has judicial review power over administrative act insofar as such acts infringes upon right protected under ordinary laws or even constitutionally protected right in respect of which there is no dispute of interpretation.[362] He goes to state that

[357] Getahun Kassa ,supra note 181, at 22
[358] See Asefa Fiseha (2005) ‘Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience’, *Netherlands International Law Review* 1; see also I Ibrahim (2002) ‘Constitutional adjudication under the 1994 FDRE Constitution’ 1(1) *Ethiopian Law Review 62*; Tsegaye Regassa (2000) ‘Courts and the human rights norms in Ethiopia’ in *Proceedings of the symposium on the role of the courts in the enforcement of the Constitution*, Ethiopian Civil Service College.
[359]Assefa Feseha, Mizan Law Review Vol. 1 No.1, June 2007,at 16
[360] Council of Constitutional Inquiry Proclamation *No.250/2001*
[361] Id, art 2(5)
[362] Mohammed, supra note 3, at 45

this does not extend to declaring laws made by the executive and administrative unconstitutional as this power is given to the HOF.

As it exists now, the proclamation that defines the power and responsibility of the HoF has broadened the definition of the term 'law'. This is because it defines the term as "Law shall mean Proclamations issued by the Federal or State legislative organs, and regulations and **directives** issued by the Federal and States government …."[363] Thus, this proclamation has specifically made interpretation of directives a jurisdiction of HOF. Due to this, some scholars argues that this is unconstitutional as the constitution did not give HOF to pass on matters of unconstitutionality of decision given by any government organ or official.

The second instance where Ethiopian courts could interpreter the constitution stems the commitment *to respect and enforce* the fundamental right and freedom enshrined in the constitution.[364] Even though this article impose the obligation on all branch of governments, Indreas Ishete argue that, at the time the rest two organs of the state fails, the citizens' ultimate hope will rest on the independent judiciary.[365] Thus, this role of court becomes meaningless unless the judiciary in one or another ways involved in interpreting the constitution. As such they interpret the scope and limitation of rights and freedoms for which they are duty bound to respect and enforce. In its daily practice, the judiciary is the primary institution where the constitution is to be under constant consideration.[366] As such, administrative directives may be interpreted by the judiciary in this instance. Ato Abbat believes that for the court to discharge their duties under this provision, they must have judicial power to question any administrative organ.[367]

The Oromia National regional state Constitutions vest the power to interpret and settling constitutional disputes in the hand of other separate organs rather than vesting in the hand of ordinary courts.[368] Here, any issue of constitutionality whether arising out of Proclamation or

[363] Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation No. 251/2000 art 2(2) ( emphasis mine)
[364] The FDRE constitution, art 13(1)
[365] Comments by Andreas Esthete on the draft constitution, November 22,1994
[366] Getahun Kasa, supra note 18o, at 98
[367] Interview wih Ato Abbat, supra note231
[368] The Oromia constitution, art 67

*subordinate legislations* must be entertained by Regional Constitutional Interpretation Commission rather than ordinary courts.[369] Unlike at federal level, where at least there is an argument which claims courts have certain role in constitutional adjudication and in determining the constitutionality of the executive enactments like regulations and directs as per Article 84(2) of the Amharic version of FDRE Constitution, under the Revised Constitution of Oromia, there is no such room to favor courts to adjudicate constitutionality issues and the Constitution is clear so that any issue related with the constitutional matter, including regulations and directives, must be submitted to Regional CCI and Regional Interpretation Commission.[370]

We have said that both the empowering act and the delegated legislation have equal force of law. This is however on condition that the power under which the later emanates is delegable, delegated, properly delegated, and must be exercised by appropriate officer. the regulation enacted for the implementation of the Oromia rural land administration proclamation make encroaches on or occupies land or buildings, the possession of another; or in any other manner, interferes with the quiet possession of another an offence. [371] Based on this regulation one Oromia Justice Bureau werada public prosecutor institute a charge based on this regulation stating that the defendant has occupies another person's plot of land. The wereda'c court found the defendant guilty and sentenced by improvement. The region's supreme court however reverse the lower courts decision and free the person by stating that the regulation do not by the parent act give a power to come up with criminal liability. The court declared the regulation in this respect unlawful not as the power to make such rule resides restrict with the state council hence not delegable nor unconstitutional, rather because the parent act (proclamation no 130/1999) did not delegate the power to do so. However, even if the parent act remains silent or open with regard to the coverage of some issues, the law can not be presumed to authorize anything which may be inconsistent with the constitution.

