

Judicial Review of Administrative Actions: A Comparative Analysis

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Abstract

Table of content

Introduction.....	iv
Chapter one: General Overview on Judicial Review.....	1
Introduction.....	1
1.1. Definition of Judicial Review	1
1.2. Nature of Judicial Review	3
1.3. Arguments In Favor of and Against Judicial Review.....	8
1.3.1. Arguments in Favor of Judicial Review.....	8
1.3.2. Arguments Against Judiciary Review.....	14
1.4 Grounds of Judicial Review.....	17
1.5 Limitation of Judicial Review	21
1.6 Remedial Action of Judicial Review	25
1.6.1. Private Law Remedies	26
1.6.2 Public Law Remedies	28
Chapter Two: Judicial Review of Administrative Actions in Different Legal Systems	31
2.1 Judicial Review of Administrative Actions in Common Law Legal System	33
2.1.1. Judicial Review of Administrative Actions in England	33
2.1.2. Judicial Review of Administrative Actions in USA	41
2.2 Judicial Review of Administrative Actions in Civil Law Countries.....	51
2.2.1. Judicial Review of Administrative Actions in France	52
2.2.2. Judicial Review of Administrative Actions in Germany	63
Chapter Three: Judicial Review of Administrative Actions in Ethiopia	70
3.1. Judicial Review of Administrative Actions in pre 1931 period	71

3.2 Judicial Review of Administrative Actions in the 1931 Constitution.....	76
3.3 Judicial Review of Administrative Actions in the 1955 Constitution.....	79
3.4 Judicial Review of Administrative Actions in the 1987 Constitution.....	82
3.5 Judicial review of Administrative Actions in the 1995 Constitution	85
3.5.1 General Remarks	85
3.5.2 Judicial Review of Administrative Actions on Constitutionality Ground.....	87
3.5.3 Judicial Review of Administrative Actions on other grounds.....	93
3.5.4 Judicial Review of Administrative Actions in the Draft Administrative Law Proclamation	97
Conclusion and Recommendations	112
Bibliography.....	125

Introduction

In the modern world establishment of administrative agencies become a normal trend and the number of these agencies raise in a drastic manner. In most of the time, administration agencies are created to accomplish a certain legally defined act. Inherently these administrative organs have the power of execution. However, through delegation they are also equipped with the power of legislation and quasi- adjudication. The accumulation of these three powers in one organ makes it to be flexible enough to make the appropriate decision. In addition, since they acquire the best experience over the matter they become beneficial to the public. On the other hand, the accumulation of the three powers in one organ is also taken as contrary to the principles of modern government and considered as a potential to be autocrat and a threat to individuals' right. Together with other mechanisms judicial review is designed as a response to this trait in order to hold public bodies accountable.

Judicial review can be understood as a mechanism designed to check whether the decision of the administrative agencies doesn't trespass the limit defined by law. With this regard, it can also be added that even when the administrative agencies act within the power granted to them, courts can check whether there is arbitrariness, unreasonableness or procedural impropriety in the decision as part of their judicial review function. However, it's good to note in here that the nature of judicial review doesn't allow courts to interfere in the agency task.

In this research the concept of judicial reviews in general and its relation with the administrative branch of the government will be dealt. Chapter one of this research is devoted to touching up on issues surrounding judicial review. In chapter two the experience of USA and England from the common law country and France and Germany from the civil law countries will be dealt. In the last chapter a sole emphasis will be given to the Ethiopian experience. In doing so an introduction to the concept historical back ground starting from the pre 1931 period up to the present time will be made. Moreover, in the part which analyzes the present legal system attention will be given to the power of

the HOF and courts since they share this judicial review power over the decision of the administrative branch of the government. Finally, the draft administrative law will be analyzed in light of the general jurisprudence of the concept as it is dealt in chapter one and countries experience as it is analyzed in chapter two.

Chapter one: **General Overview on Judicial Review**

Introduction

In general judicial review is a means to make sure the other branches of the government are functioning within the power they are granted by law. To make sure this, the judiciary serve as protector of citizens right from the possible abuse by the other branches of the government especial from the administrative branch which is the most powerful one. In the first chapter of this research, a general overview will be made on what judicial review is all about by giving due emphasis on judicial review in general and review of the decision of the administrative organs in particular. In doing so, analysis will be made on its definition, nature and grounds for exercising it. In addition, different views forwarded for and against the existence of this mechanism together with its limitations and remedial actions attached to it will be seen in detail.

1.1. Definition of Judicial Review

Like most of the legal terminologies, finding a conclusive definition for judicial review is a difficult task to accomplish. This is mainly because despite the fact that it is generally practiced by many countries, this legal concept has understood differently in different legal systems. Among the countries that practice this review mechanism, we find a variation on the basic rationality for exercising it, its scope, grounds for exercising and/or organs that are entrusted with this activity. However, to clarify the matter as much as possible let us take one definitions and by showing

its limitations let us try to have some common understanding on the issue. Judicial review is defined as:

The power exerted by the courts of a country to examine the actions of the legislative, executive and administrative arms of the government and to ensure that such actions conform to the provisions of the constitution.¹

From this definition, it is easy to understand that judicial review is a mechanism to oversee the decisions of government organs and make sure their decisions are made within their legal boundary. In other word, this mechanism makes sure the decisions aren't made by trespass the power granted by law. However, in this definition it's good to clarify five points.

The first one is, from the ambit of this definition exclusion is made to the review of the decision of Courts. For example in England judicial review of administrative actions is made by the administrative division within the high court and the power of this court includes reviewing the decisions of lower courts by excluding the decision of the high court itself and other higher appellate courts. On the other hand, when we see the USA legal system as it is provided in 551(1(B)) of the Administrative Procedure Act (APA) we find that the decision of courts is excluded from being reviewed. Second, according to this definition, among other things it is stated that judicial review mechanism also includes the decisions of the legislature. However, such practice varies from country to country. For example in USA courts can review the laws made by the legislature on constitutionality ground. But this isn't the case it Britain. This is because of the existence of the well accepted notion of "parliament supremacy". According to this supremacy notion, there is a perception that the laws made by the parliament are always rights and out of the reach of any organ except in the form of amendment by the parliament itself.

¹22 THE NEW ENCYCLOPEDIA BRITANNICA (15th ed., 1986).

Third, this definition also makes it clear that the acts of the mentioned organs can only be quashed and set aside only when it contravene the constitution. But in addition to constitutionality issue the action of these organs can be set aside on many other grounds: Being illegal, unreasonable and procedural impropriety. Fourth, the definition also can be said it is narrowly defined because it only recognizes the exercise of judicial review by courts. However, experiences of countries show us that reviewing on constitutionality ground can be conducted by other organs. For example in France, judicial review on constitutionality ground is the task entrusted to the constitutional council which is more of a political organ than a court. In the same manner, in general, in Ethiopia also interpreting all constitutional issues is given to a political organ known as The House of Federation while reviewing on other grounds left to courts.

Finally, its also worthy to consider that in addition to the “action” of the three branches of the government the scope of judicial review needs to be inclusive of the unlawful inaction or omission. This is because traditionally judicial review is considered as the product of the concern of unlawful government action. But in recent years, the experience of different countries show that with the rise of the welfare state, the laws of judicial review starts to give attention to government unlawful inaction so as not to restrain but to stimulate the government.²

From the above discussion, it is ease to understand that even if the definition given can provide what judicial review in general means depending on other grounds the practice can vary from situation to situation, and from country to country.

1.2. Nature of Judicial Review

²JERRY L. MASHAW, RICHARD A. MERRILL AND PETER M. SHANE, ADMINISTRATIVE LAW, THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS 816(3rd ed., West Publishing co., 1992)

In the modern world establishment of administrative agencies become a normal trend and the number of these agencies raise in a drastic manner. In most of the time, administration agencies are created to accomplish a certain legally defined act. For example in USA administrative agencies are created by the federal Constitution, the U.S. Congress, state legislatures, and local lawmaking bodies to manage crises, redress serious social problems, or oversee complex matters of governmental concern which are beyond the expertise of the legislator. These agencies are normally considered as part of the executive branch of the government. But it is also good to remember that rarely they can also be established by the legislator for accomplishing different purpose. Inherently these administrative organs have the power of execution. However, through delegation they are also equipped with the power of legislation and quasi- adjudication. The accumulation of these three powers in one organ makes them to be flexible enough to make the appropriate decision. In addition, since they are created specifically to accomplish a certain task, they acquire the best experience over the matter and they become beneficial to the public. On the other hand, the accumulation of the three powers in one organ is also taken as contrary to the principles of modern government and considered as a potential to be autocrat and a threat to individuals' right.

It's from the later understanding that it is constantly pointed out by differed writers that this powerful engines of authority must be prevented from running amok.³ Through the years different mechanisms are designed for such purpose. Among them the most notable are the office of ombudsman, tribunals, internal reviews, actions by members of parliament, the National Audit Office and regulatory agencies.⁴ De Smith Woolf and Jowell also argue that judicial review should be seen in the context of the general administrative system where different mechanism are employed to hold public bodies accountable.⁵

³ JUDICIAL REVIEW: A SHORT GUIDE TO CLAIMS IN THE ADMINISTRATIVE COURT 7(Unpublished,2006)

⁴ Id.

⁵ De Smith, Wolf and Jowell's , Principles of Judicial Review, sweet and Maxwell ,1999 as it is cited in Judicial Review: A short Guide to Claims in the Administrative Court 4(unpublished,2006)

As a nature of judicial review one can also say that this is a mechanism designed to check whether the decision of the administrative agencies doesn't trespass the limit defined by law. With this regard, it can also be added that even when the administrative agencies act within the power granted to them, courts can check whether there is arbitrariness, unreasonableness or procedural impropriety in the decision as part of their judicial review function.

However, it's good to note in here that the nature of judicial review doesn't allow courts to interfere in the agency task. As part of this, in exercising their judicial review power courts can't entertain the merit of the decision or they can't decide whether a decision is right or wrong.⁶ They are also not allowed to step up and involve themselves in policy decision making. They are also forbidden to determine what the law should consist of or what is best for the nation in the exercise of their judicial review power.⁷ Such limitation on judicial review boils down to one reason that is the principle of separation of power, which entrusted such task to the administrative agencies than the judiciary branch of the government. Trespass such limitations will make this organ to infringe its own power boundary while it is expected to exercise its function of keeping the other branches within their own. In addition, the courts can also end up in risking their legitimacy if they keep trespass into the function reserved to the other branches of the government.⁸ Therefore, courts don't have a say on decisions of this organ which is wrong in substance but made by meeting the grounds provided by law.

It is because of the existence of such strong limitations that judicial review is described as a sporadic and peripheral mechanism.⁹ It isn't available for every

⁶Judicial Review, Supra note 3, at 9.

⁷ Id.

⁸Reginald Parker, Administrative Law 103,(The Bobbs Merrill Company, Inc. Publisher)

⁹ Judicial Review, Supra note 3, at 15.

individual whose interests are affected by the administrative agencies. It's only in the grounds provided by law that courts can exercise this review mechanism. As it is witnessed in the USA legal system, even when there is no exclusion of such review, courts can restrain themselves if they find that doing so has the end result of stepping into the power of the other branches.

In addition, while they exercise this power in connection with the administrative agencies courts can find corruption, favourism, inefficiency and irresponsible agencies.¹⁰ The court may occasionally correct even such lapse but they are on the whole incapable of providing a constant check on bad administration or a positive spur to creative administration.¹¹ This is the area of discretion and of policy making and it isn't for the courts. The objective of good administration must be achieved primarily within the organization itself. By analyzing the above limitations some also say that judicial review isn't effective instrument of supervision and control. It is too occasional and cursory, and is exercised from too remote a point to supply an adequate correction for arbitrary administration.¹²

Despite such limitations, its undeniable fact that the existence of judicial review has a tremendous benefit in preventing the possible abuse by the administrative agencies. In addition, the role of the court may be taken place sporadically but its availability is a constant reminder to the administrator and a constant source of assurance and security to citizens.¹³ Moreover, its availability is also a necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate or legally valid.¹⁴ Moreover, it is also good to remember that unless applied only at the periphery it runs counter to the basic idea of delegation of responsibility to administrative agencies.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 325 (Little Brown and Company Boston, Toronto, 1965).

¹⁴ Id at 320.

In connection to the nature of judicial review, it's also good to clear the confusion that exists between appeal and review of the decision of administrative agencies. Both appeal and review are external remedies made available to correct the possible mistake by the decision of the administrative agencies. However, judicial review is taken as constitutional right of citizens to present their case to the court of law in case their right is infringed by the administrative agencies.¹⁵ Even in case a statute is silent on the issue of judicial review, the existence of such practice is presumed. When a need arise for its exclusion, there must be an express provision by the legislator for this effect.¹⁶ On the other hand, appeal on the decisions of the administrative agencies is taken as a statutory right.¹⁷ Meaning, appeal is only possible when a statute provide for the existence of such remedy.

Moreover, when a court quashes decision of an administrative agency on judicial review purpose, what it is allowed to do is to see on how the decision is made without engaging in the task of evaluating the merit of the decision. In addition, in this case what the court can do is to decide on its validity and return the case to the agency for reconsideration in case of its illegality. Together with the decision, the court is allowed to make inclusion of some direction for enabling the agency to reach in a different decision. With an exception to some situations, substituting its own decision for the quashed decision of the agency is taken as trespass the power of the agency. But this situation is different in case of appeal. In the later case, the court can see into the merit of the case and substitute its decision by the decision of the administrative organ if the court believes that there is an error on the substance of the decision. Besides to this, the difference on the two related remedies also extends to the ground for exercising these powers. In case of judicial review, courts can only quash a decision on the grounds allowed by law. But in the case of appeal

¹⁵ Id.

¹⁶ Jerry, *supra* note 2, at 786.

¹⁷ Id.

the presumption is the court can entertain the case on all available grounds unless a statute makes exclusion in a specific manner.

1.3. Arguments In Favor of and Against Judicial Review

Now days, even if judicial review is a developed practice it is still a bone of contention among scholars on the field. In this part of the research a discussion will be made on different views or arguments on the need to have a system of judicial review and also reasons forwarded for abrogating such a system.

1.3.1. Arguments in Favor of Judicial Review

- **Separation of power**

Under the principle of the separation of power the three branches of the government are entrusted to have their own unique power: the legislative to make laws, the executive to implement and the judiciary to adjudicate. Montesquieu purpose in formulating the separation of power theory is to prevent the same man or the same body whether of the nobles or of the people to exercise those three powers all together. The assumption is that one of the branches will act as a check upon the other and because of this at the end individuals' liberty will survive.¹⁸ This doctrine in effect requires that each branch of government stay within their own limiting walls and the powers arranged to each can't be unilaterally and directly increased nor indirectly by delegation from another branch.¹⁹ In general manner,

¹⁸ Louis, supra note 13, at 28.

¹⁹ 32 MATTHEW C. STEPHENSON, "WHEN THE DEVIL TURNS....." THE POLITICAL FOUNDATIONS OF INDEPENDENT JUDICIAL REVIEW in the Journal of Legal Studies 59 (No.1, 2003).

the separation of power means three things.²⁰ The first one is the same person shouldn't form part of more than one of the three organs of government. Second, one organ of government shouldn't control or interfere with the exercise of its function by another organ. Finally, one branch of the government is also forbidden from exercising the function of the other organ.

In a modern government one of the justification or argument in favor of the existence of judicial review is based on the view that its existence helps the functioning of the principle of the separation of power.²¹ This is because by exercising the function of judicial review courts are entrusted with the task of affirming the other branch of the government are acting within the legal boundary they are entrusted with. Since the doctrine of the separation of power existed in many Countries constitution, this nature of judicial review makes this remedy to have a constitutional source.

- **Rule of law**

Rule of law is defined by many scholars in different ways. Dicey define rule of law as it has different three perspectives.²² The first one refers to the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power. Secondly, it is also defined as it includes equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts. Thirdly, it also extends to the law of the constitution as a consequence of the rights of individuals as defined and enforced by courts. Basically rule of law is also defined as everything must be done according to law and government should be conducted within a framework of recognized rules. If government power isn't restricted the rule of law becomes a fiction and rather rule of men will prevail.

²⁰ 1 Paul and Clapham, Constitutional Development in Ethiopia 23.

²¹ Louis, Supra note 13.

²² Eugene Cotran and Adel Omar Sheriff, The Role of the Judiciary in the Protection of Human Rights 93 (Hluwere Law International)

Based on this background, the existence of judicial review advocated in light of its consistency with the rule of law since one of the purpose of judicial review is it tries to limit government within the legal boundary and make them responsible in time of their infringement. In other word, this judicial control is taken as a means to ensure the practical enforcement of rule of law which demands that public authorities should be able to show legal warrants for what they do, and if legal warranty is lacking their actions should be condemned.²³ So the existence of the judicial review helps a system to implement the rule of law.

- **Due process of law**

Just like the doctrine of the rule of law, due process of law is also taken as one of the most important concept in administrative law in general and judicial review in particular. Due process of law is defined as one of the principle of the constitutional law which protects the life, liberty and property of a person against unreasonable or arbitrary laws and procedure by national and local governments.²⁴ The due process clause also has been said requires that government action whether through one agency or another shall be consistent with the fundamental principles of liberty and justice which lie at the base of all the civil and political institutions.²⁵ By doing so it protects citizens against arbitrary government action.

The constitutional right of due process is said to be divided into two parts.²⁶ The first is the protection of the life, liberty and property of a person and is known as substantial due process. The requirement on the government to follow some legally recognized procedure before depriving the persons' right to his life, liberty and

²³ 52VUKAN KUIC, Law, Politics, and Judicial Review in THE REVIEW OF POLITICS 270 (Cambridge University Press No. 2,1990) 265-284

²⁴ MORRIS D. FORKASCH, THE TREATIES ON ADMINISTRATIVE LAW 29, (The Bobbs- Merrill Company, Inc. Publisher Indiana Polis 1956).

²⁵ Id at 31.

²⁶ 92 YUVAL EYLON AND ALON HAREL, The Right to Judicial Review in VIRGINIA LAW 992 REVIEW,(No. 5, 2006).

property is also known as procedural due process. Administrative law mainly concerns itself with procedural due process than the substantive part. This is mainly because the day to day life of individuals comes in contact more with procedural than substantive due process of law.²⁷ In addition, the procedural part of this right consists of two elements which courts make sure their fulfillment while they review the decision of administrative agencies. These are notice and hearing.²⁸

The requirement of notice obliges the state to inform the person sought to be deprived of a right especially as regards property rights that the matter is pending before tribunals to enable him to prefer what actions to take in reference to such suit. In the same manner, the state also has a duty to provide a hearing to the party in a suit. The right to a hearing includes the right to be heard, an explanation to the victim of infringement that addresses his particular grievance and maintains a principle willingness to respect the right if it transpires that the infringement is unjustified.²⁹ Even when the presumption that a right exists and shouldn't be infringed is defeated there is still a presumption that the right bearer is entitled to present his a grievance.³⁰

Even if the due process of law is considered as a restriction against the three branches of government the main responsibility to make sure the implementation of the right lies on the courts. So as part of their judicial review power they make sure the requirement of this notion is fulfilled by the administrative organs.

- **Judiciary Independence**

²⁷ Id.

²⁸ Id

²⁹ Matthew, supra note 19, at 62.

³⁰ Matthew, supra note 19, at 67.

Judiciary independence is a principle that the judiciary should be politically insulated from the legislative and the executive power. That is, courts should not be subject to improper influence from the other branches of government or from private or partisan interests. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influence, inducement pressures, treats or interference, direct or indirect, from any quarter for any reason.³¹ The judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether the issue submitted for its decision is within its competence as defined by law. If those matters that have a judiciary character are snatched from the jurisdiction of courts, it is taken as one of the ways of interfering in its power and will be against the independence of this branch of the government. Sir Ninian express this last matter by stating that independent courts with uninfringed and full judicial powers constitute the last bulwark of the citizen against the arbitrary encroachments of the state.³²

Moreover, as part of their duty it is believed that courts should prevent the abuse of the other branches of the government and for this purpose they need to perform many notable explanations and develop general doctrines for keeping the two branches power within proper guidelines, both as to substance and as to procedure.³³ Because of this understanding some writer argue that the absence of judiciary review contravene the very established doctrine of the independence of the judiciary.

In the above discussion it is easy to understand that making judicial review of the decisions of the administrative agencies as part of the general judicial review mechanism is a prerequisite for having an independent judiciary. But still the vice

³¹ SIR NINIAN M. STEPHEN, JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 529 (1985).

³² Id at 531.

³³ H.W.R.WADE AND C.F. FORSYTH, ADMINISTRATIVE LAW 21 (Oxford University press, 8th ed., 2000).

versal is also true. Meaning, to perform its duty of judicial review the judiciary needs to be independent. With this respect, it is said that an independent judiciary with the authority to rule on the legality of government policy and thereby to constrain the government's freedom of action is taken by many to be the foundation of government under the rule of law.³⁴

Alexander Hamilton also expresses the need for independent judiciary for condemning the illegal decisions of the two branches by stating that:

*The independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of these ill humors, which the arts of designing man, or the influence of particular conjunctures, sometimes disseminate among the people preserver, and which have a tendency to accession dangerous innovation in the government, and serious oppressions of the minor party in the community.*³⁵

For having an independent judiciary, establishing the system of judicial review is taken as a fundamental requirement. Among other things, it's on the bases of this that the existence of judiciary review defended. But this doesn't mean the judiciary can intervene in any kind of controversy that comes to its view. Even if it is undeniable fact that the independence of the judiciary is a good principle, but the scope of its power to reverse or modify the decisions of the political branches of the government representing the people directly should be narrowly limited.³⁶

- **Human Right Protection**

³⁴ Matthew, supra note 19, at 77.