In fact the region's public prosecutor applied to the region's cassation division predominantly by stating that the court has no power to do so. In my interview with the prosecutor, he firmly believes that the regulation is lawful and there is no any legal ground that prohibits enactment

[369] Ibid, 69(2)
[370] The Oromia constitution, art 69(2)
[371] Regulation No. 15/2011

of such criminal sanction by regulation.[372] He goes to state that even if it is said that the regulation is illegal and violate the constitution, other than referring the case to the concerned organ, the court has no legal power to nullify the law in such case.

# CHAPTER FIVE

## CONCLUSION AND RECOMMENDATION

### 5.1. CONCLUSION

The principle of the separation of powers recognized by modern constitutional states determines, among others, the mechanism of the law making and the place of the legislative bodies in it. The principle divides the state powers into three branches: the legislative, executive and judicial powers. The legislative power is vested in the legislative bodies. This principle singles out the representative bodies and empowers them to adopt laws. This politico-cultural understanding of the legislative role however does not mandate that the elected assembly possesses exclusive or even predominant power to produce legislative type norms to govern society. Rather, the prevalent conception of representative democracy has tolerated a good deal of norm production outside the legislative sphere, in

[372] Interview with ato Solomon Kabu, Public Prosecutor at the Oromia Justice Bureau, December 19, 2014.

particular in the executive or administrative domains. There are numerous reasons why a legislature might choose to delegate. But generally, the birth of the concepts of welfare state and developmental state justified conferring wider powers on governments for the interest of the public.

Particularly, although these roles of the state were reflected in the three organs of the government, the executive organ that was functionally the most suited to shoulder the major part of the new responsibilities. Due to this, administration does not only assume its conventional responsibility but does much more: 'legislate' and 'adjudicate'

Even though the FDRE constitution provides that the legislative powers shall be discharged by the Parliament and State legislature, in view of the multifarious activities of a welfare State, it cannot presumably work out all the details to sit the varying aspects of complex situations. Similarly, there is also nothing in the constitution which prohibit parliament from delegating either. Thus, the act of delegating rule making power to subordinate bodies has been the practice for long time.

However, even if delegation is considered to be a sound basis for administrative efficiency and it does not by itself amount to abdication of power if exercised to within proper limits, the delegation should not, in any case, be unguided and uncontrolled. Legislature cannot abdicate the legislative power in its essential aspects which is to be exercised by them. It is only a nonessential legislative function that can be delegated and the most point always lies in the line of demarcation between the essential and nonessential legislative functions. The limitations imposed by the application of the rule of ultra virus are quite clear. A legislature cannot certainly strip itself of its essential functions and vest the same on an extraneous authority. The primary duty of law making therefore has to be discharged by the legislature itself but delegation may be possible to as a subsidiary or ancillary measure.

Despite this universally accepted and in fact applied principles, legislatures at both federal and Oromia national regional government may not lay down any policy at all, declare its policy in vague and general terms, not set down any standard for the guidance of the executive, confer and arbitrary power to the executive to amend or modified the policy laid down in the parent act, with out reserving for itself any control mechanisms over subordinate legislation. At the end of every proclamation, there is a provision that

empowers the concerned authority to make regulations providing for any matter for which provision appears to them to be necessary for the purpose of giving effect to the provisions of the proclamation. The words 'necessary' makes the authority the sole judge of what are its powers as well as the sole judge of the way in which it can exercise such powers as it may have. Such is the width of some of these powers that pose a real treat to the rule of law as well as their control may be increasingly difficult. We have seen how practice of unlimited delegation lead to the collapse of the parliament system before 1933 in Germany.

Even if there is no a clear constitutional stipulations in Ethiopia as to the extent the legislature may delegate its rule making power as well as there is no a formal law that set up a parameter that enables delegable from non delegable matters, from the principle of separation of power and the very existence of the legislature in the first place, there is implied limit on the legislature while delegating administrative rule making. Due to this, unlike the experience we have seen from others countries particularly of Germany, there is no formal legal and practical limitations on both the legislature at both the federal and Oromia national region. Due to this, the practice at both level revels that there are many instance by which the legislature it self does not know the extent of its power to delegate due to which its act would be considered as excess of delegation by enacting a parent act that violate a clear constitutional limitation, violate implied constitutional limits as well as violate constitutional rights.

Administrative rule making problems continues after power is delegated in the aforementioned manner. We have said that unless the granting of power to make rules is not supported by its making procedure as well as control mechanisms, its harm may surly prevail the function. As such, many jurisdiction, believing the inevitable need of subordinate legislation as the some time the potential danger, have provide administrative rule making procedure either in the parent acts, or in their administrative procedure law that applies to any kind of administrative decisions or agencies specific procedure. There are no such formal procedures both at the federal and Oromia national regional state. Due to these administrative rule making have been left ungoverned by any procedural rules at both levels of government. This lack of procedure will give rise to, in addition to lack of the purpose and objectives administrative could serve for, it violate constitutional

Principles and values like transparency, accountability, rule of law and democracy in general.

In addition to the lack of an practical limitation on the part of the legislature that give rise to excessive delegation, as well as due to luck of any standards that limits the exercise of delegated power, the problem is more aggravated due to lack of post control of administrative rule making power in Ethiopia. We have seen the experience and usefulness of laying procedure in England. There is no the means by which the legislature could have at least an information about administrative made rules let alone to have a means to control administrative rules. Despite the existence of legal ground, the legal and administrative standing committee of the HPR remains has no role in this regard. The Ethiopian courts power to review administrative rules has been snatched. Control of administrative action through judicial review is almost non-existent. Moreover, there is no a procedural means by which administrative rules could be scrutinized by the public at large or the concerned parties. Furthermore, despite constitutional basis, the higher executive organ has neither formal nor informal mechanisms of controlling subordinate administrative rule making. Due to these, administrative rules making power have been left with out legal and practical limitation at both federal and state level.

Generally, the legal instrument to bring about administrative justice, executive accountability and good governance is far from being developed in a comprehensive and systematic manner. Presently, the need for such a developed system of administrative law is beyond necessity. The question of the administrative justice is still an unanswered question for the citizens of Ethiopia

We tried to see how there were no underpinning circumstances for the existence of administrative law in general and administrative procedure in particular pre1991 constitution to show if there is change, progress and attempts with regard to administrative law in general and administrative rule making in particular at this time. The constitutions and other legislative rule did not deal about administrative rule making. This is mainly that the constitution was not devised to limit the power of the government. Hence, one should not expect administrative law to deviate from the prevailing constitutional structure and develop as an instrument of checking the executive. Thus, there is no room for the

development of administrative procedure as there were nonetheless regimes beset by fear and there was no fertile ground to foster the recognition and exercise of human rights.

On the other hands, the present Federal Democratic Republic of Ethiopia of the 1995 has laid down the constitutional framework for the development of the administrative law. It contains key principles of government administration like accountability, transparency, rule of law and public participation. But having a good constitutional provision does mean nothing unless put in practice. The presence of a developed system of administrative law is sine qua non for the practical realization of these principles. Administrative law is also instrumental in enhancing the development of constitutional values such as rule of law and democracy. The rules, procedures and principles of administrative law, by making public officials, comply with the limit of the power as provided in law, and checking the validity and legality of their actions, subjects the administration to the rule of law. This in turn sustains democracy. Only, in a government firmly rooted in the principle of rule of law, can true democracy be planted and flourished. Furthermore, administrative law also plays an important role in improving efficiency of the administration. Therefore with out giving emphasis to, at least try to have, a administrative jurisprudence, talking about the supremacy of the constitution, the sustainability of rule of law and democracy as well as the prevalence of good governance on ever stages has been and would become a deceitful discourse!

Generally, compared to our previous legal history, there seems no change during the current Ethiopia with regard to the development of administrative law in general and administrative rule making in particular. The concentration of power and the lack of control mechanisms during the past Ethiopia may be justified by the nature of the governors and the time during which they have lived. In fact, I am surprised with the emperors attempt to establish the office of ombudsman and to have a draft administrative procedure at that time and I am ashamed the total ignorance of the field during the current 'democratic' nomenclature of Ethiopia. Finally, the time is not passed now. Before reaching the stage of like the German's third Reich that allow the government to enact a rule to the extent that amend or repeal the constitution it self thereby resulting the collapse of the whole system, I recommend the following main points;

### 5.2. Recommendations

1. The granting of administrative rule making power by the legislature should be under taken within the narrowest possible limit. To this effect, it should define the extent and purpose of such delegated power, as well as the procedure by which such power come to effect.
2. Adequate standards safeguard and other procedural control mechanisms should be guaranteed. To this effect, there should be a means by which the legislature it self check whether the role of the game have been observed, or should have an information at least for those regulations and directives of great importance.
   - To do so, it may make either made responsible its legal, justice and administrative standing committee or may establish a distinct body

Particularly, the following purpose and objectives of these procedures should be given the place they deserve:

♦ It is believed that public participation in administrative rulemaking can make an essential contribution towards more effective as well as accountable public decision making and ultimately towards more effective control of government. It also contributes on the simple enforcement and the rules quality. If this statement is accepted, then appropriate procedures should be devised to guarantee wide and genuine citizen *participation* at administrative rulemaking process.