³⁵Id.

³⁶ Id.

The Universal Declaration of Human Rights stated that the definition of human rights holds Human rights as those which are inherent in the nature of man and without which we cant live as human being. And they are inherent, inalienable and possessed equally by all human beings, alike. From this definition we can understand that human rights are acquired because simply one is a human being. Their application also refers to all without distinction based on color, race, sex, language, religion, nationality, ethnic origin, family back ground, social or political statues.

Because most human rights are violated at the domestic level by the government officials and because of the very nature of these rights which involve relations among individuals and between individuals and the State, the practical task of protection of human rights rests primarily on national governments.³⁷ Especial the judicial branch of the government as part of its power of interpreting laws, it has the obligation to protect citizens from the possible abuse of such kind. This role of the judiciary become more important when one see the possible abuse that can possibly inflicted by administrative agencies. This threat is mainly the result of the recent trend followed by countries in creation of administrative agencies that have more power and which makes decisions that affect individual life. This is why it is said that one of the modern watch dog functions of the judiciary is protecting citizens from such kind of administrative abuse.³⁸ Therefore, in the protection of individual rights also some writers strongly argue in favor of the existence of judicial review.

1.3.2. Arguments Against Judiciary Review

As there are scholars who support the existence of judicial review, there are also some who disagree with this doctrine by backing their conclusion from different

³⁷ VI Michael Ross Fowler, Thinking about Human Rights: Contending approaches to Human Rights 69(1987)

³⁸ Yuval Eylon, Supra note 26, at 992.

bases. Surprisingly, most of the arguments for and against judicial review are more or less use different version of the same ground to justify their position. Those who argue against the existence of judicial review mainly uses, the doctrine of separation of power, rule of law and constitutional democracy to validate their position. In the paragraphs following this effort will be made to show what these arguments are all about.

Separation of power is conceived as a doctrine which establishes the three branches of government that have a distinct function. According to this doctrine, the duty or power of these branches doesn't overlap one with another. But there is also an understanding that there is no complete and net separation of power. Some overlap on the function of these branches is taken as a tolerable one. Some authors state that even if separation of power is one of the features of modern government the existence of judiciary review undermines this notion.³⁹ They also added that this is because since the judiciary oversees the decisions made by these three branches of the government, it allows the judiciary to intervene in the works of the other two branches. In connection to the USA judicial review system, it is said that why should nine people who aren't elected but appointed for life have the power to tell everyone else what they can and can't do while the constitution establish three co-equal branch of government.⁴⁰

Seconds, those who argue against judicial review also base their argument on its being contrary to the rule of law. They state that the exercise of judicial review doesn't support the judiciary responsibility for the maintenance of the rule of law by overseeing the executive action. For them the judiciary power of over seeing the decisions of the other two branches of the government is contrary to what is stipulated under the fundamental doctrine of the rule of law. According to there argument, this power of the judiciary establish the complete supremacy of the

³⁹ Id.

⁴⁰ 52VUKAN KUIC, Law, Politics, and Judicial Review in THE REVIEW OF POLITICS 275 (Cambridge University Press No. 2,1990)

judiciary that brings rule of man than law.⁴¹ On the same manner, Dicey also pointed out that administrative law in general is incompatible with the rule of law perception of England. In addition, he also stated that the French establishment of special administrative law is against his conception of the rule of law. According to his argument this is because these courts are established for the purpose of giving to officials a whole body of special rights, privileges or prerogatives as against private citizens, so as to make them a law unto themselves.⁴²

Finally, the last argument against judicial review is forwarded on the bases of its being contrary to constitutional democracy. Even if there is lack of uniform definition, in general manner democracy consists of four basic elements:⁴³ First in a democratic society there must be a political system for choosing and replacing the government through free and fair elections. Second, there is also a need on the active participation of the people, as citizens, in politics and civic life. Thirdly, there is also an expectation for the protection of the human rights of citizens. Finally, a rule of law, in which the laws and procedures apply equally to all citizens, is also regarded as one requirement. In relation to this, judicially review is criticized on two accounts: It is being counter majoritarian and the review mechanism is done by unelected people.⁴⁴

As it's stated above, in a democratic society citizens have the right to choose their future by equally participating in government decision making. In most of the cases the majority decision is the one that rule the country. Nevertheless, these decisions of the majority can be quashed by the judiciary as part of its reviewing power when there is contradiction with different legally recognized grounds. That is why this

⁴¹ Matthew, supra note 19, at 62.

⁴² Wade, Supra note 33, at 24.

⁴³ <http://www.stanford.edu/~ldiamond/iraq/WhalsDemocracy012004.htm> (accessed on Oct.23).

⁴⁴ 9 SAMUEL FREEMAN, Constitutional Democracy and the Legitimacy of Judicial Review in LAW AND PHILOSOPHY 337, (No. 4, (1990 - 1991)).

review system is criticized as being counter majoritarian and undemocratic. It is also explained as the judicial supervision of the other two branches is the antithesis of the people governing themselves.⁴⁵ Some also criticize it as a mechanism which dwarf the political capacity of people and deaden their sense of moral responsibility.⁴⁶ But it is good to remember one thing. Do the elements of democracy only revolve around equal participation of citizens? No! From the definition given at the beginning of this discussion one can grasp the point that it is more than that. So even if it's undeniable fact that there is some undemocratic element in the judiciary task of quashing the decision of the people, there are other elements of democracy that are elevated by the existence of judicial review. The second argument that goes against the system of judicial review arises together with the exercise of this power by unelected judges over the elected members of the government. In other word, the central problem of judicial review is a body that isn't elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they can't govern as they would like.⁴⁷

1.4 Grounds of Judicial Review

Different countries use different grounds for the exercise of judicial review. The most notable base for such exercise of power is constitutionality. Since in most legal systems the constitution is provided at the top of the hierarchy of laws all other laws and acts of government must be in accordance to it. From this, logically it follows that any act or law which contravenes this higher law should be abrogated. In addition to this, there are different grounds for quashing the decision of the administrative organ. For example; in England the court would traditionally only intervene where a public body has used a power for the purpose not allowed by the

⁴⁵ DAVID M. BEATY, HUMAN RIGHT AND JUDICIAL REVIEW 2,(1994).

⁴⁶ Yukan Kule, Supra Note 23, at 268.

⁴⁷ Samuel, supra note 44, at 337.

legislation (acting *ultra vires*) or in circumstances where using its power the body has acted in a manner that was obviously unreasonable or irrational.⁴⁸ In case where there is a real unfairness, the courts may now be willing to intervene where public body has made a serious factual error in reaching its decision.⁴⁹ On the other hand, in USA, on the bases of article 706 of APA judicial review of administrative decisions extends to decisions which are found to be arbitrary, capricious, an abuse of discretion, or not in accordance with law, contrary to constitutional law, power, privilege, immunity, in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, without procedure required by law, unsupported by substantial evidence and unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. Despite the existence of such wording difference, cases that declared invalid by courts of different countries are some what similar.

Even if there is variation on the classification made on such grounds by different writers, now days there is a general consensus on the division made by Lord Dip Lock in connection to the England legal system. He stated in the case of *Council of Civil Service Unions v Minister for the Civil Servic* that the main grounds for judicial review in modern world can be classified as “illegality” “irrationality” and “procedural impropriety”.⁵⁰ But he also didn’t deny the possible adoption of other grounds in the future and the possibility of overlapping among these three grounds. To have a better understanding about the concept of judicial review lets see what they are all about.

- **Illegality**

⁴⁸ Judicial Review, Supra note 3, at 11.

⁴⁹ Id

⁵⁰ Judicial Review, Supra Note 3, at 13.

The first ground for exercising judicial review of the decisions of the administrative agencies is on the ground of illegality. As Lord Dip Lock confirms the decision maker must understand correctly the law that regulars its decision making power and must give effect to it.⁵¹ So anything that is done in contrary to the law is considered as illegal. Under the umbrella of illegality ground, different instances can be mentioned. The first is declaring the decision as *ultra vires*.⁵² *Ultra vires* can be defined as lack of or excess of jurisdiction. If a public authority act outside the jurisdiction of the power set by the statue, his acts will be considered as *ultra vires* and quashed on the ground of illegality. The ground of illegality also extends when the decision is made by a wrong person.⁵³ There is an understanding that delegation of power is one of the manifestations of a modern form of good management. But the issue of illegality arises in this connection when a statue reserves specifically a certain power to a specific individual and delegation is made for such effect. In such instance, the power can't be delegated to another and doing so will have the end result of making the decision illegal.

Thirdly, the way a discretion of power is exercised also considered as a base for a decision to be considered as illegal. With this respect illegality arises in the context of discretionary powers and sometimes labeled as "abuse of discretion".⁵⁴ Even though the decision maker keeps its decision within the legal boundary set by a statute, its motive may be improper, it may be influenced by irrelevant factors or it may overlook relevant factors. This applies even where the statute appears to give the decision maker unrestricted and subjective discretion using expressions like "as if the minister thinks fit".⁵⁵ However, there are some exceptions to this general rule.⁵⁶ First, the court will set aside a decision if the irrelevant consideration

⁵¹ Id at 15.

⁵² JOHN ADLER, CONSTITUTIONAL AND ADMINISTRATIVE LAW 387 (6th.ed., 2007).

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id at 387-88.

wouldn't have made any difference to the out come. Second, unless the statute plainly requires factors that need to be taken into account, the decision maker may have discretion to decide what is relevant in the particular circumstances mostly where the statute confers power in broader terms. Finally, if the power used for the purpose different from the one envisaged by the law under which they were granted, it can also be regarded as a base for considering an act as illegal.

- **Irrationality**

The second ground for exercising judicial review against the decision of administrative branch of government is irrationality.⁵⁷ Courts may intervene to quash a decision if they consider it to be so demonstrably unreasonable as to constitute “irrationality” or ‘perversity’ on the part of the decision maker. In England the benchmark decision on this principle was made in the year 1948 in the *Wednesbury* case.⁵⁸ In this case, it was stated that if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then courts can interfere. This threshold is extremely difficult to meet and its why later on the *Wednesbury* ground is usually argued alongside other grounds rather than on its own. For example, in case individual rights is involved courts use the concept of proportionality and requires a balancing exercise between on the on hand the general interests of the community and the legitimate aims of the state and, on the other, the protection of the individual's rights and interests.⁵⁹ With this respect, even if the end result is the same, in the USA legal system the requirement is the arbitrariness of the decision of administrative agencies.

- **Procedural Impropriety**

⁵⁷ Judicial Review, *supra* note 3, at 18.

⁵⁸ *Id.*

⁵⁹ John, *supra* note 52, at 234.

The final ground for quashing the decision of the administrative organ is procedural impropriety.⁶⁰ A decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute have not been followed or if the rules of natural justice have not been adhered to.⁶¹ Further more, through the years courts also shape how procedural impropriety can serve as a base for judicial review of administrative actions. The road they prefer in recent years is a more flexible approach than what used to be applied. Traditionally, the courts have tried to rationalize this by distinguishing between mandatory and discretionary procedural requirements by reference to the language of the governing statute.⁶² Now a day, courts become reluctant to set aside a decision on purely technical grounds and they have modified this approach in favor of a flexible response to the particular context. Using their discretionary power to withhold a remedy, the courts will set a decision aside for procedural irregularity only if the harm or injustice caused to the applicant by the procedural flaw outweighs the inconvenience to the government or to innocent third parties in setting the decision aside.⁶³ In addition, under this ground situations like failure to give a chance to be heard and being biased are incorporated.

1.5 Limitation of Judicial Review

Even if the judiciary branch of the government is entrusted with the duty of keeping the other branches of the government within their legally defined jurisdiction, this power isn't without limitation. Under this section a discussion will be made on these limitations by categorizing them into substantive and procedural limitations.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ Id.

- **Substantive Limitation**

One of the grounds for justifying the existence of judicial review is the constitutional principle of the separation of power. The existence of judicial review makes the other two branches of the government to function within the power they are granted in the constitution. In case of their infringement, the judiciary comes to the view with its judicial review power. By exercising this function the judiciary tries to make the other branches within their area of play. The need to act in one's own legally defined power as it is dealt in the separation of power doctrine also extends to the judiciary branch. As it's used as a justification for its existence, the separation of power also serves to limit the judiciary from exercising some matter under its judicial review function.

Because of the application of the separation of power doctrine of the constitution, the judiciary is excluded from exercising its review function if the power is specifically given to the other branch. The most notable example of such matters is political issues. There is a strong belief that the political matters by far can be better handled by the other branches than the judiciary. But this general understanding doesn't work in its strict manner for France and Germany as it is for England and USA. In the first category, courts involvement in politics in handling constitutional issues is more tolerable than those countries in the second category.

In relation to this, there is also an understanding that fact finding functions are better handled by the administrative agencies than the judiciary branches of government. Hence in the exercise of judiciary review function courts are limited from seeing into the issue of facts. For example in USA, the Administrative Procedure Act introduces what is known as "substantive evidence rule".⁶⁴ According to this rule the judiciary is limited from reaching into the facts of the administrative decisions which is subjected to it for review purpose.

⁶⁴ Federal Administrative Procedural Act, Article 701(1946).

In addition, in the modern world, there is an assumption that judicial review on the decisions of the other branches is a constitutional right of citizens and there is a presumption of reviewability. But the legislator can limit this power through legislation. On some issues, in statute the legislator can limit the decision of the administrative agencies from the reach of the judiciary. Since judicial review is one of a safe guard against the possible abuse by the other branches, its exclusion should be interpreted narrowly even in a situation where a statute is silent on judicial review matters.⁶⁵ The interpretation for judicial review should be in favour of the existence of the mechanism than its exclusion.

Moreover, the exclusion or limitation of judicial review by the legislator can also take the form of giving discretionary power to the administrative agency.⁶⁶ When the legislature deliberately commits discretionary power necessary to mean a certain policy objectives to certain administrative body, the power of courts is indirectly precluded. But still the judiciary can question on how that discretionary power is exercised, for instance if the agency exercise or fail to exercise the power because of improper motive or by taking or fail to take improper information this discretionary power will be subject to review.⁶⁷ Finally, in connection with the substantive limitation on judicial review, the availability of judicial review can also be limited if a person fail to fulfill the requirement of standing to sue. This requirement has different definitions. But in general terms what it is referring is to claim for judicial review a person needs to have an interest in the out come of the decision. Otherwise, the claim for such remedy can't be made.⁶⁸

- **Procedural Limitation**

⁶⁵ Jerry, *Supra* note 2, at 786.

⁶⁶ Wade, *supra* note 33, at 20-23.

⁶⁷ *Id.*

⁶⁸ JERMONE A. BARRON, *CONSTITUTIONAL LAW IN A NUT SHELL* 123 (ST. Paul, Minn 4th ed., 1999).

Just like the substantive limitation stated above, there are also procedural limitations that restrict courts from entertaining the decision of the administrative agencies. These are exhaustion of remedies, finality and ripeness of the case.

Administrative delegates are created and empowered to do a certain job, thereby enabling their delegator to be free of details, themselves to develop an expert understanding of the problem to be resolved, and thus permitting the judiciary to act as a guardian of constitutional right rather than as fact finder or a policy determiner.⁶⁹ Because of this, there is an accepted understanding that before the intervention of courts, the administrative branch must exhaustively put its effort on the decision of the case before a claim is made for judicial review. In England the exhaustion of legal remedies interpreted to mean exhaustion of all other remedies such as statutory appeals and appeals to relevant tribunals.⁷⁰ In the same manner, Art.704 of APA provides that agency action made reviewable by statutes and final agency action for which there is no other adequate remedy in a court are subject to judicial review. This time limitation enables the administrative channel to rectify its own mistakes without being intervened by the judiciary. In addition, this also enables citizens to have the at most benefit from the expertise of these agencies.

The other related concept that can be raised in connection to exhaustion of remedies is the finality of the decision. This issue has a similar requirement like the previous one. According to this finality requirement there is a need for getting the final decision of the agency before requesting for judicial review claim. Government action is “Final” in the sense that when at no future time will its impact on the petitioner becomes more conclusive, definite or substantial.⁷¹ In other word, there

⁶⁹ Id.

⁷⁰ Judicial Review, *supra* note 3, at 22.

⁷¹ Samuel, *supra* note 44, at 561.

needs to be an “effectual disposition of rights”.⁷² There can be no review unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.⁷³ However, in some instances getting the final decision of an agency become impossible for an individual. For instance, suppose the agency refuses to issue an order or do whatever is necessary so as to accomplish the final result upon which review to the courts may precede. In this case the decision can be considered as final and a claim for review by courts can be made.⁷⁴

Besides, there is also a requirement of ripeness of the case before it is brought to review. Where administrative intention is expressed but hasn't yet come to completion, or where that intention is unknown it's held that the controversy isn't yet ripe for equitable intervention. In another language we are asked to adjudicate claims against it's constitutionally before the schemes has been put into operation or before for its enforcement have been authoritatively defined.⁷⁵

1.6 Remedial Action of Judicial Review

Many public authorities and officials have a privilege to do acts which if done by an individual would make them liable. Laws in most countries are designed to limit both the civil and criminal responsibility of officials in order to protect them from such kind of suits.⁷⁶ In countries like France and Germany, the courts make a moderate use of their power to determine their liability.⁷⁷ Because of this, it is much

⁷² Id at 560.

⁷³ Id at 558.

⁷⁴ Id at 555.

⁷⁵ Id at 582.

⁷⁶ Morris, supra note 24, at 620.

⁷⁷ STEPHEN G. BRAYER AND RICHARD B STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 190 (Little Brown and Company, 1979)

more difficult to sue officers of the government than individuals for the tortious acts of its officers. To be successful in such kind of proceedings it requires corruption and the absolute overstepping of power of the officials. Recent developments also show that there is an emerging general principle to make the officials liable in case they willfully exceed or abuse their power in a manner that inflicts peculiar loss on an individual.⁷⁸

The limited grounds for the liability of public officers can be justified on two bases. One is making these officials liable for every possible deviation that can be imagined will hinder them from performing their responsibility so as to avoid liability. This has the end result of depriving the public from benefiting from the special expertise that these officials have. Second, such kind of constant interference in the task of administrative authorities by courts can also infringe the doctrine of the separation of power. Despite the existence of these justifications, government officers can be liable on different grounds. Because of this liability individuals are also entitled to get different relief when the case is brought to courts. These remedies which are granted against improper administrative acts can be classified as private and public law remedies.

1.6.1. Private Law Remedies

Private law remedies are those remedies that are available in suits involving individuals. If an individual shows that an improper act of a government officer affects his interest, he can invoke these private law remedies. During the early days of the judicial review of administrative decisions the commonly available remedies were the public law remedies but later on their importance became diminished and more preference started to be given to the private law remedies. As Lord Denning observed “Just as the pick and shovel is no longer suitable for the winning of coal, so also the

⁷⁸ Id at 221.

procedure of mandamus, certiorari, and actions of the case aren't suitable for the winning of freedom.....they must be replaced by.....declaration, injunctions and actions for negligence."⁷⁹.Under this remedial type we find Injunction, Declaration and Peculiar compensation.

- **Injunction**

Injunction is one of the private law remedies that can ordered by courts in cases individual right is infringed by the conduct of government officer. This kind of remedy is ordered to refrain the execution of a decision which if implemented have a determinant effect to the applicant or individual. It's also said that it's granted pursuant to the formula of a threatened irreparable injury for which there is no adequate remedy at all.⁸⁰ In addition, injunction can be ordered when the penalties prescribed for violations of orders are drastic that no person could afford to run the risk of disobeying them and later testifying their validity in a suit by the agency to enforce them.⁸¹

Injunction order also can have two forms. The first one is a preliminary injunction, or an interlocutory injunction. This type of injunction is a provisional remedy granted to restrain activity on a temporary basis until a final decision is made. It is usually necessary to prove the high likelihood of success upon the merits of one's case and a likelihood of irreparable harm in the absence of a preliminary injunction before such an injunction may be granted. The second type of injunction is also known as permanent injunction which will be granted if the case is decided against the party that has been enjoined, and it can stay in effect indefinitely or until certain conditions are met.

⁷⁹ Stephen, supra note 77, at 866.

⁸⁰ Louis, supra note 13, at 193.

⁸¹ Morris, supra note 24, at 654.

- **Declaration**

Declaration is a claim made by an individual to ascertain the existence of a certain legal rights. Despite the fact that such declaration prevents the applicant from the possible abuse of his right, it is difficult to say that such declaration amount to relief because such mere declaration by itself doesn't impose any obligation on another to give relief to the applicant. Because of such limitation countries request the joining of other form of private rights remedies. For instance in USA, such declaration is requested to be joined with injunction.⁸² The same is also true in case of England.⁸³

- **Peculiar Compensation**

In the exercise of this power, public authorities may injure individuals in their property and person which can have a tort liability. In such instance countries follow different approach for such kind of liability. Some countries like Ethiopia allow a full liability of the officer in particular in case of their negligence or abusive exercise of power which might otherwise infringe any specific and explicit provisions of law. The availability of this kind of private law remedies to individuals in case their right infringed by inappropriate action of the administrative agency help them to be peculiarly compensated for the loss they incur.