♦ If the principle of ignorance of the law is no excuse is in order, the public should have access to administrative rules. Particularly, even if the practice is that let alone the public at large, many practitioners do not know many directives meant to implement even the usually known proclamations and regulations, directives should be published in the formal gazetta. Even if we don't have a general administrative procedure that mandates the publications of rules, freedom of information and mass media proclamation has paved the way. The implementation of this proclamation should have given a series place until it is supported by other legislations with similar purpose.

♦ For this purpose, a distinct organ that is responsible in organizing and publishing administrative rules, particularly directives, has to be established at federal and the regions. Otherwise, despite its conflict with the principle of ignorance of the law has no excuse, which pre suppose the existence of written rules accessible to the public at large, it impact on the administration of justice, like dalliance of justice, wrongful judgments and the like is inevitable.

3. Until the coming of a comprehensive administrative procedure in each level of governments, council of ministers/state administrative council, ministers/Bureau and other administrative agencies should have their own formal rule making procedure.
4. In addition to these legislative and procedural safeguards, there should be a mechanisms the upper executive organs should *formally* enabled or *informally* should able to check the rules made by inferior administrative agencies
5. There should be a system or the court them selves able to challenge administrative rule making to be challenged in court of law at least as being ultra virus the parent act. To this effect those laws that snatched courts power to review administrative rule making should be revised in line with the FDRE constitution.
6. Furthermore, since the implication of the federal structure is that there is a possibility of the Federal and the state administrative law, it is be up to the states to formulate their own administrative law. Even if the practice is that regions are always follow after the federal government in all aspect, I recommend the Oromia national regional government to lead in enacting a comprehensive administrative procedure or to encourage the region's administrative council and other Bureaus of the region at least to have their own formal administrative rule making procedure

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7. Interview with ato Solomon Kabu, Public Prosecutor at the Oromia Justice Bureau, December 19, 2015

## Annex

**Sample of interview questions**

***A. Question to the HPR and the Oromia national state council, as the case may be***

1. As a rule, it can be said that the legislature cannot delegate its general legislative power and matters dealing with policy. What parameters the HPR/the state council follow to design the scope of delegation?

2. In many instances the legislature passes an act in skeleton form containing only the general principles and leaves to the executive the task of not only filling the detail but even that of adding a policy by using broad provision like 'to make such rules as it appears to it to be 'necessary' or 'expedient', or conferring power to modify the parent act it self, or passes law to confer power government to bring individuals, bodies, or commodities within, or to exempt them, from the purview of a statute

    2.1. By taking the above few indicators, how satisfactory do you think the formulation of secondary or delegated legislation in the HPR?

    2.2. Do you think that these are matters which one normally would have expected to be regulated by the legislature it self and not in subordinate legislation, or it does not matter? Why?

3. Usually council of ministers and other administrative agencies get their power of rule making from the parent act. What if the parent act remains silent with regard to rule making power? i.e. Do these bodies have the power to make rules even in the absence of express authorization (inherent power)?
4. 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 first possibility for the HPR to control an agency is on the time when the extent and purpose of the delegated legislation to be discussed, both in the parliament and at the committee stage. What do you think with regard to the possibility and effectiveness of this mechanism in HPR of Ethiopia?
5. Are there other possible mechanisms by which the house could control administrative rule making like procedural requirements for laying the instrument before the parliament, or through scrutiny by the legal standing Committee? If not, do you think that at least there should be a procedure that gives information about its existence? In other words, how is the legislature in the first instance to be made aware of the creation of secondary legislation in Ethiopia?
6. If lying before the house and committee scrutiny is less probable in the current Ethiopian, is there other means by which administrative agencies rule making power could be controlled?