1.6.2 Public Law Remedies

Public law remedies are granted for the protection of the public interest and making the government to function properly. But this doesn't mean that this kind of remedies goes against the individual rights. Even in some cases when courts are stack between the choices of protecting individuals' rights and making the

⁸² Id.

⁸³ Id.

government institutions work effectively they advised to go for the first.⁸⁴ The origin of this type of remedies traced to the English administrative law system.⁸⁵ These kinds of remedies are Certiorari, Prohibition, Mandamus and Habeas corpus.

- **Certiorari**

Originally this kind of public law remedy was designed for enabling the higher court to review the decision of the lower courts by directing it to send the record in a given case for review.⁸⁶ But later on such kind of public law remedy extends to other public officials action. This remedy proceeds from the understanding that all inferior courts and authorities have limited jurisdiction and power and must be kept in their legal bounds.

- **Prohibition**

The remedy of prohibition is a mechanism to prevent an inferior tribunal or administrative authority from exceeding or from continuing to exceed its authority, or from abuse of power in contravention of the laws.⁸⁷ But once a decision is made by the tribunal or public authority claiming for prohibition has no meaning because the damage that supposes to be prevented is already done. In such case the appropriate mechanism is applying for certiorari for quashing the decision already made.

- **Mandamus**

⁸⁴ 2 BURT FRANKLIN, COMPARATIVE ADMINISTRATIVE LAW 204(New York, 1970).

⁸⁵REGINALD PARKER, ADMINISTRATIVE LAW, (The Boobbs- Merrill Company, Inc., Publisher, 1952).

⁸⁶ Id.

⁸⁷ Id.

In the administrative law realm as actions of administrative authorities are the subject of judicial relief, omission also has the same importance. The remedy of mandamus is ordered for making the public officer to do act which they supposes to do based on a certain statue but they failed. In this case, the applicant pleading for mandamus should be able to show that the respondent has a legal duty to do the specific act. Even if some scholars insist that this kind of relief cant be extend to discretionary power, it is wise and logical to conclude that in case the government officer refrain to exercise his discretion because of legally irrelevant or forbidden considerations this kind of relief can be granted.⁸⁸

In modern practice mandamus is often used to review final action of an affirmative character which for one reason or another cant be reviewed by certiorari or statutory appeal.⁸⁹ Certiorari brings before the court a record on the basis of which an officer has acted. Thus, characteristically, no new evidence can be presented in court, though recent statutes and some early practices do permit additional evidence. Mandamus, on the other hand, can be used to review informal action, action based on investigation or after hearing granted. Thus in mandamus the court may in the proper exercise of discretion permit additional evidence.⁹⁰

- **Habeas Corpus**

Habeas Corpus literally defined as “have his body”.⁹¹ This kind of relief is seeks for quashing the decision of the administrative body which cause the detention of the person. This relief safeguards an individual freedom against arbitrary state action. Because it is an effective mechanism to preserve individual liberty it is also known as "The Great Writ".

⁸⁸ Louis, supra note 13, at 181.

⁸⁹ Id at 177.

⁹⁰ Id at 177.

⁹¹ Id at 74.

Chapter Two: Judicial Review of Administrative Actions in Different Legal Systems

- **Introduction**

The concept of judicial review of administrative actions can be seen into two contexts: Judicial review on constitutionality issues and judicial review on the bases of other legally

recognized grounds. The first kind of judicial review refers to the review made to make sure the existence of compatibility of statutes and other government decisions with the constitution. For this kind of judicial review countries like Germany opt for constitutional courts which have the exclusive jurisdiction to deal with constitutional issues. Countries like USA trust their ordinary courts to perform such function. On the other hand, countries like Ethiopia and France opt for a political organ to do such job. On this regard, Swiss also can be mentioned as a country which follows her own model since in this system entertaining constitutional issues only works for canton laws. The federal laws are outside the reach of interpretation by any organ and it's by using referendum that constitutional issues in federal laws settled. Different reasons can be mentioned for such lack of uniformity among countries. To mention few, the distrust that the states may have over the judiciary, the difference in commitment to natural law or legal positivism and the different application of the notion of separation of powers have their own influence.⁹²

The second form of judicial review refers to reviewing on the bases of other legally recognized grounds i.e. Illegality, Irrationality or Procedural Impropriety. In this type of judicial review, Countries also followed two types of trend. Some countries like England entrust this task to their ordinary courts. On the other hand, Countries like France give this power to special administrative courts. Though judicial review of this kind may come in varying forms and at different times in different countries, commonly it is the result of an evolutionary pattern common to much of the west in both civil and common law countries.⁹³ First, there was a period of natural justice, when the acts of crown and parliament alike were said to be subject to a higher unwritten law. Then, with the glorious revolution in England and the French revolution a century later came the era of positive or legal justice characterized by the primacy of the written statute and the popular legislature, and the relative powerlessness of both judges and natural law theories. This era carried a

⁹² 58 MAURO CAPPELLETTI, JUDICIAL REVIEW IN COMPARATIVE PERSPECTIVE 6 (California Law Review, No. 5, 1970).

⁹³ *Id.*, at 1033.

new flag to the citadel of justice: the "principle of legality". Institutions such as the *Conseil d'Etat* were the instruments used to implement this principle.⁹⁴ Together with this legality concept, the judiciary role in reviewing statutes and the decision of the administrative decisions become broader in most of the civil and common law countries.

In this chapter, a comparative analysis of the judicial review experience of the selected common and civil law countries will be made. In doing so, much attention will be given to judicial review of the actions of administrative agencies. To make this comparative analysis in addition to statutes different settled cases that show the trend of the selected countries will be consulted. This is because in common law countries case law is part of the legal system and in civil law countries well recognized administrative decisions are taken as governing principles in the administrative law area.

2.1 Judicial Review of Administrative Actions in Common Law Legal System

2.1.1. Judicial Review of Administrative Actions in England

Judicial review of administrative actions in England has a long rooted history.⁹⁵ It was early established that an appeal could be made to the court of the King's bench when officers of the crown such as bailiffs or sheriffs committed what was a prima facie a common law wrong i.e. battery or trespass.⁹⁶ This principle of accountability of government officials to damage suits was regarded as a fundamental element of the English conception of the "rule of law".⁹⁷ However, this protection of citizens weren't that much effective. This was mainly because of the established principle of privileges of higher officials and inability of these

⁹⁴ Id

⁹⁵ LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 1 (Little Brown and Company Boston, Toronto, 1965)

⁹⁶ 2 BURT FRANKLIN, COMPARATIVE ADMINISTRATIVE LAW 21 (New York, 1970).

⁹⁷ Louis, supra note 4 at 1.

officials to satisfy the judgment out of their own pocket, and the system of damages of this time might not afford fully adequate relief.⁹⁸

During the sixteenth and seventeenth centuries, in England the Tudor and Stuart monarchs had developed powerful administrative tribunals that were similar to the present French *Conceal d' Etas*. However, this line of development was cut by the glorious revolution of 1688.⁹⁹ Nevertheless, by the end of the seventeenth century, the basic principles of administrative law in general and judicial review in particular managed to be securely established in the country. At this time, the choice was made and the power of reviewing the decisions of the administrative branch of the government was brought to the jurisdiction of the ordinary courts.¹⁰⁰ Starting from this time on, the ordinary courts became a responsible organ to pass on the legality of acts done by the executive branch of the government and its officials.

Despite the fact that the basic principles were established long ago, it is difficult to say that the development of administrative law in general and judicial review in particular had a smooth development in the country. During this time, there was thinking among the lawyers that this concept was an alien intrusion. This kind of thought also extended to the point that the British constitution had nothing to take from foreign countries because of its unique character and because of a belief that representatives and responsible governments were securely founded, political and administrative morality was usually high, the administration of justice by the ordinary courts was even handed and incorrupt.¹⁰¹ Because of these reasons, there was a conclusion by some writers that England had little to learn from the laws of other countries.

⁹⁸ Id at 15.

⁹⁹ Id at 20

¹⁰⁰ DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 28 (London Stevens and sons Limited, 4th ed., 1980)

¹⁰¹ Id at 7.

Dicey also share this idea and maintained that administrative law is contrary to the well established rule of law principle in England. This is because fundamentally he believed that the prime virtue of the rule of law is, all cases came before ordinary courts and the same general rules applied to an action against a private individual. In connection to this, he also criticized the French *Council d'Etat* by stating that it existed for the purpose of giving officials a whole body of special rights, privileges or prerogatives as against private citizens.¹⁰² He also argued in favor of the existence of the superiority of England over France law in this field because this Anglo-American system had a mechanism to allow a private-law remedy against the individual officer who committed a wrong.¹⁰³ However, De Smith disagrees with the above assertion and he stated that French administrative law has a system of compensation for the acts of public officers, which is in some respects more generous than that of English law. Though their judges are government employees, the said writer doesn't believe that they are so less critical of the administrative than is the British judiciary. He also remembered the historical failed attempt of England to import the French model.¹⁰⁴

Starting from 1950s administrative law in general and judicial review in particular starts to show notable progress in this country.¹⁰⁵ Firstly, this is because by taking the experience of courts in the United States, France and some common wealth countries, the England courts themselves become more creative and active in their decision making. Secondly, the country's membership to European Communities also plays a role in sharing some experience from member countries with this regard. Like many other countries, the judicial review system in this country also meant to preserve some important interests. First, the British Constitution is founded on the rule of law and administrative law is the area where this principle is to be seen in its most operation.¹⁰⁶ Therefore, as part of the administrative law, in the exercise of their review power courts are expected to give more attention to the

¹⁰² Louis, *supra* note 4, at 54.

¹⁰³ GIRMA W/SILASSIE, MATERIAL ON ADMINISTRATIVE LAW 18 (1967).

¹⁰⁴ De Smith, *supra* note 9, at 17.

¹⁰⁵ *Id* at 44.

¹⁰⁶ H.W.R.WADE AND C.F. FORSYTH, ADMINISTRATIVE LAW 20 (Oxford University press, 8th ed., 2000).

concept which is fundamental to the Constitution. Just like USA, in England it is believed that judicial review is the exercise of the court's inherent power at common law to determine whether action is lawful or not, in a word to uphold the rule of law. In addition, the British constitution though largely unwritten is firmly based upon the principle of the separation of powers.¹⁰⁷ Starting from its introduction, judicial review was meant to play within this notion and it was designed to make sure the executive accountability to the parliament.

Furthermore, judicial review is also meant to protect individuals from the abuse of the administrative agencies. This justification becomes strong after the incorporation of the European Union and European Convention on Human Rights and Fundamental freedoms as part of the constitution of the Country. In addition to strengthening the protection of human right, the European Convention on Human Rights also require the courts to check misuse of power by the executive.¹⁰⁸ Besides, it is also believed that the judiciary accept a responsibility for the maintenance of the rule of law that embrace a willingness to oversee executive action and to refuse to countenance behavior that threatens either basic human rights or the rule of law.¹⁰⁹ From the above justifications, we can understand that in England the doctrine of judicial review meant to protect especially the separation of power, rule of law and individual rights.

In this Country, the power of reviewing the actions of the administrative agencies is entrusted to ordinary courts. To be specific, in the present context judicial review cases are decided by the administrative court, which is part of the Queen's Bench Division of the High Court.¹¹⁰ To be residing on this court, judges are nominated by the Lord Chief Justice to site on Administrative cases. The rationale for such nomination is the hope that a degree of specialization would result in a more efficient and consistent dispatch of court

¹⁰⁷ Id.

¹⁰⁸ JUDICIAL REVIEW: A SHORT GUIDE TO CLAIMS IN THE ADMINISTRATIVE COURT 25 (Unpublished,2006)

¹⁰⁹ Wade, *supra* note 14, at 23.

¹¹⁰ JOHN ADLER, CONSTITUTIONAL AND ADMINISTRATIVE LAW 376 (6th.ed., 2007).

business”.¹¹¹ Entrusting ordinary courts which are independent of the administration business to take care of suits that involve the government is taken as an important element in the Anglo- American concept of rule of law.¹¹²

Application for judicial review in this country is only be admissible by the court if three conditions are satisfied.¹¹³ The first one is the application must be made promptly and in any event within three months from the date when the grievance arose. Secondly, the applicant must satisfy the requirement of locus standi by showing that he has sufficient interest. In addition to this, the application also needs to relate to [public law](#) matter without being purely based on [tort](#) or [contract](#) law.¹¹⁴ On this point one thing needs to be clear. These administrative courts do not merely deal with judicial reviews claims. They also has jurisdiction to hear cases like statutory appeals and applications, appeals against decisions of magistrates' courts and the Crown Court, applications for *habeas corpus and etc.*¹¹⁵

When we see the scope of judicial review in this country context, we find that it extends to every action and omission of the administrative agencies. In the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985], Lord Dip Lock observed that the subject matter of every judicial review is a decision made by a decision maker or else a refusal by him.¹¹⁶ It is also noted that judicial review cases applies to all public bodies other than the high court itself and parliament.¹¹⁷ As it is provided in the exception part of the previous statement, the high court power of judicial review can't extend to primary legislations or legislations made by the parliament. This is because of the well accepted doctrine of

¹¹¹ RICHARD GORDON QC, JUDICIAL REVIEW AND CROWN OFFICE PRACTICE, SWEET & MAXWELL5 (Unpublished, 1999).

¹¹² Wade, supra note 14, at 22.

¹¹³ http://en.wikipedia.org/wiki/Judicial_review_in_English_law(accessed on September,2009)

¹¹⁴ Id.

¹¹⁵ Id.

¹¹⁶ John, supra note 18, at 385.

¹¹⁷ Id at 376.

“Parliamentary Sovereignty”. Based of this doctrine, the role of courts is seen as enforcing the will of parliament and these courts have no power in reviewing laws made by the sovereign. In connection to this, it is believed that the sovereign legal power in England lies in the Queen in parliament. An act of parliament requires the assent of the queen, the House of Lords, and the House of common, and the assent of each House is given upon a simple majority of the votes of members present. The parliament also has no limit to its legal efficacy.¹¹⁸ This exclusion of the primary legislations from the purview of judicial review is one of the main features that distinct the British judicial systems from other countries like USA.

However, with this respect there are also some limitations that are worth of being mentioned. The European Convention on Human Rights and Fundamental freedoms, and the European Union have become part of the British constitution. Amendments of these documents can be effected only by agreement of the member states, as by the Protocols added to the convention on Human Rights and the treaties of Maastricht and Amsterdam in the case of EU.¹¹⁹ Exceptionally in this regard, if primary legislation is found out to be incompatibility with them unlike other cases even if courts have no power to quash or suspend they have the power to declare on its incompatibility.¹²⁰

With regards to the grounds of judicial review, in England it has been developed through the years in their case law. In this system, the ground of judicial review is disputed on the bases of the nature of the legal system in general and the nature of the Constitution in particular. The first view relies on parliamentary supremacy.¹²¹ This view assumes that, because most government powers are created by an act of parliament, the courts’ role should be confined to ensuring that power doesn’t exceed the limits set out by parliament. This approach is known as the *ultra vires* doctrine. Based on this view, a decision of a public

¹¹⁸ Wade, supra note 14, at 25.

¹¹⁹ Id.

¹²⁰ Id

¹²¹ John, supra note 18, at 379-381.

authority can only be set aside if it exceeds the powers granted to it by Parliament. On the other hand, the second view is known by the name of the common law approach.¹²² According to this view, powerful bodies must act in accordance with the rule of law values of fairness and rationality. By doing so, this approach claim a much broader grounds than the *ultra vires* doctrine. In addition, this doctrine also criticized by some as it ignores the supremacy of the parliament since it doesn't only make parliament intention as its base for judicial review. Moreover, the common law approach also taken as a base for extending judicial review principles to powerful private bodies such as sports regulatory bodies, powerful commercial companies etc., which express control over aspects of public life.¹²³

The constitutional theory of judicial review has long been dominated by the doctrine of *ultra vires*.¹²⁴ Because of this, the high court role was limited to determine whether the decision of a public authority exceeds the powers granted to it by Parliament. By doing this, it is believed that the judiciary branch of the government plays a role in respecting the sovereignty of the parliament. However, this doctrine starts to be widely interpreted to include errors of law. As it is witnessed in *Anisminic Ltd v foreign Compensation Commission (1969)* it has been widely decided that any mistake of law makes a decision *ultra vires* in that all such mistakes could be presented either as taking an irrelevant factor or failing to take a relevant factor into account.¹²⁵ It therefore invites courts to investigate the decisions of public bodies in considerable depth.

The other important historical decision made in connection to the grounds of judicial review was in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948)*.¹²⁶ In this case, the court tries to show that unreasonableness can be a ground for the judiciary

¹²²Id.

¹²³ Id.

¹²⁴<http://www.austlii.edu.au/au/journals/FedLRev/2002/8.html>(accessed on October 2009).

¹²⁵ Id.

¹²⁶ John, supra note 18, at 384.

to intervene and exercise its power of judicial review. In addition, the court also went one step further and tried to show what it meant by unreasonableness.

According to Lord Green MR the court will interfere for judicial review only where a decision is so unreasonable that no reasonable authority could have made it, not merely because it thinks it is a bad decision. In addition to the reasonable man standard, in this case it is also stated that unreasonableness can be the result of the decision maker reliance on wholly irrelevant material or on wholly irrelevant considerations, or it has ignored relevant materials, which should have been taken into consideration. Moreover, this case also mentioned as an important point since up to 1947 the law in England was that the courts could interfere only with judicial or quasi-judicial decisions and not with administrative decisions.¹²⁷ But after this case the courts find a legal base for intervening in any administrative decisions.

Through the years, the high courts power in interfering on the decision of the administrative agencies starts to have a broad base. This was mainly manifested in the decision of *Council of Civil Service Unions v Minister for the Civil Service*.¹²⁸ In this case, Lord Dip lock summarized the grounds for reversing an administrative decision by way of judicial review on three distinct parts: Illegality, Irrationality and procedural impropriety.

Like what is observed in USA courts, the England high courts also try to demarcate their territory not only by showing the grounds for the exercise of judicial review but also by indicating areas that they cant interfere. The main reason for this self restrain is the doctrine of the separation of power. In *Council of civil services Union (CCSU) v Minister for the civil service (1985)*, it was suggested that some matters are 'non-justiciable'.¹²⁹ This might be because of their political sensitivity, the courts lack of expertise to deal with the

¹²⁷ <http://www.austlii.edu.au/au/journals/FedLRev/2002/8.html>(accessed on October 2009)

¹²⁸ John, supra note1 ,at 380.

¹²⁹ Id

matter or because the legal process may be unsuitable owing to the nature and range of matters involved. These issues include the dissolution of parliament, the appointment of ministers, the granting of honors, the making of treaties and other matters concerning relationships with overseas governments.

In controversial areas, matters particularly appropriate to democratic decision making or where the matter involves expertise outside of the courts or if it includes a decision that involves the discretionary allocation of scarce resources courts apply strict standards to accept for review.¹³⁰ At the end of the scale, where a decision depends on controversial social, economic or political factors or matters remote from ordinary judicial experience the court should as a matter of practical reality be cautious in interfering. In cases of this kind, at least where human right interests are not an issue, the courts may revert to Lord Diplock's basic rationality test which is interfering only where a decision is entirely unreasonable.¹³¹

2.1.2. Judicial Review of Administrative Actions in USA

In USA judicial review has two distinct features. The first one is reviewing statutes and government decisions on constitutional issue and the second is review of the decisions of administrative agencies on legally defined grounds. In the part below we will try to see each one of these judicial review powers together with the controversy that surround them and their limitation.

In USA judicial review on [constitutionality](#) ground is a power given to ordinary courts both in the Federal and State level by reserving the final say to the Federal Supreme Court in the form of appeal. Unlike the United Kingdom doctrine of [parliamentary sovereignty](#) , the Federal Supreme Court is entitled to struck down primary legislation of the government on the ground of unconstitutionality. The Federal Constitution wording of "We, the people" is

¹³⁰ Id

¹³¹ Id at 402.

also referred to popular rather than parliamentary Supremacy.¹³² This nature of the Constitution boils down to the discussion made in the convention of 1787. During this time there was a perception of the legislature as the most dangerous branch was dominated and this was something of a shift from the primary fear of executive tyranny that had informed the State constitutional conventions of 1776 to 1787 in reaction to the antimonarchical sentiment of the revolution.¹³³ This prevailing fear of excessive legislative power undermines the case for legislative supremacy.¹³⁴ In addition, it urges the drafters to mandate the courts for controlling the legislator.

Reviewing on the ground of constitutionality also extends to state statutes if it contravenes the federal constitution and federal statute which made in conformity with the federal constitution. But other than the ground of constitutionality the courts cannot strike down any statute even if it is obviously poorly drafted, irrational, or arises from legislators' corrupt motives. In 2008, Justice [John Paul Stevens](#) also reaffirmed by stating that the Constitution does not prohibit legislatures from enacting stupid laws.¹³⁵ The Federal Supreme Court judicial review of constitutionality power also includes invalidating government action as repugnant to the Constitution. These decisions include the national executive and congress as well as the activities of State Governments.¹³⁶

At the [federal level](#), there is no power of judicial review explicitly established in the [United States Constitution](#), but the [doctrine](#) has been inferred from [Article III and VI](#) of the Constitution. Under [Article III](#) it is provided that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. In addition, under [Article VI](#) it is also stated that the

¹³² JERMONE A. BARRON, CONSTITUTIONAL LAW IN A NUT SHELL 5 (ST. Paul, Minn 4th ed., 1999).