7. Since the legislature is compassed of the party which has a majority seat, do you think other control mechanisms like budgetary control either at the time of approval (art 55(11) or through auditor general (art 101(2)), call and question( art 55(17)), or report and appointment are viable means of control of delegated legislation? If not how and when these constitutional powers could be exercised?
8. As per the HPR Working Procedure and Members' Code of Conduct proclamation 470/2005, is there a chance for the legal and administrative standing committee responsible or check for delegated legislation? How? Why not?
9. What about the provision that states that '…Federal Government bodies shall present their reports to the pertinent committees in the allotted time" of art 7(4), using its power to 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 (art 19(2)?
10. Is it necessary to have a separate committee other than the legal and administrative standing committee for delegated legislation like some countries called 'Committee on Subordinate Legislation '?

***B. Questioners to Council of ministers and/or Oromia National administrative council***

1. One of administrative rule making control mechanisms is executive internal control. The enabling act or the executive order, as the case may be, can set up a mechanism of internal review. In the absence of such *formal* mode of controlling, the agency using its discretion can also set *informal* controlling mechanisms in place.
    a. Do you have such experience? How do you see the purpose and efficiency of these mechanisms in controlling administrative rule making?
    b. What measures the council of ministers and other subordinate administrative agencies take in time they make regulations and directives to this effect?
    c. What other control mechanisms in general do you have?
2. It is said that unless the granting of power to make rules is not supported by its making procedure as well as control mechanisms, its harm may surly prevail the function. As such, many jurisdiction, believing the inevitable need of subordinate legislation as the some time the potential danger, have provide administrative rule making procedure either in the parent acts, or in their administrative procedure law

that applies to any kind of administrative decisions. There are no such procedures in Ethiopia.

a. Are there any *formal* guidelines that are created to outline the procedures for drafting regulation? Is there time requirement, for instance, within which regulations have to be made? If there, how many of them made on time? If not, how it is possible to control delays in framing and publishing administrative rules? When does regulation come into effect?

***C. Question to Ministry of Justice and the Oromia National state Justice Bureau***

1. Administrative procedure may be found either in the parent acts or in administrative procedure law that applies to any kind of administrative decisions or in specific procedure of a certain agency. We don't have administrative procedure law both at the federal and regional level. Do you have specific formal procedures of rule making? If not, how are regulation and directives are made?
2. The most common format for administrative legislation in Ethiopia is regulation and directives. If it is only regulations and directives that is said to be administrative rules or subordinate/delegated legislation in Ethiopia, so what is the status of by law, ministerial order, department circulars, guidelines, and code of conduct? To be specific, what extent, if at all, they have any legal effect?

D. **Questioners to scholars and practitioners**

1. Do a comprehensive administrative procedure is mandatory in Ethiopia? Or specific laws that could regulate the activities of administrative rule making are enough? There are almost similar two administrative procedure drafts in 1967 and 1997 during the imperial era and during FDRE, respectively. What do you think are the reasons for unsuccessful attempt during both periods?
2. If you believe that the legislature must necessarily delegate only the working out of details to the executive or any other agency, not delegate the essential legislative function, who determine whether the legislature exceeded such limits in Ethiopia? How?
3. Some observers contend that administrative procedure would become impediment for effective and efficient administration. Do you believe a sacrifice of administrative procedures for the sake of efficiency is tolerable?

4. Since lying before the house and committee scrutiny is less probable in the current Ethiopian, is there other means by which administrative agencies rule making power could be controlled, like Budget control either in its appropriation or utilization, what about the power to questioning and report, appointment?
5. How satisfactory do you think the safeguards available in our parliament are in regard to the formulation of secondary or delegated legislation?
6. With regard to publication, many of law practitioners do not know the directives enacted even for the usually known proclamations. How would you see the principle of ignorance of the law has no excuse in this scenario? How about its impact on administration of justice, like dalliance, wrong judgment?
7. The most common format for delegated legislation in Ethiopia is regulation and directives. On the other hands, many countries administrative procedure give a meaning to 'rule'. Since we don't have administrative procedure, there is no comprehensive definition of administrative rules. So what is the status of by law, ministerial order, department circulars, guidelines, and code of conduct in Ethiopia?
8. Do you think judicial control of administrative rule making is feasible in Ethiopia? That is, is there instance where the judiciary examines delegated legislation's legality inline with either the constitution or the parent act? If it is possible, is it limited to in case delegated legislation ultra virus the parent act or it may extend to the case in which the rules are ultra virus the constitution? How do see the constitutionality of proclamations No. 250/2000 and 251/2000 in line with the FDRE constitution?