¹³³ CHRISTOPHER WOLF, THE RISE OF MODERN JUDICIAL REVIEW 97 (Basic Books Inc., Publisher, New York, 1986).

¹³⁴ *Id.*

¹³⁵ <http://www.austlii.edu.au/au/journals/FedLRev/2002/8.html> (accessed on October 2009).

¹³⁶ Jermone, *supra* note 38, at 6.

Constitution is the supreme law of the land and the judges of every state shall be bound thereby and no State or Federal law is allowed to violate the U.S. Constitution. So it can be argued that these two articles show that Federal or State law or State Constitutional provision in contravention to the Federal Constitution are invalid and the judges are the appropriate authority to declare that. However, neither article III expressly provides judicial power does include the prerogative of invalidating the acts of co-equal branches of the government nor does article VI expressly authorize courts to determine the Constitutionality of laws.

The turning point in this kind of argument took place in the year 1803 after the Supreme Court exercised its power of judicial review in the case of *Marbury v. Madison* by declaring a federal statute unconstitutional. But the Supreme Court refrains from striking down a federal statute during the subsequent fifty years until the case of *Dred Scott v. Sandford* in the year 1856.¹³⁷ However, the decision in *Marbury v. Madison* has never been disturbed, although it has been criticized and has had opponents throughout the Country's constitutional history. In the year 1958 in case of *Cooper v Aron*, the court decide that in *Marbury v. Madison* the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution was declared and that principle has ever since been respected by this court and the country as a permanent and indispensable feature of the constitutional system of the country.¹³⁸ Judicial review is not only carried the day in the federal courts, but from its announcement it made rapid progress and was securely established in all States.

Mauro Cappelletti also argues that judicial review was first effectively implemented in the United States and the idea did not spring new and fully developed from the brow of John Marshall. Rather, the American version of judicial review was the logical result of centuries of European thought and colonial experience which had made western man generally

¹³⁷ <http://www.austlii.edu.au/au/journals/FedLRev/2002/8.html>(accessed on October 2009).

¹³⁸ Jermone, supra note 38, at 8.

willing to admit the theoretical primacy of certain kinds of law and had made Americans in particular ready to provide a judicial means of enforcing that primacy.¹³⁹

In *Marbury v Madison*, to defend the courts power of judicial review Justice Marshal argued on two grounds. The first argument states that the power of judicial review is derived from the theory of limited government. In the second argument Marshall also tried to support his argument from the particular phraseology of the constitution itself.¹⁴⁰ Based on the first argument, the American people had chosen a limited and written constitution and therefore the constitution controls any legislative act repugnant to it. If the acts of the legislature allowed and prohibited by the constitution are of equal obligation, then there is no distinction between limited and unlimited government, and the legislature can change the constitution by an ordinary act. Written constitutions are understood by their framers to be fundamental laws, so that legislative acts contrary to them are void.¹⁴¹ In addition, it is also stated that the judicial power is extended to all cases arising under the constitution.¹⁴²

In addition, [Alexander Hamilton](#) also tried to defend the exercise of judicial review by courts in [Federalist No. 78](#) by raising the same grounds as justice Marshal .In this document he stated that the interpretation of laws is the proper and peculiar province of courts.¹⁴³ Moreover, in the American society there is a profound and tradition reliance on courts as the ultimate guardian and assurance of the limits set upon the legislatures and executive power by the constitutions.¹⁴⁴ Hamilton also added that the judiciary will always be the least dangerous to annoy or injure.¹⁴⁵ He also concluded by saying that all these support of

¹³⁹ Mauro, supra note 11, at 1020.

¹⁴⁰ Christopher, supra note 39, at 82.

¹⁴¹ Id.

¹⁴² Id at 83.

¹⁴³ Id at 75.

¹⁴⁴ Louis, supra note 3, at 321.

¹⁴⁵ Christopher, supra note 39, at 75.

the judiciary did not imply the superiority of the judges to the legislature, but the superiority of the will of the people to both.¹⁴⁶

On the other side of the argument we also found [Thomas Jefferson](#). In 1820, he expressed his deep reservations about the doctrine of judicial review by stating that our judges are as honest as other men, and not more so.¹⁴⁷ They have, with others, the same passions for party, for power, and the privilege of their corps... their power is the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control. Despite the existence of such kind of extreme positions, the Supreme Court power of entertaining constitutionality issue continues to be exercised.

Even if it is an established fact that judicial review is an important concept in a democratic system, it is not without limit. There are Constitutional, policies and judiciary provided limitations. As it is asserted in *Flast v Cohen (1968)* for making judicial review under this system there needs to be a case and controversy situation.¹⁴⁸ In other words, the court doesn't make interpretation for its own sake or for the purpose of making abstract review or giving advisory service as it's done in France and Germany. As it is correctly stated in the decision of the above case such task only confine itself in giving a decision to "Flesh and blood" controversies.¹⁴⁹ In this legal system such limitation on interpretation gives it an incidental character. The most explicit example with regard to advisory opinion was occurred in the year 1793. In this year, Jefferson asked the Supreme Court to give him advice on the interpretation of treaties and international law. However, the court politely

¹⁴⁶ *Id* at 104.

¹⁴⁷ 52VUKAN KUIC, Law, Politics, and Judicial Review in THE REVIEW OF POLITICS 270 (Cambridge University Press No. 2, 1990).

¹⁴⁸ Jermone, *supra* note 38, at 24.

¹⁴⁹ JERRY L. MASHAW, RICHARD A. MERRILL AND PETER M. SHANE, ADMINISTRATIVE LAW, THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS 24 (3rd ed., West Publishing co., 1992).

declined to do so by supporting its reason by the separation of powers and such kind of act may deprive judges impartially.¹⁵⁰

In addition, the court also accepts the case if the party fulfills the requirement of standing to bring his case to this court. As it's confirmed in *Baker V Carr (1962)*, a person is said to fulfill such criteria only when the party seeking relief allege such a personal stake in the outcome of a controversy as to assure that concrete adverseness which sharpen the presentation of issues. Moreover, the court is also under the obligation to entertain the case by starting from the presumption of constitutionality.¹⁵¹ Justice Bushrod Washington also wrote that it is a decent respect to the wisdom, integrity, and patriotism of the legislative body, by which any law is passed to presume in favor of its validity, until its violation of the Constitution is proved beyond a reasonable doubt.¹⁵² Besides, before handling the case the court needs to make sure that there is no other way to handle the case. This is because such adjudication by the constitutional Court is taken as out of strict necessity.¹⁵³ In addition, constitutional questions will not be decided in broader terms than that are required by the precise state of facts, to which the ruling is to be applied. Besides to this, there is also a need for the existence of a very clear constitutional mistake in the case presented.

Further more, when a judicial decision cannot have any practical legal effect because the issue that generated it either have been resolved or disappeared, it is said that the case become moot. But this rule won't apply if the case is found to be capable of repetition and yet evading review, even if the unlawful activity is voluntarily ended where is a reasonable likelihood that the wrong will be resumed or where there are important unsettled collateral consequences that remain unresolved.¹⁵⁴ An agency decision may not be challenged prematurely, as gauged under the doctrine of "finality", "ripeness" and "exhaustion".¹⁵⁵

¹⁵⁰ Christopher, supra note 39, at 103.

¹⁵¹ Jerry, supra note 55, at 785.

¹⁵² Id.

¹⁵³ Jermone, supra note 38, at 26.

¹⁵⁴ Id, at 50-54.

The other feature of judicial review in the USA system is the review of the decisions of administrative agencies by ordinary courts. The origins of American Administrative law trace its origin from the common law courts of England.¹⁵⁶ The American Colonies inherited the English system of common law writs and the chancellor's injunctive power as mechanisms for the control of administrative official. This system of judicial remedies formed control basis of administrative law in the state and federal courts of this Country during the first 100 years of the Republic.¹⁵⁷

The Country also came up with a comprehensive Administrative Procedure Act (APA) in the year 1946. The purpose of the APA was to establish fair administrative law procedures to comply with the constitutional requirements of [due process](#) and define and systematize such formalities, although particulars statutes and agency regulation may impose different or additional requirements.¹⁵⁸ Different parts of this act were also amended in the year 1966, 1974 and 1976.¹⁵⁹ In general, just like the rule of law is fundamental to the English administrative law system, Due process of law has important place in the constitutional law of USA. In this system, it is also believed that due process of law has a central point in administrative law in general and judicial review in particular.¹⁶⁰ In this act judicial review matter is dealt in section 10 in the articles that are found between 701-706. In general, these articles deal with the availability, timing, form, and scope of judicial review.¹⁶¹

¹⁵⁵ Jerry, *supra* note 55, at 854.

¹⁵⁶ STEPHEN G. BREYES AND RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 20 (Little, Brown and Company, Boston and Toronto, 1979).

¹⁵⁷ *Id* at 21.

¹⁵⁸ *Id* at 30.

¹⁵⁹ *Id*.

¹⁶⁰ *Id* at 15.

¹⁶¹ See Federal Administrative Procedure Act 1946, Article 701-706.

On the bases of article 706 of APA, the scope of judicial review of administrative agencies extends to compel agency action which unlawfully withheld or unreasonably delayed. In addition, it also extends to decisions which are found to be arbitrary, capricious, an abuse of discretion, or not in accordance with law, contrary to constitutional law, power, privilege, immunity, in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, without procedure required by law, unsupported by substantial evidence and unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. From this we can understand that in terms of *ultra vires* actions in the broad sense, a reviewing court of United States may set aside an administrative decision if it is mainly [arbitrary](#) or capricious. Even if cases that can be quashed based on these grounds are more or less the same in Britain such kind of decision is mainly struck down by using the well established notion of the [Wednesbury reasonableness](#).

In the USA system, reviewing the decisions of the administrative branch arise from two sources: Statutory and non statutory review.¹⁶² Many regulatory statutes explicitly provide particular parties a right to challenge the legality of agency action taken pursuant to that statute. This type of explicit provision for the intervention of the judiciary in the form of judicial review is known as statutory review. With respect to certain agency functions, a statute may exclude or remain silent with respect to the exercise of judicial review. For this effect, according to article 701 (a) of APA provided that this act will not apply to statutes which precluded judicial review. Since judicial review is a basic right, the intention to exclude it must be made specifically.¹⁶³ However, in the case of the statute silence courts may still have the authority because APA provided that, with certain exception, that a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, is entitled to judicial review thereof.¹⁶⁴ This is known as non statutory review.¹⁶⁵

¹⁶² Jerry, supra note 9, at 702.

¹⁶³ Mauro, supra note 1, at 923.

¹⁶⁴ Jerry, supra note 55, at 702.

¹⁶⁵ Id at 702.

Besides, the traditional law of judicial review of administrative action is largely the product of a concern to prospect private interests from unlawful exercise of government authority. In recent years, in cases like *Allen v Wright (1984)*, supreme court of the United States start to give more attention to the failure of administrative agencies to enforce existing standards or to develop standards adequate to protect the public interest.¹⁶⁶ With increasing frequency, judicial review is sought not to restrain, but to stimulate administrative action.

Moreover, the Country also transplanted the English system of remedies. In the federal system, suits for injunctive or declaratory judgment conventionally serve as the primary vehicles for relief against unlawful agency action.¹⁶⁷ One explanation is the generally flexible use of injunction by federal courts coupled with the generous authorization of specific statutory review. In addition, the “the great writ”, habeas corpus, also has a venerable role in the federal courts. With respect to States also most commonly pursued writs have been certiorari and mandamus. In connection to mandamus, some American judges question its consistency with the notion of the separation of power doctrine.¹⁶⁸ This is mainly because in this system there is a strong view that the three branches of the government are found in an equal footing and ordering the other two branches by the court unbalance this structure and contravene the separation of power doctrine.

In the judicial review of administrative action also there are certain areas restricted from judicial review because of many reasons. In the case of *Marbury v Madison* in the decision it is put clearly that the judiciary can exercise its judicial review power at the extent it doesn't intervene in the power that is exclusively confine to the other branches of the government. Since the constitution clearly shows the recognition of the separation of power principle by stipulating the power and duties of the three branches of the government this limitation is the means to preserve this will of the constitution.

¹⁶⁶ Mauro, supra note 1, at 923.

¹⁶⁷ Jerry, supra note 55, at 702.

¹⁶⁸ Louis, supra note 4, at 178.

The Eleventh Amendment of the constitution also prohibits federal courts from entertaining specific cases brought against a state without its consent. This is known as Sovereign immunity.¹⁶⁹ On the bases of this limitation, any litigant who desires to change the action of a federal agency or official in federal courts must thus be able to demonstrate that a state authorizes the court to hear the case. In any event, the problem of sovereign immunity has been reduced significantly for those seeking review of agency action by an amendment of APA and article 702 which was adopted in 1976. That amendment provides that a case can be brought against the State without its consent if in the suit the party seeks an injunction or declaration relief. But still Sovereign immunity works to actions for money damages or other cases that limit review.¹⁷⁰ In addition, the courts exercise of judicial review can only be extended to the question of law. In other word, the administrative agency has a final say on the question of fact. This

is because it's believed that the administrative agency is believed to be in a better position to see into the technicality of the facts than the courts.¹⁷¹ In addition, any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action.¹⁷²

An agency decision may not be challenged prematurely, as gauged under the doctrine of "Finality", "ripeness" and "exhaustion".¹⁷³ Although the requirement of final agency action is statutory, APA 704, while "ripeness" and "exhaustion" and judicial crafted. Because of the existence of this doctrine the federal courts will not hear cases unless there is present injury or significant threat of imminent injury. Something adverse must be happening now or in

¹⁶⁹ Jermone, supra note 38, at 17.

¹⁷⁰ Stephen, supra note 62, at 872.

¹⁷¹ Jerry, supra note 55, at 383.

¹⁷² Federal Administrative Procedure Act, Article 10(c), (1946).

¹⁷³ Jerry, supra note 55, at 854.

the immediate future.¹⁷⁴ This avoid judicial interruptions in the administrative process and at the same time it gives agencies to develop expert judgment and maintain program integrity; and maximizing the likelihood that judicial challenges, once brought will be sharply focused and based on reviewable records.¹⁷⁵ The courts experience shows that when matters less important than citizenship are at stake, the courts have interpreted “finality” clause less favorably to plaintiffs. But congress still has had to make its intent to preclude review very specific to be effective.¹⁷⁶

Some basic statute also provides that the decision taken by the administrative branch of the government become effective if a petition for judicial review is taken within thirty days after final judgment is given.¹⁷⁷ This means after the lapse of this time the courts are bared from exercising this power.

2.2 Judicial Review of Administrative Actions in Civil Law Countries

In the previous part of the research an attempt is made to give a full picture on the judicial review mechanism of England and USA from the common law countries. In the same manner, in this part of the research an analysis will be made about the same experience of France and Germany as a representative of the civil law country.

¹⁷⁴ Jermone, supra note 38, at 55.

¹⁷⁵ Jerry, supra note 55, at 854.

¹⁷⁶ Stephen, supra note 62, at 903.

¹⁷⁷ Jerry, supra note 55, at 563.

2.2.1. Judicial Review of Administrative Actions in France

France is taken as the best example for the establishment of a special administrative court for reviewing the decisions of the administrative agencies. Opting for this kind of administrative courts instead of ordinary courts is mainly connected to the strict application of the separation of power doctrine. Even before the coming into effect of this doctrine, there was an existence of these kinds of special administrative courts. Some of these were independent of the active administration, and had been established simply because of the application of the economic principle of the division of labor and two of these courts were the court of moneys and the chamber of accounts.¹⁷⁸ But by the side of these tribunals there grew up in the 17th century new authorities completely dependent upon the active administration might have perfect freedom of action in its endeavor to perform the greater tasks imposed upon it as a result of the great increase of the powers of the Crown.¹⁷⁹

In the early understanding, the doctrine of the separation of powers was deemed to require that the administration's actions be completely free of control or question by the regular judiciary. In the year 1790 a law which forbid the interfering of courts in the administration area came into effect. In its Art. 13, this law states that:

*The judicial functions are distinct and shall always remain separate from the administrative functions. The judge shall not, under penalty of forfeiture, interfere in any manner whatsoever with the operation of the administrative bodies, nor summon before them administrators on account of their official duties.*¹⁸⁰

¹⁷⁸ Burt, supra note 5, at 217.

¹⁷⁹ Id at 217.

¹⁸⁰ CHARLES E. FREEDMAN, THE CONSEIL D'ETAT IN MODERN FRANCE 112 (Columbia University Press, New York, 1961)

This provision of the law was also affirmed repetitively in the years following this. At the Constitution level also the 1799 Constitution under article 75 included the same kind of restriction upon courts.¹⁸¹ On the other hand, there was also an understanding that leaving the decision of this organ without control will have a detrimental effect. So to avoid such effect, there was a devise for the rectification of administrative excess of the subordinate authority by the higher administrative echelons. Because of this, the administrative organ becomes a judge in its own case in the event of conflicts between citizens and the administration.

In addition to prohibiting courts from interfering in the administration, the 1799 constitution also provide a provision for the establishment of the modern form of *Conseil de'Etat* or Council of State which is entrusted to pay an active role in the French public life both in the legislative and administrative fields. The Council of State's origins go back to the 13th Century when it appears under various names, sometimes as *Conseil privé* or *Conseil des parties* ("Privy Counsel") and sometimes as *Conseil d'État*.¹⁸² Despite its long history, the State Council was established officially in the year 1557.¹⁸³ The major duties of this Council of State was giving advice to the king in the development of new laws and advise him on law suits against the Crown.¹⁸⁴ The kings, who had the power to dispense justice and hand down judgments as the court of last resort and he also retained the power to override any decision at will. In particular, the kings continued to decide great issues and to make decisions when the acts of their administration were disputed. This was regarded as the self-restraint of the sovereign.

Because of the establishment of the modern form of *Conseil d'Etat* in the year 1799 conflicts between citizens and the administrative agencies came under its jurisdiction. As part of its

¹⁸¹ *Id.*

¹⁸² BERNARD SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD* 22 (Oxford University Press, London, 1954).

¹⁸³ *Id.*

¹⁸⁴ JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 55 (Clarendon Press, Oxford, 1992).

power, the Conseil can grant permission to the injured party to prosecute the agents of the administration in the ordinary courts in some exceptional circumstances. But in its history, the Conseil do such permission in limited instances.¹⁸⁵ Because the Conseil d'Etat in the early 19th was under strict governmental control, only rarely and with difficulty was permission to sue obtained. This administrative guarantee was abolished in 1870 and now officials may be sued without the consent of the government for fault personelles.¹⁸⁶

In the early days of the Conseil, since its members are appointed by the executive branch there was a long lasting conception that it is the auxiliary of the executive.¹⁸⁷ It's only in the year 1870s that the Conseil retain some form of independence and create a section developed as autonomous court which completely judicialized in sprit and procedure. Even though, the Conseil was given the final power to give decision by the law of 1872, until the year 1889 the active administration still had a part in the judicial process.¹⁸⁸ During this time, in England there was a consensus that for checking the legality of the decision of the administrative organ there is no need in the formation of a special court and the country go for entrusting the matter to the ordinary courts.

In the modern France, the separation of power doctrine for the choice of a special administrative court is taken as it was before. The strict application of the separation of power doctrine is among the many reasons given for such maintenance of a separate system of court. In addition, it is also supported by the fact that the ordinary judicial tribunals had hampered the administration in its work of reform in the 17th and 18th centuries, which they were able to do because of their position of independence against the Crown.¹⁸⁹ Moreover, it is also mentioned that practical reasons also calls for the existence of such kind of court system. Special character of the matters, which are embraced within the administrative

¹⁸⁵ Bernard, supra note 88, at 78.

¹⁸⁶ Girma, pp19

¹⁸⁷ Freedman, supra note 86, at 125.

¹⁸⁸ Id

¹⁸⁹ Id, at 221.

jurisdiction, requires special knowledge of judges who devote most of their time to the consideration of questions of private law cannot be expected to possess.¹⁹⁰ This is believed to be essential both to the government and that of the individual. French experience shown in those few instances where the decisions of the ordinary judicial courts and those of the administrative courts relative to private rights are capable of comparison, that the decisions of the administrative courts have been more favorable to private rights than those of the judicial courts.¹⁹¹ The tendency of the private law judges when confronted with an administrative question is to apply to it the rules of private law, which often lead him into errors and result in too great technicality. Furthermore, the desirability of an inexpensive and informal procedure such as is not to be found in the ordinary procedure of the civil courts.¹⁹² Because of these reasons in the modern world the country still retains its preference for the special administrative courts.

When we see the judicial branch of France we find three distinct kinds of courts: the Constitutional, Administrative and other forms of courts. Unlike the judicial system in many other countries i.e. USA, these courts are not organized under a single hierarchy. The final decision making power on administrative powers rested on the Council of State while matters on [civil](#) and [criminal](#) issues come under the [Court of Cassation](#). In addition, the Constitutional Council is created as the only organ that can see into constitutional issues and give a final decision on such matters. For the sake of this research we will only focus on the administrative and constitutional courts.

As it is stated in the discussion above, in France the power of reviewing the decision of the administrative organs is entrusted to special administrative courts. But giving a final say on such matters in the form of appeal and in some of the cases in the form of first instance jurisdiction is reserved to the *Conseil d'Etat* or the Conseil of State. This organization of a special court for such a matter is the underlining difference between France in particular and most of the civil law countries in general, and common law countries like USA and

¹⁹⁰ Burt, supra note 7, at 220-221.

¹⁹¹ Id.

¹⁹² Id, at 220-221.

England. In this country, the major source of administrative law in general is legislations and doctrine. The *Conseil d'Etat* and the subordinate administrative courts powers, organization, and their form of procedure are determined by statute. In addition, in the absence of a statutory provision such a gap will be filled by jurisprudence.¹⁹³ The decisions of the *Conseil d'État* may be of considerable importance, often not for the actual case judge but also for the implications on the interpretation of law.¹⁹⁴

In addition, the role of the Conseil can also be summarized into three distinct functions which are undertaken by its different sections: legislative, administrative and judicial. The involvement of the Conseil in the legislation process of the country varies from time to time. But the apex of such power was noticed during the reign of Louis Napoleon in the year 1851.¹⁹⁵ During this time, the Conseil drafted all legislative bills and all amendments suggested by the legislative assembly; no bill or amendment could be discussed by the legislative assembly without the prior approval of the Conseil. But after 1870, its role was limited to give advisory function for the drafting of legislations only when it was required by the concerned government organs and the legislative assembly was given the right to initiate and discuss bills without prior examination by the Conseil. At present day, this body ascertains the existence of a legislative provision and its meaning of specific legislative text. As it is indicated in the constitution the Council of Ministers need to consult with the Conseil before it enacts Ordinances and Government Bills.¹⁹⁶ This role of the Conseil in the legislative process is a valuable aid to the government both in insuring the correct legal form of bills and bringing to the attention of the government any inconveniences or illegalities that the text may contain.

¹⁹³ Id at 114.

¹⁹⁴ While France is a civil law country and there is no formal rule of stare decisis, lower courts follow the jurisprudence constante of the Conseil d'État. The major decisions of the Conseil d'État are collected into books and commented by academics; the official site of the Conseil carries a list of comments on important decisions. The interpretation of points of law forms the Conseil's doctrine.

¹⁹⁵ 36F. L. MORTON, Judicial Review in France: A Comparative Analysis In THE AMERICAN JOURNAL OF COMPARATIVE LAW 102 (No.1,1988)

¹⁹⁶ France Constitution Article Art. 37 and 39,(1958).

Secondly, the Conseil also involve in giving advice to the government. With this respect, the areas of giving advice can be divided as mandatory and optional one. In a mandatory manner, this body needs to be consulted in all regulations of public administration matters. The power to make regulations of public administration refers to the rule making power of the executive.¹⁹⁷ In addition, in matters of making decrees and giving advice to the executive branch of the government it has an optional power.¹⁹⁸ This advisory function of this body is explained by some authors as the major function of this body. In addition, the existence of the Council of State as a central advisory organ has also prevented the French jurists from felling the need for consultation of the judiciary in some matters as at that time advocated by the common law lawyers.¹⁹⁹

The third role of the Conseil is related to its judiciary function. In its early days, the Conseil's role as a judiciary was at its infant stage. The recognition that the citizen injured by an illegal administrative act should have remedy led to the development of a section within the Conseil into a court which has a definite jurisdiction in administrative suits.²⁰⁰ Rather than the whole section of the State Conseil, it is this section which is known as a special administrative court that has a final say on all administrative controversies. Despite the existence of such a centralized administrative court system, there are exceptions to this rule. As a result of special statutory provision, the ordinary courts have the entire control over the matter of expropriation or the exercise of the right of eminent domain. In addition, arrests made by the administration are also under the control of the ordinary courts as a result of the penal code.²⁰¹ In some cases, there may be some confusion as to whether a case should be heard before an [administrative](#) or judicial court, in which case the court of jurisdictional disputes, or *tribunal des conflits*, sat by an equal number state councillors and

¹⁹⁷ JOHN BELL, A French Lesson in Judicial Review in OXFORD JOURNAL OF LEGAL STUDIES 144 (Oxford University Press No. 1, 1982).

¹⁹⁸ Id.

¹⁹⁹ Freedman, supra note 86, at 134.

²⁰⁰ Id.

²⁰¹ Burt, supra note 5, at 222.

suprem court justices and chaired by the Minister of Justice is convened to decide to whom the matter shall be vested.²⁰²

The litigation role of the Conseil of State can be seen further as an original and appellate jurisdiction:²⁰³In its original jurisdiction the Conseil of States hears cases against decisions of the national government which includes [decrees](#), regulations issued by ministers, decisions by committees with a national competency as well as recourses pertaining to regional elections. By doing so, it renders final judicial review over almost all acts of the executive branch. The Conseil of State examines the conformance of regulations and administrative decisions with respect to the Constitution, higher administrative decisions, the general principles of Law²⁰⁴, [statute](#) law, international treaties and conventions.²⁰⁵ As it is stated above the Conseil has full latitude to judge on the legality of any decision from the [executive branch](#), except for the very narrow category of "acts of government" where it judges itself incompetent.

The Conseil itself has judged that such restrictions include acts that cannot be separated from the [foreign policy](#) of [France](#) and acts of political matters.²⁰⁶ Political matters are defined as which are performed by the president in carrying on the relations of the executive with the other governmental authorities and which relates to the carrying on of the war of diplomatic relations, and to domestic peace and tranquility.²⁰⁷ On the other hand, the Conseil of State has [appellate](#) jurisdiction for local elections decisions from any of the 37 administrative courts.²⁰⁸ It has final appeal jurisdiction for decisions originating from any of

²⁰²Id.

²⁰³ Id.

²⁰⁴ The general principles of law are principles that are not found in any statute but derive from the spirit of the body of law; they are discovered by the Conseil and thus made into [case law](#)

²⁰⁵ Bernard, supra note 88, at 22.

²⁰⁶ Id.

²⁰⁷ Burt, supra note 5, at 227.

²⁰⁸ Id.

the eight courts of administrative appeal, meaning that it hears cases in which the plaintiff argues that the court of appeal ignored or misinterpreted law.

In this system, the most important grounds for individuals to complain against the decision of the administrative branch of the government are action for damage under the public law of liability and for *ultra vires*.²⁰⁹ In these cases, the type of gravity of the act, the relief available and the power of the judge vary considerably. The plea of *ultra vires* is an extraordinary petition in which the suit is made against the act for the purpose of seeking for annulment of the illegal act.²¹⁰ On the other hand, on the case of public law liability the suit is against individual for the purpose of being compensated for the damage inflicted.²¹¹ The past decisions of the Conseil of state shows that there is an excess of powers when an administrative authority encroaches upon the competence of some authority, whether that other authority be the legislative, judicial, or another administrative authority. It also extends to the case when an administrative authority, even when acting within its competence and following the necessary formalities, use its discretionary power for the purposes other than those for which the power was granted.²¹²

The remedy for review for excess of power also differs considerably in its character and effect. As part of judicial review function, administrative courts may review and amend the decision complained of, even if this involves the consideration of questions of fact and expediency. However, the situation may be different when review is made to it on the ground of excess of powers. In this case, the Conseil of State may simply annul the act complained of and may not amend it or substitute another decision for the one appealed from, and will necessarily consider questions of law almost alone.²¹³

²⁰⁹ Freedman, *supra* note 86, at 140.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Burt, *supra* note 5, at 230.

²¹³ *Id.* at 232.

Moreover, what is peculiar to the administrative judges of France is that they aren't independent as judges of the ordinary courts found in the country. They don't possess the same tenure as the ordinary court judges. They are all appointed and may at any time be removed by the president of the republic.²¹⁴ By contrast, U.S. Supreme Court judges are appointed for life, and serve an average of fourteen years.²¹⁵ The reason given for such tenure is that it is believed necessary, in order that the administrative judges may have the necessary knowledge of administrative affairs, that they be continually engaged in active administrative work. Therefore, the administrative courts are at the same time administrative councils, which are being continually called upon to advise the administration; and it is felt in a country like France, where the belief in the necessity of administrative centralization is so strong, that it would be unwise to relax the usual administrative control over the members of the administrative councils. Even if it is difficult to believe that the reason is a satisfactory one, in practice their weakness of tenure over against the administration does not appear to have had any appreciable influence on their decisions.²¹⁶

This trend followed by France has its own advantage and disadvantage. To begin with adding a new perspective to the working condition of the Conseil can be taken as the benefit of such a system. On the other hand, it is also can be criticized as its lack of continuity since the judges are changing within a short period of time. This kind of tenure limitation over the administrative judges is the peculiar feature of the French system and also even different from Germany which have the same administrative legal tradition. Moreover, this limited tenure of the judges can also be seen as one defect in the independence of the administrative judicial system.

²¹⁴ *Id* at 224.

²¹⁵ Morton, *supra* note 100, at 99.

²¹⁶ Burt, *supra* note 5, at 224.

The other important issue that needs to be raised in connection to judicial review in this country is its Constitutional review mechanism. In this system seeing into all constitutional matters is entrusted to the *Conseil Constitutionnel's* or Constitutional Council. The 1958 constitution provides a provision for the establishment of the council for interpreting constitutional matters. Until the year 1970's, the Constitutional Council function was much more limited than what is existed in the present time. It was limited to the following two matters: The first was it was intended to protect the new executive power from parliamentary usurpations. Secondly, it was also entrusted with the responsibility to investigate cases of alleged voting irregularities. The turning point which had the final end result of broadening the power of the council occurred in the year 1970's.²¹⁷

The first was, prior to 1971 the *Conseil Constitutionnel* had almost no role in protecting civil liberties and individual rights. Then in a 1971 the counsel struck down a government bill that seriously restricted freedom of political association.²¹⁸ Because of this turning mark, in its subsequent decision the Counsel starts to be an active protector of civil rights. By 1987, "fundamental rights" accounted for forty percent of the Counsel's annulment of ordinary laws. Because of the importance it has the 1971 decision is known by some as the "Marbury v Madison of France,"²¹⁹ The second scenario also occurred in the year 1974. During this year a reform that extended its authority to rule on the constitutionality of a law upon petition by any sixty members of the National Assembly or the Senate was promulgated.²²⁰ Prior to this, a law could be referred to the *Conseil Constitutionnel* by only four officials: the President of the Republic, the Prime Minister, the President of the National Assembly, and the President of the Senate. Since all four were usually members of the governing majority party/coalition, they were unlikely to challenge the validity of their own legislation.²²¹ Because of this reform in addition to broadening its power and involve in law making

²¹⁷ Morton, *supra* note 100, at 99.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 90.

²²¹ *Id.* at 91.

process, opposition political parties start to get a ground for challenging the government and bringing their issue to the Counsel.

At present day, the Council has two main areas of function. The first one is supervision of both [presidential](#) and [parliamentary elections](#), and ensuring the legitimacy of [referendums](#).²²² They issue the official results, they ensure proper conduct and fairness, and they see that campaign spending limits are adhered to. The Council is the supreme authority in these matters. The Council can declare an election to be invalid if improperly conducted, or if the elected candidate used illegal methods, or if he spent for his campaign over the legal limits.

The second area of Council power is to rule on whether proposed statutes conform to the Constitution, after they have been voted by Parliament and before they are signed into law by the President of the Republic.²²³ The Council can declare dispositions of laws to be contrary to the [Constitution of France](#) or to the principles of constitutional value that it has deduced from the Constitution or from the [Declaration of the Rights of Man and of the Citizen](#). It also may declare laws to be in contravention of [treaties](#) which France has signed, such as the [European Convention on Human Rights](#).

The examination of the laws by the Council can have a mandatory and optional manner. Bills which fundamentally affect government, treaties and the rules governing parliamentary procedures are expected to be mandatorily to be reviewed by the Council.²²⁴ On the other hand, in the case of other statutes, seeking the oversight of the Council is not compulsory. However, the president of the Republic, the president of the Senate, the president of the Assembly, the [prime minister](#), or 60 members of the National Assembly, or 60 senators can submit a statute for examination by the Council before its signing into law

²²² France Constitution Article 58, 59 and 60,(1958).

²²³ Id.

²²⁴ Id.

by the President.²²⁵ The decisions of the Council are binding on all authorities. In addition, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the *Conseil d'État* or by the *Cour de Cassation* to the Constitutional Council within a determined period.²²⁶ It is only after such matter is resolved by the Counsel that the court proceeding continues.

2.2.2. Judicial Review of Administrative Actions in Germany

Before the broke down of the old German kingdom and holly imperial in the year 1806, administrative matters in Germany were taken care of by the royal imperial courts.²²⁷ Establishment of this kind of courts in this time was a good thing, these courts were not effective enough to give guarantee to citizens in their abuse by the administration. This is mainly because the most important member of the empire enjoyed a privilege against these courts. To the worst, these Courts were destroyed during the year 1806 and individuals were left at the mercy of the state.²²⁸

During this time, a modified absolutism of the princes prevailed in all the most important states of Germany. Bringing the issue of judicial review for the purpose of protecting the rights of individuals from the possible abuse of administrative agencies was unthinkable. The most notable example that can be mentioned in the protection of individual right in this time was the formulation of "Fiscus theory".²²⁹ Based on this theory, the state was regarded as acting in two different capacities: on the one hand it met the citizen as a sovereign and on the other it acted as an equal partner and on equal terms with the citizen and it was subjected to the same laws. For the betterment of this situation, there was a constant

²²⁵ France Constitution Article Art. 54-60, (1958).

²²⁶ *Id.*

²²⁷ <http://www.germanlawjournal.com/article.php?id=726>(accessed on November 26).

²²⁸ *Id.*

²²⁹ HANS G. RUPP, Judicial Review In THE FEDERAL REPUBLIC OF GERMANY IN THE AMERICAN JOURNAL OF COMPARATIVE LAW 233 (No.1, 1960).

pressure the country face from a number of German scholars so as to change the developed rights and duties of the estates by modifying and extending them to all citizens. In addition, the Country also started to be influenced by the western ideas of the separation of powers and democratic constitutions which came to prevail over the old fashioned estate constitutions of most of the countries of the world.²³⁰

In Germany, like France, the well founded notion of the separation of power doctrine was taken as the base for choosing the relationship that existed between the administrative agencies and courts. Therefore, there was a strong holding that an administrative matter needs to be taken care of fully by the administrative system itself. Just like France, to make this possible a perfect appeal from the decision of the subordinate authorities to the highest was provided. At the beginning, even if it seems that it can have the final end of jeopardizing individual rights, this wasn't the case. For the administrative authorities in their higher instances were so organized as to ensure to the individual almost the same guaranties on imperial action as were to be founded in the Courts.²³¹ When, however, the absolute monarchy was changed into the constitutional monarchy as of the revolution of 1848 all this was changed. The highest administrative authorities and the ministers became partisans rather than the representatives of an imperial crown.²³² As all of the political parties were essentially social parties, the danger became very great of the partisan application of the administrative law in the interest of some particular social class.

Because of this factor, the need for judicial control over the administration was becoming a necessity. However, the question was on choosing on its type: Ordinary courts and special courts. Different trends were chosen by different states of Germany. For instance, Prussia chose ordinary courts for this purpose. On the other hand, Baden chose special court system

²³⁰ 3HEINRICH NAGELM , Judicial Review in Germany In THE AMERICAN JOURNAL OF COMPARATIVE LAW (No. 2,1954).

²³¹ Burt, supra note5, at 240-241.

²³² Id.

to resolve the problem.²³³ Nevertheless, this lack of uniformity starts to settle upon the establishment of the empire. The imperial law organizing the courts maintains in theory the non-interference of the judiciary branch of the government on the decision of the administrative organ and goes for the establishment of special administrative courts. Among other things these special administrative courts were created as a means of protecting citizens against the power of administrative agencies.

Based on the principles evolved by these courts, administrative acts could not be reviewed as long as the agencies kept themselves within the scope of their discretion. As an exception, arbitrary acts were subject to review. But the problem of protecting the citizens against arbitrary acts of legislation was not discussed and remained unsolved.²³⁴ It seemed to be inconsistent with the position of the prince that the laws should be subject

to judicial review. In addition, at the time there was no established hierarchy of law which states that one law had a higher rank than another which served as a base for Constitutional judicial review in most Countries of the time.²³⁵ Because of such understanding during the time the constitution was regarded as any kind of law and the most important parameter for exercising judicial review miss from the country's legal system.

In the days of the Bismarck Constitution (1871-1918) also there was a well accepted presumption that the law concerned had been enacted in the manner prescribed by the Constitution and its content also conformed to the Constitution.²³⁶ So there was an understanding on the irrelevance of reviewing statutes in light of the constitutional provisions. Just like its predecessors, the Weimar Constitution of the 1919 also did not introduce any progress. This is mainly because the previous thinking that regards the Constitution like all other statutes continued to exist. However, during this time some

²³³ Id at 242.

²³⁴ Nagelm, supra note 135, at 234.

²³⁵ Id at 234.

²³⁶ Id at 235.

progresses were reached in the general understanding on the scope of judicial review. There was unanimity on three points: the judge had to review whether a statute had been promulgated correctly; whether a statute of a single state was consistent with the law of the Empire; whether a legislative act was consistent with the law authorizing its enactment.²³⁷ But with regards to the rest good reasons were presented both for and against judicial review.

This attitude on judicial review started to change after the downfall of the empire. In the year 1925, in a leading case decided by the then highest German court, *the Reichsgericht*, in a civil action, it was finally settled that the courts had the power to declare federal and state statutes inapplicable on constitutional grounds.²³⁸ Another big historical event also came together with the enactment of The Bonn Constitution of 1949. This is mainly because by rectifying the past mistakes the constitution establishes the hierarchy of laws by making itself at the top. In addition, this constitution also established a constitutional court and it expressly mandated this court to entertain all constitutional matters.²³⁹

When we come to the present day situation of the country we find that the judicial system of the country is comprises of three types of courts. The first is ordinary courts, which are found in numerous number and it deals with [criminal](#) and most [civil](#) cases. The second is specialized courts which are mandated to hear cases related to [administrative](#), [labour](#), social, fiscal, and [patent law](#). The third one is Constitutional courts which are entrusted to the task of entertaining all constitutional matters of the country. The [Federal Constitutional Court](#) or *Bundesverfassungsgericht* is the highest court dealing with constitutional matters and has played a vital role through its interpretative rulings on the [Basic Law](#). For the purpose of this resarch emphasis will only be given to Constitutional and administrative courts of this country.

²³⁷ Id at 237.

²³⁸ Rupp, supra note 134, at 31.

²³⁹ Nagelm, supra note 135, at 239.

As it is stated above the specialized courts under this country are established for five distinct subject areas: administrative, labour, social, fiscal, and patent law. The German administrative courts consist of local administrative courts, higher administrative courts, and the Federal Administrative Court. Just like the case of France the most important bases for these administrative courts for reviewing the decisions of the administrative branches of the government are compensation for the liability of the public authority and on the ground of *ultra vires*.²⁴⁰ Based on this, individuals can seek compensation from the government for any harm caused by incorrect administrative actions by officials or even has administrative acts overturned. On complaint filed by the individual concerned, the administrative court decides whether the administrative agency has acted within its statutory power and of course within constitutional limits. In addition, Art. 19(4) of the constitution also provide that any person, whose rights have been violated by public authority, shall have recourse to a court.

Despite the existence of special administrative courts, in this country also there exists an exception to for the ordinary courts to exercise some issues which has an administrative character. For example, Like France individual liberty is protected against the administration by the code of criminal procedure. So a person who has been arrested can bring his case to the ordinary courts.²⁴¹ Other imperial laws also have provided in special instances for special administrative courts.²⁴²

This Constitutional court was established in the year 1951 by having it origin from the 1949 constitution. The scope of the jurisdiction of this court is also dealt in this document with an exception to the details of its organization which is left to the legislator. Since this court has a constitutional origin in order to abolish it there is a need for constitutional amendment. In

²⁴⁰ *Id.*

²⁴¹ Burt, *supra* note 5, at 244.

²⁴² *Id* at 243.

addition to its establishment in the Federal level, it is also organized in the State level which is autonomous both administratively and financially.²⁴³ At the Constitutional level this court is entrusted with entertaining all constitutional matters. In addition, it is entrusted with the task of defending the Constitution against violation by legislative, executive, and judicial powers since Article 20(3) of the constitution stipulates that all the three branches of the government are bound directly by the constitution. Its interpretation of the constitutional document is also final and binding on all departments of government. But this court does not review the executive orders issued by the Federal or State Governments, which is left to the administrative courts below.

Unlike the [United States Supreme Court](#), the Constitutional Court of Germany just like what is practiced in France, it does not hear final appeals. This approach has one great advantage when it is compared with the United States decentralized approach. Since the constitutional question is not raised by an appeal, the Federal Constitutional Court is never tempted to take a case only because it feels that it should be decided otherwise on its merits. In other words, despite the fact that the court want to help "the poor widow," the Court cannot do so unless the case presents a clear constitutional issue, because its jurisdiction covers only the question whether a statute federal or state violates the Federal Constitution.²⁴⁴

When we see the scope of the jurisdiction of this Court we can easily understand that it has a broader jurisdiction. In addition to determining the meaning of the Constitution it serves as an organ for conflict resolution for the federal setting. The first unique jurisdiction this court has is entertaining constitutional amendments passed by the Parliament. When this kind of cases submitted to it, the court needs to see whether this amendment is compatible with the principles of the basic law. In addition, the court also has power to entertain disputes between the federal and state governments. In a similar manner, Federal institutions are also entitled to bring internal disputes over competences and procedures before the court. Moreover, if internal disputes over competences and procedures arise in

²⁴³ Id.

²⁴⁴ Rupp, *supra* note 134, at 34.

case of the working of the parliament the federal government may bring the case before the court. Besides to these, violations of election laws also can be brought before the court by political institution or any involved and the constitution granted this court the power at the extent of prohibiting a political party.

In addition, the other most important achievement of the Bonn constitution is its recognition of many human right provisions in a much better way than the previous constitutions.²⁴⁵ For its enforcement, statute provided a mechanism for individuals to access the court. Based on this mechanism, any person may apply directly to the Court to have it declare a federal or state statute unconstitutional on the ground that it impairs the civil rights of the petitioner. The complaint must be filed within one year after the statute has come into force, and the Court will consider complaints only if the petitioner can establish that he personally and directly is impaired in his rights by the statute.²⁴⁶

Finally, any regular court which has doubts about whether a law in question for a certain case is in conformance with the constitution may suspend that case and bring this law before the Federal Constitutional Court.²⁴⁷ Under this type of procedure the constitutional question is directly referred to the Federal Constitutional Court by the trial judge without an intermediary. After the decision of the Federal Constitutional Court has been handed down, the court which had certified the question to the Constitutional Court and before which the case is pending, resumes proceedings and renders judgment. The latter may eventually be appealed but never on a constitutional ground, since the constitutional question has been settled finally by the Federal Constitutional Court, which reviewed it on all possible grounds, not only those raised by the court below.²⁴⁸ Finally, request for constitutionality can be made to the court by different parties. As it's indicated in the constitution, this can be done by lower courts, by the Federal Government, state

²⁴⁵ Id at 36-42.

²⁴⁶ Id.

²⁴⁷ Id.

²⁴⁸ Id at 34.

government, one third of the Bundestag or upon constitutional complaint by an individual petitioner.²⁴⁹

Chapter Three: Judicial Review of Administrative Actions in Ethiopia

- **Introduction**

²⁴⁹ Basic Law for the Federal Republic of Germany, Article 100(1) and 93, (1949).

This chapter is devoted to Ethiopian experience in judicial review of administrative actions starting before the coming into effect of a written constitution until the present day. In doing so, the country experience in pre 1931 period and in the 1931, 1955, 1987 and 1995 constitution will be seen. In this part, since the concept of judicial review highly connects with limited government, democratization and modern government the research tries to touch upon the existed traditional set up in light of these concepts. In connection to the present system, a deep analysis will be made on the power of the House of Federation and courts with this respect. Finally, a section will also be devoted to the analysis of the draft administrative law. In this section an effort will be made to enlighten the readers on the general ideas incorporated in the draft law by reserving the deep analysis for the issue of judicial review of administrative actions.

3.1. Judicial Review of Administrative Actions in pre 1931 period

In the years before 1974, Ethiopia was ruled by monarchs. Before the centralization of the country finalized by Minilik II, there was a high decentralization prevailed in the country. Different localities were ruled by their own kings by preserving the title of “king of kings” to the one who was considered as the ruler of all. During this time, a person with this title considered as the elect of God who had a blood tie with king Solomon of Jerusalem. His power extends to everything: to the land, persons and property alike. Just as his authority was unlimited and unquestionable, so was his function multi faceted.²⁵⁰ He was regarded as the head of the executive, the ‘fountain of justice’, the agent of change, the law giver, the commander in chief and the defender of the Ethiopian Orthodox church.²⁵¹ Two foreign writers also described the situation of this time as “the kings of Abyssinia are above laws and they are supreme in all causes ecclesiastical and civil, the land and persons are equally theirs property and their inhabitant of the kingdom is born their slavery.”²⁵²

²⁵⁰ ABERRA JEMBERE, AN INTRODUCTION TO THE LEGAL HISTORY OF ETHIOPIA 1434-1974 167(A publication of the African studies center, Leiden, The Netherlands, 2000)

²⁵¹ Id.

²⁵² JAMES C.N. PAUL AND C.CLAPHAM,ETHIOPIAN CONSTITUTIONAL DEVELOPMENT 287(Hailselasiye University,Vol.1)

At this juncture it is good to mention that in this period Ethiopia had no experience of written constitution. The source of the above power of the emperor together with how things should be ruled in the country came from the sophisticated traditional unwritten constitution which also included the idea of the monarchy, an imperial court system involving the monarchy, church and nobility in an intricate power relationship.²⁵³ Abera Jembere also state that the basis of all these powers were not constitutional provisions but conventions based on “divine kingship”.²⁵⁴

Just like what was experienced in many other countries, in this kind of system the rulers were made above the law, it was impossible to know the limits of their power and to question their decisions. Since Ethiopia also shared the same experience under the monarchical rule, it was difficult to find concepts like rule of law, due process of law, separation of power and the like, which justifies the existence of modern government and administrative law in general and judicial review in particular. But it’s also good to remember that despite the lack of these concepts and the existence of an absolute form of monarchy, during the time there was some avenues open for citizens in case their rights were infringed.

The first one was, during the time one of the characteristics of the traditional administrative system was its complete fusion with the rest of the administration of the government.²⁵⁵ In addition to performing other administrative tasks, an administrator in each level of administration had the duty of adjudication. The jurisdiction of this administrative unites depends on the gravity of the case. Meaning simple matters were handled by lower administrative units and serious matters by those who were in higher rank. In addition, the one with the higher rank also hear appeal on the decision of the lower administrative

²⁵³ FASIL NAHUM, CONSTITUTION FOR THE NATIONS: THE ETHIOPIA PROSPECT 17(The Red press., Inc, 1997).

²⁵⁴ Aberra, supra note 1.

²⁵⁵ 1GIRMA Wolde SILASSIE(Dr.), MATERIAL ON ADMINISTRATIVE LAW 484(Hailselasiel University,1974).

personnel. The case could then appeal to the Afe- Negus, the chief justice, who exercised universal jurisdiction over the territory under imperial control.²⁵⁶ Even if the Afe-Neguse was the only full time judicial organ, from this we can understand that there were some mechanisms available for citizens in case their rights were infringed.

For those who were dissatisfied by the decision of the top administrative persons, the emperor was available to hear appeal or review the decision made by lower administrators. During the time, the emperor was considered as the ultimate source of justice who can reverse any decision. Expecting a fair decision from this person may seem contradictory since he enjoyed the absolute power over his subjects. However, there was a traditional belief that the one who is an elect of God do justice on their claim. On the same manner, those who were in power also at some extent thought that they are duty bound to decide fairly to their subjects. On this regard the Fetha Negast also provided that the king shall judge in the middle of his people with equality and shall not be partial neither towards himself and other, nor towards his son or his relative in any way which brings about justice.²⁵⁷ For performing this duty, the emperor has a “zufan chilot” or “Emperor’s court”. By accepting petition from those who are aggrieved, the emperor did justice in person. Professor Sedler explain this institution as the Chilot represents the exercise of the sovereign prerogative to do justice and as its source the residuum of justice that, it is submitted, remains neither in the sovereign nor with standing the establishment of courts.²⁵⁸

However, the discussion made above shouldn’t lead the readers to the conclusion that in the pre 1931 period individuals had a justice system which was adequate enough to redress any infringement from the administrative organ. Rather the discussion should be understand as even if there was lack of modern form of government and established means for

²⁵⁶ Id.

²⁵⁷ Fetha Negest (Aba Paulos Translation, Faculty of Law) 273, (Chap.XLIV,Sec.IV)

²⁵⁸ Aberra, supra note 1.

entertaining citizens grievance, because of the deep down commitment to justice there were some avenues available for citizens.

Among the many reasons forwarded for the lack of such kind of systems lack of a modern form of government is mentioned as one. For the first time a modern form of government was initiated by emperor Thewodros. The emperor made a huge progress in centralizing the country under his authority by using force. He also tried to create a modern public administration by distributing authority without demanding his position.²⁵⁹ In addition, he also turned chiefs into salaried officials who were dependent upon the throne. For the first time, he also organized a territorial police force and a regular army which had bound to preserve the territory of the provinces. In addition, filling the lower level administrative posts with imperial as well as provincial personnel was also accomplished.²⁶⁰ All this progress shows how the country started a modern form of government under the leadership of this progressive man. However, a strong resistance from internal and external forces prevented his modernization progress and cost him his life.

After the period of Emperor Thewodros a noticeable attention for modernization was made during the reign of Emperor Minilik. By giving a continuation to what was started by Emperor Thewodros, he was capable of accomplishing the unification of the country in a relative term. In addition, he also performed in a better way in modernizing the country. New progresses in the area of health, education, internal and external commerce, public transportation, postal, telephone and telegraph were took place.²⁶¹ Most importantly, in the year 1908 the first ministerial frame work was organized.²⁶² This progress was recorded as a big step towards such modernization end. However, the effectiveness of these ministers was limited by four factors.²⁶³ The first one was the offices weren't function in there full

²⁵⁹ Girma supra note 6, at 38.

²⁶⁰ Id.

²⁶¹ Id at 39.

²⁶² 2JAMES C.N PAUL AND C.CLAPMAN, ETHIOPIAN CONSTITUTIONAL DEVELOPMENT 320(1967).

²⁶³ Id at 323.

force because of the traditional custom of these higher officials in hanging in the palace or attending one of the frequent public festive or ceremonies. Second, the emperor also found it necessary to appoint conservative older men for standing as minister and liberal educated younger men as directors of department under them. This lag the possible success that can be attained in this modern government initiation because of a constant friction among the conservative ministers and the liberal department heads. Thirdly, because of the underdeveloped condition of the country, the ministers' effectiveness was limited to the capital city. Lastly, even if the mere establishment of this ministerial frame work was one achievement, those in position couldn't deliver judgment independent of the emperor.

From the discussion made its easy to understand that in this period initiation for modern form of government were made. However, in general wording the major problem attached to this system was inability of these initiatives to replace the well entrenched traditional form of administration. In this time, the rulers were taken as having a blood tie with Christ so they were regarded as the law and they weren't expected to base their decision according to the law. It is also logically follow that in this kind of system the notion of limited government was unthinkable. Even the Emperor's power as the final appellate and reviewable body can't be taken as an indicator for the existence of rule of law or the availability of judicial review of administrative actions. This is because in rendering decision, first the concept of the separation of power was unknown and the limits of the power of those in administration weren't established. Second, the emperor wasn't expected to refer to the law while he exercised his power to review or appeal. So it is difficult to construct a correlation between these powers of the emperor which based on his good will with the commonly understand judicial review mechanism. Finally, since there is a strong connection between the existences of modern administration system with the existence of judicial review, it is good to point out some of the problems for having such a system during this time.

In the wording of Girma the reasons for the lack of a modern form of administration in this time can be summarized into four points.²⁶⁴ The first one was the existed monarch system which was static in its own way prevent the penetration of the western idea. Secondly, the traditional belief also prevented the emperor from delegating some of his power because for the society the emperor was absolute and delegation of his power will lower his position. In addition, the physical condition of the country which was high mountains and deep cut valleys together with heavy rains also contributed for the lack of modern form of administrative system in general. Lastly, the lack of fixed capital was also taken as a hindrance in the development of such a kind of modern system.²⁶⁵

3.2 Judicial Review of Administrative Actions in the 1931 Constitution

As it is stated in the previous section the period before the 1931 constitution is characterized as the era of unwritten constitution. In the year 1931, during the reign of emperor Haileselassie the first written constitution came into view. For drafting the Constitution the 1898 Meiji Constitution of Japan was taken as a model.²⁶⁶ This constitution was aimed to free the state from crippling power struggle of the traditional constitution; thereby making the monarchy the super-power vis-à-vis church and nobility.²⁶⁷ So from this, one can make an easy guess that by taking this constitution as a model the 1931 constitution couldn't be an instrument for limiting the power of the emperor and to place modern constitutional principles like judicial review.

²⁶⁴ Girma, supra note 6, at 31-33.

²⁶⁵ Id.

²⁶⁶ Fasil Nahom, supra note 4, at 23.

²⁶⁷ Id.

One can ask why the enactment of a constitution became important during this time. The answer for this can be summarized into two: For modernization and centralization.²⁶⁸ By using the constitution as an instrument the emperor tried to break the power of the regional lords by constitutionally designing a centralized system more than ever. As part of this mission, the creation of administrative units headed by appointed chiefs, the establishment of a standing army, and a ministerial frame work were incorporated.²⁶⁹ In addition, the emperor was also managed to put himself above any decision made by the government. Moreover, Art. 6 of the constitution also provided that the supreme power in the country rests in the hands of the emperor and he was made responsible for ensuring the exercise thereof in conformity with the established law.

In addition, the enactment of the 1931 constitution also used as an instrument for meeting the strong felt need to modernize the country. Around this time, the country joined the league of nation over the objection that the country wasn't a modernized one. The prevailed slave trade and lack of respect for human dignity was mentioned as reasons for such lack of modernity.²⁷⁰ So by enacting this Constitution the emperor wants to prove to the whole world that his Country was in the road of modernization. Even if the enactment of the Constitution by itself taken the country in a new positive road, among the reasons that initiated the making of the Constitution none of them were done to meet the needs of the citizens of the time.

One of the most important achievements of this constitution was the establishment of the parliament which consisted of two chambers: Chamber of the Senate and Deputies.²⁷¹ The members of the Senate were appointed by the emperor among nobility and the local chiefs.²⁷² And until the people were in a position to elect themselves, the members of the

²⁶⁸ Id at 18.

²⁶⁹ Id at 20.

²⁷⁰ Id at 19.

²⁷¹ Ethiopian Constitution of 1931, Art.30.

²⁷² Id at Art.31.

Deputies were decided to be chosen by the nobility and the local chiefs.²⁷³ In the constitution the emperor was given the power to establish the two deliberative chambers and in his will he could also dissolve the Chamber of Senate.²⁷⁴ From this it's easy to grasp that no attention was given to the need for representing the people in the law making body.

The main function of these deliberative chambers was giving advisory function.²⁷⁵ Their power on making of laws was restricted on making discussion. They couldn't neither refuse to deliberate on proposal sent to them nor initiate legislation themselves. As it is put under Art. 34, no law may be put into force without having obtained the confirmation of the emperor.²⁷⁶ Even if all things were passed through the emperor the establishment of this parliament was a good beginning since it opened the door for further development.

This Constitution also established the executive branches of the government. By using the pretext that the time wasn't yet ripe the ministers weren't vested with substantial powers.²⁷⁷ In addition, since the prime minister office wasn't organized till 1943, "the keeper of the seal" acted as first among equals. In connection to the executive power, the emperor was also given the absolute power for organizing and regulating all administrative departments.²⁷⁸ He also given the power to appoint and dismiss the officers of the army as well as civil officials, and to decide as to their respective changes and salaries.²⁷⁹

²⁷³ Id at Art. 32.

²⁷⁴ Id at Art. 6 cum Art.8

²⁷⁵ Fasil Nahom, supra note 4, at 22.

²⁷⁶ Ethiopian Constitution of 1931, supra note 22, at Art.34.

²⁷⁷ Id at Art 12.

²⁷⁸ Id at Art.11.

²⁷⁹ Id at Art. 64

With respect to the judiciary branch also the constitution provided two sets of judiciary line: Ordinary courts and special administrative courts.²⁸⁰By taking the jurisdiction of adjudicating administrative matters from the ordinary courts, the constitution established administrative tribunals. Just like the other branches, the judiciary was also made under the close supervision of the emperor and he was the one who appointed the judges among those that had experience and their tenure was also depend on his pleasure. ²⁸¹Moreover, at the apex of the court system there was the Emperor's Chilot, where cases could be reviewed by the monarch in person when necessary.²⁸²

However, since every decisions made by the three branches needed to get his final confirmation it was difficult to question those decisions again in the court he adjudicated in person. As a continuation of what was experienced in the pre 1931 period in this constitution also there was lack of separation of power. In addition, since in most of the cases the rulers were made above the law, it is difficult to think about the rule of law, due process of law and other manifestations of democratic society. In the same manner, the concept of judicial review was also absent from this constitution.

3.3 Judicial Review of Administrative Actions in the 1955 Constitution.

The revision of the 1931 constitution was necessitated by the 1952 Ethiopian federation with Eritrean. In this year, the general assembly of the United Nations passed a resolution to unify Eritrea with Ethiopia as one autonomous unit. With regards to their Constitution the problem was the 1931 constitution and the Eritrean constitution were poles apart in their ideologies and conceptions of government.²⁸³ So it was difficult to make an effort in making them to go hand in hand. On the one hand, the Ethiopian constitution was based on the

²⁸⁰ Id at Art.50- 54.

²⁸¹ Aberra, supra note 1,at 169.

²⁸² Id.

²⁸³ Fasil Nahom, supra note 4, at 25.

traditional monarchical society and on the other hand the Eritrean constitution was made based of progressive modern ideas. Because of this, the legal engineering necessary to make the two systems function was an acrobatic feat.²⁸⁴ Therefore, the making of the revision became necessary.

In general terms, this constitution was explained as made on the bases of the principles of the separation of power and check and balance.²⁸⁵ In a better clear way than the previous constitution it includes the power and duties of the three branches of the government. In addition, this constitution was also used as a tool for reaffirming the power of the monarch. Even more, in some aspects his power were broaden than what is provided in the 1931 constitution i.e. policy making, government organization and appointments as well as legislative and military powers.²⁸⁶ But this shouldn't be interpreted to mean that the revised constitution had no progress towards limiting the power of the emperor. In some aspects the constitution managed to provide some limitations on the power of the emperor i.e. the emperor's absolute power over foreign affairs was come under the parliament approval for certain treaties. Some articles were deleted which allowed the emperor to legislate by decree when the two chambers of parliament disagree on important matters and etc.²⁸⁷

Under this constitution also a parliament with two chambers was organized. What is different about this body in this constitution was the members of the Chamber of Deputies were elected by the people.²⁸⁸ This involvement made the citizens to be represented in a high level and introduce a representative form of government. But still all laws made by the parliament needed to get the approval of the emperor. As one manifestation of the inclusion

²⁸⁴ Id.

²⁸⁵ Id at Art.30.

²⁸⁶ Id at Art.26.

²⁸⁷ Paul, supra note 13, at 388

²⁸⁸ The Revised constitution of the 1955, (Neg, Gaz.15th year No.2), Art 93.

of the principle of check and balance the parliament was also given the power to approve the decree made by the emperor.²⁸⁹

With regard to the executive branch of the government also the emperor was found at the top of decision making and provided with the power to determine the organization, powers and duties of all ministries, executive departments and the administrations of the government and appoints, removes, transfers, suspends and dismisses the officials of the same.²⁹⁰ In the previous constitution, the emperor power over the administrative branch of the government was only to establish and regulate but in here the emperor provided with much broaden power over the administrative branch of the government.

Moreover, in article 108 the constitution also stated that the judiciary power vested in courts.²⁹¹In article 62 there independence in conducting trials and giving judgments in accordance to law was also reaffirmed.²⁹²Besides, citizens' right to challenge the acts of every agency of the government except the emperor was recognized.²⁹³What is argumentative about the power of the judiciary was its power of judicial review. By borrowing the supremacy clause from the USA constitution, under Article 122 it was included that the constitution together with international treaties, conventions and obligations to which the country was a party, was to be the supreme law of the empire. All future legislation, decrees, orders, judgments, decision and act inconsistent there with, shall be null and void. Since one of the source of judicial review power for the American judges was the enforcement of this supremacy clause, some argue that the courts had the power to review the decisions of the other organs by also supporting there conclusion by mentioning what is provided in Art. 62 and 108 of the Constitution.

²⁸⁹ Id at Art 92.

²⁹⁰ Id at Art. 27.

²⁹¹ Id at Art 108.

²⁹² Id at Art 110.

²⁹³ Id at Art 62.

However, George Krzeczunowicz argued that by basing on these provisions of the constitution it is difficult to argue in favor of the existence of the power of judicial review. The writer argued that the three branches of the government are united at their top most level in the person of the emperor, whose approval is necessary before any legislation may become effective, who possess ultimate court of appeal as well as serving as the supreme executive. He concluded by stating that it would be pointless and perhaps also inconsistent with the fundamental nature of the Ethiopian system of government, for an Ethiopian court to declare legislation void on constitutional ground.²⁹⁴ Even if its sound to argue on the existence of judicial review on theoretical bases by citing the mentioned provisions of the constitution, it isn't difficult to imagine how difficult making it practical could be since the emperor power in different capacity in the three branches of the government.

The other development before the coming into effect of another constitution in the year 1987 with regards to the issue under point of discussion is the coming into effect of the civil code which devoted some articles on the issue of administrative law. This code consists of Articles that are found between 394-403 which are devoted to such issue. Under article 400 the code made reference to administrative law with regards to prescribing the powers of the bodies referred. In addition, acts performed by the bodies referred to in the chapter in excess of the powers given to them by law or without the observance of the conditions or formalities required by law shall be no effect.²⁹⁵ However, because of what was included in the Constitution and the practical situation existed the coming into effect of these provisions didn't brought any progress in questioning the decisions of the administrative organs.

3.4 Judicial Review of Administrative Actions in the 1987 Constitution

²⁹⁴ Paul, supra note 13, at 388.

²⁹⁵ The Civil Code of The Empire of Ethiopia (Neg. Gaz. Extra Ordinary Issue No.3, 1960), Art., 401.

In the year 1974, by over throwing the reign of the monarchy, a military form of government in the name of “Derg” came to power. This government took the country in a new road by establishing a socialist form of government. The government of this time wasn’t in any rush in making a constitution and till the year 1987 the country was without having any. But immediately after its coming into powers, the government came up with proclamation No 1 and No 2 of 1974 which didn’t regarded as a constitution but was used as a means for abrogating the constitutions of 1931 and 1955.²⁹⁶ In the later years of its time, this government came up with a constitution in the year 1987. This constitution proclaimed the establishment of a unitary and socialist form of government. The constitution also proclaimed the establishment of the Workers Party of Ethiopia (WPE) as the sole political party of the time.²⁹⁷ Since it was the sole political party in the country, obviously this didn’t help the democratization process and this forced the oppositions to go underground and continue armed resistance.²⁹⁸

In addition, the constitution provided that it is supreme and any law or decision contrary to the Constitution have no effect. ²⁹⁹In addition, it also devoted a number of its provisions for human rights of citizens. Moreover, despite the fact that the constitution provided the three branches of the government together with their powers and duties, there were some constitutional provisions that undermine the existence of this principle. One of the branches of government the constitution established was the National Shengo as the supreme organ by having legislation as its primary function.³⁰⁰ Candidates of this organ were nominated by members of the workers’ party of Ethiopia, mass organizations, military units and other bodies so entitled by law.³⁰¹But the election was made by the citizens using universal

²⁹⁶ 1HEINRICH SCHOLLER, ETHIOPIAN CONSTITUTIONAL AND LEGAL DEVELOPMENT: ESSAY ON ETHIOPIAN CONSTITUTIONAL DEVELOPMENT29 (2005).

²⁹⁷ Id.

²⁹⁸ Id at 33.

²⁹⁹ The Constitution of Peoples Democratic Republic of Ethiopia, Proc.No.1989,Art.118.

³⁰⁰ Id at Art 62.

³⁰¹ Id at Art. 64.

suffrage.³⁰² Despite the fact that this organ was endowed with very important powers it had only one regular session per a year.³⁰³ Between its sessions the council of ministers which was the executive organ took its place and performed the function.³⁰⁴

By using its power to establish standing and ad hoc commissions necessary for its activity,³⁰⁵ the Shengo established the Council of State as a standing body.³⁰⁶ Among other things, this body had the power to interpret the constitution and other laws.³⁰⁷ In addition the president of the Country was elected to serve as the president of this council.³⁰⁸ From this we can see the lack of separation of power between the law maker and interpreter since the Shengo was a law maker and its standing body was entrusted with task of determining what the law means.

The council of ministers as the highest executive and administrative organ was also established by the Constitution.³⁰⁹ It comprises of the Prime Minister, deputy prime ministers, ministers and other members as determined by law.³¹⁰ This organ was made responsible to the National Shengo. If it isn't in session the president replaced the Shengo and the executive branch of the government made responsible to the president. In here also the lack of the separation of power become clear when one see the Shengo had one time mandatory session per a year and naturally it follows that in all other times the president became the person that this organ was accountable to.

³⁰² Id at Art.65.

³⁰³ Id at Art.67.

³⁰⁴ Id at Art.90(3).

³⁰⁵ Id at Art.70.

³⁰⁶ Id at Art.81.

³⁰⁷ Id at Art.82(1(b)).

³⁰⁸ Id at Art.81(3).

³⁰⁹ Id at Art,89(1).

³¹⁰ Id at Art.89(21).

Moreover, the constitution also put judicial authority to be vested on the Supreme Court, courts of administrative and autonomous regions and other courts established by law.³¹¹The judges' independence also guaranteed and allowed to be guided by no other authority than that of the law. However, this independence get blurred when one see article (86(1(e)) which mandated the president to ensure the Supreme Court discharge its responsibility.

From the discussion made above it's easy to grasp the point that power was concentrated in the hands of one man by putting himself at the top of the three branches of the government. In addition, the practice also proved that things were far from being democratic and it was difficult to make the human right provisions of the constitution in operation. Besides, the modern constitutional law concepts like rule of law and due process of law was out of imagination since power was concentrated in few hands. So thinking about the existence of judicial review of the administrative action was in general an ideal concept.

3.5 Judicial review of Administrative Actions in the 1995 Constitution

3.5.1 General Remarks

After over throwing the military government, a federal form of government which made ethnicity its base was established. The founding of this form of government was taken as a manifestation for the recognition of different ethnic groups found in the country. Based on the constitution, both the federal and state governments together with their own three branches were established. In addition, a provision for the establishment of a parliamentary form of government is provided. The preamble also recognizes that one of the aims of the

³¹¹ Id at Art.100(1).

constitution is to build a political community founded on the rule of law. Moreover, the constitution also stipulated for the supremacy of the constitution. According to this supremacy clause any law, customary practice or a decision of an organ of state or a public official which contravenes the constitution shall be no effect.³¹² This supreme document also managed to incorporate constitutional principles like rule of law, due process of law, independence of the Judiciary. Besides, two-third of the constitution also devoted to the recognition of fundamental rights and freedoms.

Moreover, in the constitution the establishment of the three branches of government is also clearly provided. As a law making body a bicameral form of parliament is established: House of Peoples' Representatives (HOPR) and House of Federation (HOF). But the involvement of the HOF in the law making body is very limited. From the reading of the constitution one can easily understand that it's only in the constitution amendment situation that the House can be part of the law making process.³¹³ Rather the primary function of the HOF is interpretation of the constitution. This creates the possibility that the House can found itself in engaging in determining the meaning of the constitution as a whole or some of its provision which itself makes in the form of amendment.

In addition, based on the constitution the highest executive power of the federal governments is vested on the prime minister and the council of Ministers. This organ is made accountable to the HOPR. Based on Art 74(2), the prime Minister can nominate for ministerial posts among the two Councils and present them to the HOPR for approval. If the Prime Minister make a nomination for the executive from the HOF one can end up being the member of the law maker and of the same time being part of the implementer. In addition, a member of the HOF can also end up in entertaining the constitutionality of laws or decision

³¹² The Constitution of the Federal Democratic Republic of Ethiopia 1995, Proclamation Number 1 Fed, Neg. Gaz.; year 1, Number 1, Art.9(2) (Here in after referred as FDRE Constitution).

³¹³ Id at Art.105.

which itself make as being part of the executive. These two situations obviously contravene one of the modern constitutional principle which is the separation of power.

Moreover, as per the constitution the judiciary power is vested on courts. By the recommendation of the prime minister, the president and vice president of the Federal Supreme Court judges are appointed by the HOPR's.³¹⁴ Regarding other federal Judges, the prime Minister submits lists of candidates selected by the Judicial Administration Council for appointment to the HOPR's. The independence of the judiciary also recognized. Since the Civil Code which was promulgated in the year 1960 is still in force in addition to what is provided in the constitution the judiciary also can get a legal ground in nullifying the actions of the administrative organs from this law. However, in general wording nullifying on the ground of constitutionally is reserved to the HOF. In the following two sections a discussion will be made on judicial review of administrative actions on constitutionality and other grounds by devoting two separate sections for each.

3.5.2 Judicial Review of Administrative Actions on Constitutionality Ground

The FDRE constitution establishes two federal Houses namely the House of Peoples' Representatives (HOPR) and the House of Federation (HOF).³¹⁵ From the wording of the Constitution it seems that both of these Houses involve in the law making process. However, except the HOF involvement in the Constitution amendment situation the law making power on those matters assigned by the constitution as a federal jurisdiction is given to the HOPR.³¹⁶ Based on Art.62 (1) the primary task given to the HOF is the power to interpret the constitution. In addition, Art. 83(1) mentions that all constitutional disputes shall be decided by the HOF. Entrusting this task to this body categorized the nation together with

³¹⁴ Id at 81.

³¹⁵ Id at 53.

³¹⁶ Id. Art. 55(1).

countries like France that granted such power to a political organ. In addition, when one see the powers and functions of the HOF as it's stated under Art.62 it's easy to notice that most of them make the House to be an active participant of the political process. Among these powers some of them are: to decide on issues relating to the rights of Nations Nationalities and Peoples to self-determination including the right to secession, promote the equality of the peoples of Ethiopia enshrined in the constitution and promote and consolidate their unity based on their mutual consent, find solutions to disputes or misunderstandings that may arise between states and etc.

Even if Ethiopia also opt for a political organ for such task like France the reasons for such decision is different from these countries. According to Art. 62(1) the constitution granted such power to the HOF which is designed as a House for the proper representation of Nations, Nationalities and Peoples. Dr. Fasil Nahom describes the House as a champion of Nations, Nationalities and Peoples of Ethiopia which is vested with powers of great political significance among which interpreting the constitution is one.³¹⁷This is also further explained by the constitution statement of making the ownership of the constitution for these NNPs. So taking an additional step and allow them to ascertain the meaning of the Constitution isn't that much a surprising fact.

In addition to this, during the drafting of the Constitution the drafters had the attitude that empowering the judiciary or a constitutional court may result in unnecessary judicial activism in the process of interpreting vague clauses of the constitution and can also enable judges to put their own preferences and policy choices in first place. ³¹⁸Thus, the framers argued this might result in hijacking the very document that contains the compact between the nationalities' to fit the judges' own personal philosophy. In addition, to avoid the suspicion that the House may lack the expertise to perform the task they go for allowing the House to establish the Council of Constitutional Inquiry (CCI) to provide assistance to the

³¹⁷Fasil Nahum, *supra* note 4, at.59.

³¹⁸ASSEFA FISEHA, *Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation*, IN MIZAN LAW REVIEW, (No. 1, June 2007).

House in its interpretation task.³¹⁹ In this point it is good to ask that Is all kinds of constitutional matters are left to the HOF? In other word Are there any Constitutionality issue left to be handle by Courts? This question is become especially meaningful when one see article 79 and 37 of the constitution. Art. 79 of FDRE constitution states that judicial powers both at federal and state levels are vested in courts. In addition, Art.37 (1) also provided that everyone has the right to bring justicable matter to obtain a decision or judgment by a court of law or any other competent body with judicial power. From the discussion made below an effort will be made to see how this kind of power is shared by both the HOF and Courts.

As it is mentioned above, Art.62(1) of the constitution provides that HOF has the power to interpret the constitution. In addition, Art. 83(1) mentions that all constitution disputes shall be decided by the HOF. However, this isn't clear what types of actions are included in the meaning of constitutional disputes and constitutional interpretation. The constitutional section which talks about this issue under Art 84(2) it only mentions about the interpretation of federal and state laws. In a more restrictive manner the Amharic version confines itself to those federal and state laws made by the law makers of these governments. As per the constitution itself the law making bodies for the federal or states are the HOPR and State Councils, respectively. So this leaves a room for courts to make interpretation of other laws made by other organs through delegation: Regulations, Directives and etc. This kind of formulation of the constitution also goes along with the parliamentary supremacy provision of the constitution.³²⁰ Meaning, since the HOPR is the highest government organ, making laws made by it out of the reach of ordinary courts and entrust it to other organ at some extent makes sense.

The problem in this regard comes together with the enactment of proclamation No. 250 and 251 in the year 2001. In this proclamation, the CCI and HOF is given the power to entertain the constitutionality of Federal and State laws. In the definition part of these proclamations

³¹⁹FEDRE Constitution, supra note 63, Art.62(2)

³²⁰FEDRE Constitution, supra note 63, Art. 50(3).

the definition given to “law” includes Regulation and Directives.³²¹ This means the constitutionally recognized courts power on judicial review of constitutionality of laws made by organs other than the Federal and State law making bodies are snatched and given to the HOF by the above cited laws. Here comes the big question. Can the HOPR make laws for the CCI and HOF? Can Art 84(2) scope be broadened by the legislator? As far as I am concerned the constitution is the source of powers and duties of the institutions that it establishes. Further legislations are needed only for providing detail rules so as to make these established institutions workable but not to broaden there scope. In addition, even if it is said that the HOPR have the power to enact such legislation, in no way that it can come up with laws that have the effect of contradicting the Constitution. Since this laws narrow the courts role which wasn’t intended by the constitution, it is logical to conclude that they are unconstitutional, and at the end they also contradicts courts independence as recognize by the Constitution. When we see the experience of CCI and HOF we don't find a coherent practice in the above controversial issue. To demonstrate this lets see two cases submitted to these organs.

The first case is brought to the attention of the CCI on the year 1996 E.C. In this case the constitutionality of a directive for recruitment of students for being accepted in Jimma Teachers’ College made by Oromia Education Burux is questioned. Such directive is claimed as contrary to Art. 9/1/2/25 of FDRE constitution by depriving blind students whose names mentioned in the case from being accepted in the college because of their disability even if they fulfill all other requirements.³²² In such case the council rejected the case as being outside of its jurisdiction by mentioning the Amharic version of Art. 84(2) of FDRE constitution. The surprising fact with this regard is it has been three years since the Proclamations that make regulation and directions under the jurisdiction of the HOF came into effect.

³²¹ Fedral Negarit Gazeta, Council of Constitutional Inquiry Proclamation No. 250/2001, Art. 2(5) (7th year No.40) cum The House of Federation and the Definition of its powers and Responsibilities Proclamation Number 251/2001, Art. 2(2) (7th year No 41).

³²² CCI decision rendered on 1996 E.C. Unpublished (The translation is mine).

The second case on this subject matter brought to the council in the year 1997 E.C.³²³ In this case Coalition for Unity and Democracy (CUD) make a request to Lideta first instance court to declare the directive issued by the Prime Minister following May 2005 election crisis and it's after math banning demonstrations in the capital for a month. The court refers the matter to the CCI and such council by having the understanding that it has jurisdiction in the case submitted, it declared the directive constitutional.

These cases show us the lack of uniformity in the decision of the council. Even though the constitution declares that among other things any law which contravenes the constitution has no effect, this can be so after such law is challenged and declared unconstitutional by the appropriate organ. So until such time come and such law contested and declared unconstitutional, the proclamations remain valid and the HOF should be the one that has the power of judicial review of constitutionality of primary and delegated laws.

Since judicial review of administrative action is highly connected to protecting citizens from the possible administrative abuse the next important matter with this regard is judicial review of constitutionality of fundamental rights and freedoms. The FDRE constitution devoted two-third of the constitution for recognizing fundamental rights and freedoms. Under the chapter which is dedicated to this purpose it is indicated that all federal and state legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the chapter which talks about fundamental rights and freedoms.³²⁴ On the same token, in connection to the supremacy of the constitution Art. 9(2) state that all citizens, organs of state, political organizations, and other associations as well as officials have the duty to ensure observance of the constitution and to obey it. The big question is- Is it possible in any way to do what the above articles impose with out engaging in the task of constitutional review? In addition to the mentioned constitutional provisions, in answering the question whether courts have jurisdiction or not one needs to consider what interpretation means and, the practice and devote some consideration on how often the

³²³ CCI decision rendered on Sene 7, 1997 E.C. Unpublished (The translation is mine).

³²⁴ FDRE Constitution, supra note 63, Art.13.

issue of fundamental rights and freedoms comes to the view of courts. To connect it to the point under consideration, since the administrative organs makes decisions that affect the day to day life of individuals, the possible abuse they can inflict on fundamental rights and freedoms is high. So there must be an organ which is easily accessible to see these kinds of issues and give protection to citizens.

Tsegaye Regassa correctly argues that enforcement presumes clear understanding.³²⁵ Understanding requires a degree of value clarification. Interpretation as a mode of value clarification precedes enforcement. As such all endeavors to enforce either assumes or involves interpretation. Therefore, the unavoidability of the task of interpretation makes it clear that, for any organ in general and the courts in particular, interpretation task assumed under article 9(2) and 13 of the constitution. In addition a curiosity also may arise how the judiciary can make a decision without first determine the scope and limits of the right without making interpretation.

With this regard Yonatan Tesfaye argues that courts are expected to enforce the provisions of chapter three of the constitution only to the extent that it doesn't engage them in interpretation.³²⁶ He also goes further and argues that if issues of constitutional interpretation arise in the courts in the process of enforcing the constitution, the courts should refer the matter to the CCI. His view on this point boils down to the thought that existed during 1900 which named as "received law".³²⁷ Based on this theory, law is held as fundamental, absolute and immutable. It contained, by implication, the answer to every constitutional question which might be raised in relation to any state or federal statutes.³²⁸ All that was necessary was for the court to apply the appropriate word or clause

³²⁵ TSEGAYE REGASSA, COURTS AND THE HUMAN RIGHTS NORM IN ETHIOPIA: AN OVERVIEW, IN PROCEEDINGS OF THE SYMPOSIUM ON THE ROLE OF COURTS IN THE ENFORCEMENT OF THE CONSTITUTION 112 (Addis Ababa: Birhanina Selam, 2001).

³²⁶ YONATAN TESFAYE FESSHA, WHOSE POWER IS IT ANYWAY: THE COURTS AND CONSTITUTIONAL INTERPRETATION IN ETHIOPIA 140-141.

³²⁷ KELLY HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 537-539 (34ed, W.W. Norton and Company. INC. New York, Wayne State University).

³²⁸ *Id.*

of the constitution, the correct conclusion was presumably self-evident to any competent judge. Bascoe Ponal in 1930 called this theory the “Slot- machine theory of law.³²⁹ By reflecting the same thought as this one what Yonatan did was, like many followers of this theory, he denies the unavailability of interpretation in any stage of handling a case by courts. In addition, this theory since it give too much attention on the mechanical aspect he wrongly denies judicial discretion and makes the duty of a judge an act which can be performed by any who knows where such law is written.

Despite such analysis, with respect to the fundamental rights and freedoms courts have a role of entertaining its constitutionality based on its power of judicial review. However, the above analysis shouldn't be interpreted in the context that HOF is excluded with this respect. From the reading of the above two articles it becomes apparent that dual protection is extended to citizens in the infringement of their fundamental rights and freedoms in the decision of different government bodies.

Under Art.23(1) of proclamation No. 250/2001 it is stated that any person who alleges that his fundamental rights and freedoms have been violated by the final decisions of any government institution or official may present his case to the CCI for constitutional interpretation. In addition, it is also provided that such kinds of appeal are possible only after the exhaustion of all remedies that have a possibility to rectify such misdeed. Moreover, this also provided that in passing its decision the CCI needs to make it compatible to the fundamental rights and freedoms ensured in the Constitution and principles in the UDHR, International Covenants of Human Rights and other instruments adopted by Ethiopia. The importance of this mechanism become bold when one considers the modern government tendency of establishing different administrative organs that makes decisions that affect citizens' rights.

3.5.3 Judicial Review of Administrative Actions on other grounds

³²⁹ Id

Overseeing the decisions of the other branches of the government by courts taken as one of the manifestation of a democratic and limited form of government. Such kind of mechanism become very meaningful with respect to the administrative organs of the government because since in most cases its part of the executive branches of the government it has the very potential of infringing the rights of citizens. Watching the decision of this organ is taken as a guaranty and protection to citizens. In addition, it's also taken as a means for confining the decision of this organ within the power granted to it by law. Because of this, courts role with this respect is taken as a means to preserve the separation of power as its set by the constitution. From this logically it follows that, this mechanism also serves as a good input for the rule of law. For the judiciary itself the existence of this mechanism serve as preserving its independence since there is a consensus that taking away judicial matters out of the courts jurisdiction affects its independence. For the administrative branch also having a court to rule against its decision incase of its infringement gives it legitimacy.

There are two possible ways that the judiciary branch of the government can rectify the administrative organs: Through Appeal and Review. As its indicated in part 1.2 of this research, even if both appeal and review are external mechanisms provided for such end there are some important variations between them. The first one is appeal on administrative decisions is taken as a statutory right. Meaning this remedy only exists when a specific statue give recognition for its existence. In most cases appeal on the error of law is allowed. On the other hand, judicial review is taken as constitutional right which even exists in the absence of recognition by a particular statue. But still exclusion is allowed if there is express provision for this effect.

When we come to the Ethiopian case, in addition to the recognition of some constitutional principles which support the existence of judicial review mechanism, the constitution also make inclusion of some articles that have a direct link with the point under consideration. Art. 79(1) of the constitution stipulates that judicial powers are vested in courts. In addition, Art. 37(1) of the constitution also adds that every one has the right to bring justiciable matter and to obtain a decision or judgment by a court of law or any other competent body with judicial power. From these two articles we can understand that the final say on any matters of judicial character rests on the courts. In more a specific wording,

Art. 401(1) of the civil code also provides that acts performed by the bodies referred to in this chapter in excess of the powers given to them by law or without the observance of the conditions or formalities required by law shall be of no effect. Sub article 2 also adds that the provisions of sub-art (1) shall apply not with standing that nullity isn't expressly provided by law in such circumstance. Moreover Art. 402 also stated that such action for nullity can be brought by any interested party up to ten years period of time.

In one of the cases submitted to it the HOF also indicated that courts have the jurisdiction to exercise power on judicial review of administrative actions. The case came to the view of the CCI in the year 1992 E.C. In this case the Addis Ababa Taxi drivers union directly submitted the petition to the CCI, by claiming that a regulation issued by the Addis Ababa Municipality contradicts the basic idea enshrined in an enabling Proclamation adopted by the HOPR. The inquiry stated examining whether the contents of a regulation conform to the parent legislation doesn't involve question of constitutionality and hence isn't a matter to be brought before the inquiry.³³⁰ Even if there is a lack of express administrative law that govern the applicability of judicial review of administrative actions by using the above cited provisions of the constitution as it is witnessed in this case courts can entertain the case and pass a decision on whether the decision of the administrative organs is *ultra vires* or not, possibly by using the provisions of the civil code.

In addition, to illustrate the need for exhausting remedies available in the administrative agency lets see one case decided by the cassation court in the year 2000 E.C.³³¹In this case the appellant put a primary objection on the lack of jurisdiction of ordinary courts to see the case which arise on the bases of Proclamation 272/94. In the lower court the applicant (now the respondent) claim for compensation for the lease land he use to posses but which take over by the Mageta city municipality. On the hand, the respondent (now the appellant) put lack of jurisdiction as a primary objection. However, the lower court decides that it has jurisdiction over the case since the Municipality fail to give notice while it exercise such

³³⁰ CCI decision rendered on Tir 16, 1992 E.C. Unpublished (The Translation is mine).

³³¹ Magate City Municipality Vs Ato Wube Gebre, Cassation court case 2000, No.34191.

power which is a base for the possessor to go for a commission within the administration. On the other hand, the cassation court mentioned Art 17 and 18 of the mentioned proclamation and rue that it's the Commission established for such purpose that has a direct jurisdiction. By using all this reasons the cassation court rue against the decision of the lower court and remand the case to the agency. Even if this case is about appeal than review it can be taken as one illustration on the need to go for the court before all available remedies in the administrative agency.

Another point that needs to be considered with this respect is some of the laws that can possibly have the end result of limiting the rights of citizens in exercising the power of judicial review. The Proclamation for the Agency for Government Houses Establishment, among other things state that the agency has the power to give and execute expulsion orders to tenants of government houses who have breached their obligations under their lease contracts and to persons occupying such houses without having any lease contracts; enforce, as may be necessary, the demolition of illegal construction works undertaken on government houses and possessions.³³² This means the agency can make expulsion order by itself without taking the case to the court of law.

In addition to this law there are also some other proclamations which have the same effect in the field of tax. The firs proclamation with this regard is Income tax Proclamation No.286/2002. Under article 77 it's provided that the tax authority has the power to seize property belonging to such person to collect tax.³³³ In addition, the proclamation also state that the Authority's power in making the seizure extends to on the accrued salary or wages of any employee. Moreover, a provision with the same effect also provided under article 31 of the Value added tax proclamation.³³⁴

³³²Federal Negarit Gazette, Re-Enactment of Urban Lands Lease Holding Proclamation No.272/2002, Art.6(3).

³³³ Federal Negarit Gazette, Income Tax Proclamation No. 286/2002, Art. 77.

³³⁴ Federal Negarit Gazette VALUE ADDED Tax Proclamation 285/2002, Art.31.

As it is stated in a repetitive manner, judicial review is a constitutional remedy provided for citizens. So for excluding this remedy in a particular situation Countries experience show us that there needs to be an express provision for such effect. From this it is evident that the above provisions of the cited Proclamations can't bare citizens' right for claiming for judicial review over the decisions of the administrative organs since there is no express provision for such effect. But one thing is obvious the existence of these provisions which exclude courts from the view of making a decision on some relevant issues opens the door for arguments among those judges and lawyers who doesn't have a deep knowhow on the matter. Therefore, the law maker should take one step further and devote a provision for reaffirming the existence of such remedy.

3.5.4 Judicial Review of Administrative Actions in the Draft Administrative Law Proclamation

Administrative law can be defined as part of the public law which deals about the establishment and regulation of administrative agencies. It also deals with how the decisions of these administrative organs can be taken to courts for judicial review purpose. This administrative law can be seen into two parts; substantive and procedural administrative law.³³⁵ The substantive administrative law normally found in the legislation that is make for establishing a particular agency. In this legislation the power and duties of the administrative agencies enumerated. On the other hand, the procedural aspect of this law deals on the procedure and principles that these administrative office should follow in exercising the power vested on them and the conditions and procedures on which complaints of administrative decisions can be review by courts.

When we come to the Ethiopian case the experience of the country isn't different from the rest of the world. There are establishment of different administrative agencies for accomplishing different purposes. In this Country the substantive and procedural administrative law has different developments. As it is stated above the substantive part of

³³⁵ ERNEST GELLHORN, ADMINISTRATIVE LAW IN A NUTSHELL 12 (USA: West Publishing company, 1972).

administrative law is about the powers and duties of the administrative organs. So this kind of law is attached to the law which comes into effect for establishing the administrative agencies. On the other hand, the development of the procedural part of the administrative law which is important for implementing what is provided in the substantive part and which is also needs to creates some procedure for reviewing the decision if a need arise is found in its infant stage. This is mainly because of the lack of a codified administrative law which is normally devoted to such procedural purpose. Among other things, because of the lack of this procedure it has been difficult to materialize all the things that are included in the substantive part. In addition, a loophole has created in the citizens' right of having a remedy in case the decisions of the administrative agencies infringe their right.

In general, even if the absence of the procedural aspect of administrative law is an obvious matter, when one talk about the country experience with this regards its mandatory to mention some of the scattered laws that have similar effect. The first one is the 1960 civil code. In the provisions found between 394-403, the code tries to touch upon the structure of government offices, their rights and duties, jurisdiction, and sources of powers and the rights and responsibilities of administrative organs. In addition, the council of ministers also comes up with a procedure that needs to be followed by agencies while they exercise their delegated law making power.³³⁶ With the decision making power of agencies also there are some legislations that incorporate provisions for these effect. Some examples of these kinds of laws are tax legislation and implementation as well as appealing procedure, disputes arisen between employer and employee reactions appealing procedure, employees of government administrative offices complaints hearing, disciplinary case hearing, a decision making, and appealing procedure, dispute arising from social security affairs decision making.³³⁷

When we come to the point under consideration in this section of the research, at present time there is some initiations for making administrative law. At the time of the interview

³³⁶ Id.

³³⁷ Research on Administrative Procedure Law 13(Unpublished, 2008).

made to Ato Hagos Woldu, a chairman of the drafters' committee, the writer understand that the making of the draft finalized and sent to the council of ministers.³³⁸ In the preamble of the draft proclamation it is stated that the need for enacting such law come together with the desire to make administrative organs to work within the constitutional parameters and other legal boundaries. In addition, in the research made for the enactment of this law also shows that because of the lack of administrative law of such kind a problem in make suring the supremacy of the constitution encountered.³³⁹ In addition, they also mention the problem of inability in limiting the legislative and judicial powers of administrative organs. Moreover, a difficulty to make the administrative bodies to do their job in case of their failure also occurred. Finally, they also mentioned the occurrence of a lack of lucid and consistent implementation procedure as a result of the lack of this kind of procedural law.

Before stepping into and start analyzing the substance of the draft proclamation, it's good to raise some points on the mentioned research which is made for finding some inputs for the intended proclamation. As it is started in the research methodology part literature review, questionnaire, interview and case study methods are used.³⁴⁰ But with this regard one thing is worthy of being mentioned. Using questioners and interviews for seeing into the practice and identify the existing problems is appropriate. But on those points that need extensive research, it is inappropriate to make a recommendation by only using these two methods and as a result the findings and conclusions became a result of mere opinion of those concerned. This problem in the research is noticed and more importantly aggravated by the existence of questions in the said methods that needs to be answered by deep research than conducting questioners and interviews. Some of these questions are: Do you think that administrative law is important, Do you think it is preferable if the appeal on administrative cases decided by the regular court or by some administrative court organized neutrally and independently? On what base should appeal from administrative action be made (error of fact or law)? In seeing into appeal cases of administrative decisions should courts only

³³⁸ Interview with Ato Hagos Woldu, The Chairman of the Drafters Committee, Dec.21.

³³⁹ Research, supra note 88, at 15.

³⁴⁰ Id at 18.

nullify or/and replace their decision?³⁴¹ According to Ato Hagos there is no need to make a deep research on the matter and the inputs gathered from those concerned is enough to reach at conclusion. He also added that the methods that they use together with the questions provided are intentionally made in that way for the purpose of creating legitimacy to the law and awareness among those that have a stake in the draft proclamation. However, even if the effort for creating a sense of belongings is a good thing it shouldn't compromise the quality of the research.

The other point that is worthy of being mentioned in this research is the issue of judicial review. In this research, a repetitive mistake is made because of a confusion of judicial review with that of appeal from administrative decisions. This mistake is especially become obvious when the research put a question whether it's preferable only to nullify or/and replace the courts decision over the administrative organ when the case brought to courts in the form of appeal.³⁴² If one understands this question to refer to "appeal from the decision of administrative agencies" since the question itself used the term "appeal", the question become irrelevant because replacing their decision over the decision of the administrative agencies is what is inherently expected from courts when they find error on the appealed cases. On the other hand, since the issue of whether there is a need to substitute the courts decisions over that of the administrative organs is an issue related to the concept of judicial review this question can also be understood to refer to the issue of judicial review than appeal. However, again this question become meaningless when one considers that as a rule such substitution is forbidden in exercising this power for the purpose of preserving the separation of power principle. Even in those limited instances where replacing their own decision over that of the decision of the administrative organ is allowed it isn't up to those concerned to determine, it's a task which needs to be entrusted to the legislator. Therefore, it is logical to say that there is some confusion on the existence of the basic differences over these two remedies.

³⁴¹ Id at 149-155.

³⁴² Id at 40.

When we come to the draft proclamation on administrative law, if it isn't failed as the countries previous initiatives made in the year 1967 and 1993 E.C.,³⁴³ there is no doubt on its need and the difference that it's going to bring. Even if there are some developments that need to be made in the draft, the initiative by itself should be appreciated. Under article 3 of the draft proclamation it's provided that the proclamation is applicable in the federal government agency in any instance which is linked to the execution of administrative acts (adjudication and rule making). It shall also include similar federally funded and administered institutions and the city administrations of Addis Ababa and Dire Dewa. Meaning the applicability of the draft is limited to the federal government level and still there needs to be initiatives in the States level.

In addition administrative agency also defined as a regulatory or supervisor body of the federal executive and a service rendering public office.³⁴⁴ However, it's pointed out that it shouldn't be applicable to the House of Representative, House of Federation, Council of Addis Ababa and Dire Dewa as well as courts and state owned economic institutions. ³⁴⁵In this regard recent development in England show that there is a need in extending judicial review principles to powerful private bodies such as sports regulatory bodies, powerful commercial companies etc., which express control over aspects of public life. Among other important reasons since the basic rationality for having judicial review mechanism over the decisions of the administrative actions is to protect citizens from the possible abuse from the regulatory administrative organs it is beneficial to extend the availability of such remedy to institutions that decisions can have the same end. Therefore, the draft proclamation needs to make consideration of this important point before its coming into effect.

Moreover, under Art. 2(4) the draft also define what administrative decision means. It states that it means an individual legal decision which is issued by an agency for the

³⁴³ Id at 15.

³⁴⁴ Draft Administrative Procedure Law, Art. 2(3).

³⁴⁵ Id.

purpose of resolving a specific case and which applies to an individually specified person or persons establishing, amending, ascertaining or completing concrete legal relations. More progressively this definition also includes failure to take decision under the ambit of this sub article. However, issues like internal matter which affect only the agency itself, political decisions, non justiceable cases, decision for emergency situations regarding military or security issues, foreign affairs matters and those related to the conduct and discipline of military and policy personnel are provided as an exception to this definition. As it is provided in chapter two of this research similar exception is provided in other countries also. However, the definition given for the concepts may vary from country to country. For example in France and Germany the involvement of the judiciary organ in politics is more tolerated than the case of USA and England. So the exclusion of political matters in case of judiciary review will logically have a narrow definition than its counter part in USA.

In addition, decisions of inspections and tests are also provided in the exception part of the definition of administrative decisions since they aren't ripe enough to be entertained by court. Lastly, the issue of election is also included in here. With regards to this last exception the writer unable to find a similar stipulation in the four countries dealt in chapter two of the research. In case of France also Conseil of State has [appellate](#) jurisdiction for local elections decisions from any of the 37 administrative courts. Besides, in reaching into a decision administrative agencies are also obliged to observe some principles: Equality before the law, the right to be heard, seeing the legality of its functions during the making of decisions, its non retroactivity effect and their decision being impartial and fair.³⁴⁶

Moreover, the draft proclamation tries to incorporate a procedure on how the administrative decisions should be made. Since one of the functions of the administrative bodies is rule making the draft procedure tries to incorporate procedures on how administrative agencies perform their function. Article 5(2) of the draft provided that in exercising their rule making power these administrative agencies shouldn't act outside their legal limit. They are also obligated to respect the hierarchy of laws and refrain from

³⁴⁶ Id at Art 4.

making laws that contravene laws made by the relevant office of higher standing.³⁴⁷ If these rules aren't complied, the proclamation provides that the law made by these agencies is invalid and open to be contested.³⁴⁸

The draft proclamation also opens the door for citizen's to force the concerned agency to make a law which is delegated to it. If an agency fail to adopt a rule in accordance with the law, another government or non government agency or at least 50 (fifty) persons may petition to the concerned agency requesting the adoption of a rule.³⁴⁹ In addition, the agency also obligates to send notice of its intended action to come up with such kind of law in a news paper or other forms of mass media.³⁵⁰ If the laws are made in time of emergency, in time of essence, if such notice is contrary to the public interest, issues of advance notice may defeat the purpose of rule and in case of national security and national defense agencies are exempted from following such law making procedures. Each agency is also obligated to review all its rules to determine whether any new rule should be adopted when a need is felt by it.³⁵¹

The second role of administrative agencies is execution or decision making power. Chapter III of the draft proclamation devoted to setting procedure for such effect. As per the articles included in this section administrative agency in reaching at a decision they are obligated to conform to the principles and requirements set in the proclamation. In addition, agencies are also given the discretion to adopt principles and requirements which better protect a party to the proceeding. In reaching at a decision, they are also expected to be fair, impartial and free from bias. Moreover, under this part a procedure for the dissemination of information and compensation when damage caused by the decision of an administrative body is provided. Under article 25 (1) its stated that upon request from the agency which

³⁴⁷ Id at Art.5(3).

³⁴⁸ Id at Art.16 (1).

³⁴⁹ Id at Art.6.

³⁵⁰ Id at Art. 7.

³⁵¹ Id at Art. 21.

has jurisdiction over a case, all other agencies, irrespective of their subordination shall provide all necessary information which is at their disposal and all other types of assistance. In addition, these organs also entitled to utilize all legal methods, including obtaining information from parties in the proceeding or from other agencies as well as from witnesses, experts, documents investigations and other types of evidentiary assistance.³⁵²

Moreover, when an agency causes damage a procedure to be compensated by submitting a petition to the agency is provided. If a party isn't satisfied by the decision a mechanism which enable the person to take it to a regular court is also included. Lastly, it's also indicated that an agency shall establish an administrative tribunal that receive petition and forward it together with opinion to the higher decision making organ for the purpose of final decision.³⁵³ It's this decision of the higher organ that can be considered as final decision of the administrative agency.³⁵⁴

Under this section, the proclamation envisaged the establishment of a tribunal that handle appeal cases and which has benches that look into the decision of each agency separately or serve more than one agencies.³⁵⁵ The tribunal is also allowed to make use of the power given to regular courts and the civil procedure code to enforce its decision, execute order of the verdict and enforce the bench procedure.³⁵⁶ With respect to the judges also the draft provided on the possibility of people with professions in the area of law, administration and other relevant fields can serve as a judge. In addition the grounds for the tribunal to exercise its power also stipulated: arbitrariness, caprice, abuse of discretion and the like, excess of authority, non observance of substantive or procedural laws or rules of evidence that are required by law or other grounds set out by law.³⁵⁷ By basing itself on these

³⁵² Id at Art 26 (2).

³⁵³ Id at Art.30(1).

³⁵⁴ Id at Art.30 (2).

³⁵⁵ Id at Art.34(2).

³⁵⁶ Id at Art.34(5).

³⁵⁷ Id at Art.35 (1).

grounds the tribunal is given the power to either may approve or amend or reverse a decision made by an agency.³⁵⁸ The decision made by the tribunal also regarded as final for question of fact. In other word, for review purpose courts are only allowed to see on the ground of the question of law.

Moreover, Art 61(1(g)) also provide that among other things where a disputed decision lacks legal ground it can serve as a base for rejecting a petition made for judicial review. The main reason attached to it is there is a consensus that while administrative agencies has the expertise on the fact of the decision, courts have a competency to see into the correctness of the legality of the decision. In this part also the draft proclamation consists of rules on the procedure of petition, notice, hearing and decisions.

The other point that administrative law is expected to deal is on the issue of judicial review of administrative matters. The draft administrative law also tries to set the procedure by devoting the provisions from article 53-66 for such matter. In the draft judicial review is defined as a procedure whereby final administrative actions for which all available administrative remedies have been exhausted are to be reexamined by courts upon compliant of persons aggrieved by the actions of the agency.³⁵⁹ From this definition, three elements can be taken out and be a point of discussion. The first is to initiate an action of judicial review the decision needs to be final. According to finality requirement there is a need of getting the final decision of the agency before requesting for judicial review claim. Government action is “Final” in the sense that when at no future time will its impact on the petitioner becomes more conclusive, definite or substantial. In other word, there needs to be an “effectual disposition of rights”. There can be no review unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process. On the question of what constitute a decision to be final, article 30

³⁵⁸Id at Art.36(1).

³⁵⁹ Id at Art.2(5).

provides that a decision of a higher organ of an administrative decision constitutes as a final decision.

However, in some instances getting the final decision of an agency become imposable. For instance, suppose the agency refuses to issue an order or do whatever is necessary so as to accomplish the final result upon which review to the courts may precede. In this case in many jurisdictions the decision can be considered as final and a claim for review by courts can be made. Nevertheless the draft proclamation fails to deal the possibility of this kind of situation. Therefore, since this loophole can enable administrative organs to prevent themselves from making a final decision to bar citizens from using such mechanism, for protecting citizens right from possible abuse there needs to be an inclusion of such remedy in case of such situation.

Secondly, the definition also provides that before submission to judicial review one needs to exhaust the available remedies in the concerned agency. In a clear word the draft proclamation provided that exhaustion of administrative remedies by the aggrieved party shall mean resorting procedurally to all available grievances hearing mechanism within the respective agency.³⁶⁰ However, the experience of USA and England gives a different definition to “exhaustion” under this context. In England the exhaustion of legal remedies interpreted to mean exhaustion of all other remedies including statutory appeals and appeals to relevant tribunals. In the same manner Art.704 of APA provides that Agency action made reviewable by statutes and final agency action for which there is no other adequate remedy in a court are subject to judicial review. Despite such variations since judicial review and appeal are two different sets of remedies which isn’t connected hierarchically the writer can’t see the reason for requiring individuals to go first to appeal before using their judicial review right. Therefore the position maintained by this draft law is more convincing than the experience of other countries.

³⁶⁰ Id at Art.53(3).

In relation to the two requirements mentioned above in legal systems like USA the requirement of ripeness is also included. As per this requirement, if a decision isn't matured enough and isn't yet ripe for affecting individuals' rights courts can't intervene and entertain the case. This is because the agency can still change its mind and make right its own decision. With respect to this requirement there is no specific stipulation in the draft proclamation. However, in article 2 (4(e)) an indication for this effect is made by excluding from the ambit of administrative decision those matters that are only made for the purpose of inspection and test. But since one of the aims of administrative law in general is to make sure the implementation of constitutional principle the draft administrative law should make an inclusion of this concept which can contribute for the implementation of the separation of power principle of the constitution.

The other point that needs to be discussed from the definition of judicial review is the requirement of standing. As it is indicated in the judicial review definition, only a person who is aggrieved by the decision of the administrative agency can make a petition for such a remedy. The draft also stated that lack of capacity, authorization or vested interest can be one of the requirements for rejecting a petition for such effect.³⁶¹ This requirement is similar to what is experienced in many other countries. For example in USA as it is indicated in *Baker v Carr*(1962) for one to present a case for judicial review the party seeking relief must allege such a personal stake in the outcome of the controversy. Even if it isn't clearly indicated in the draft this requirement is also the extension of "case and controversy" requirement. In the same manner in England also, the applicant must satisfy the requirement of locus standi by showing that he has sufficient interest.

For reviewing the decisions of the administrative agencies there are two trends followed by countries: entrusting such matter to ordinary courts and special courts. Countries like USA and England entrust their judiciary to do this job and it is also said that this choice is inherent in the legal tradition that these countries follow. Since judges have better expertise over adjudication such choice is advantageous in bringing better justice. But still it requires

³⁶¹ Id at Art.61(1(f))

additional human resource that has expertise on this area and also it demand for adding up benches in the existing judiciary system.³⁶² Other wise, justice will be delayed. On the other hand, in Countries like France establishment of special court for this purpose is preferred. This preference is especially made in connection to the historical factor that make the country to shift away from the ordinary courts and because of the strict application of the principle of the separation of power. The main advantage of this system is cases will be entertained by those that have special expertise over administrative matters.³⁶³ But again since these special courts are within the administrative branch of the government its independence will be in a big question mark. In the Ethiopian case there were initiatives for making an administrative law in the year 1967 and 1993.³⁶⁴ In the first draft it is indicated that such judicial review was intended to be made by special courts. On the other hand, in the later initiative such matter was intended to be handled by a bench in the federal high court. However, both of these drafts unable to be completed and come into force.

In the present draft proclamation a choices which is similar to the 1993 draft is made and just like what is done in a common law countries such matter is entrusted to ordinary courts. To be specific under article 55 it is provided that an administrative court which reviews administrative decisions is intended to be established in the federal high court. Even among the common law countries it seems that the country followed the England trend. In this country such matter is entrusted to Queens Bench Division of the High Court. One may ask why is it necessary to entrust such matter to ordinary courts than special courts? Among those who entrust the matter to ordinary courts why it is even important to choose England experience than other countries of the same tradition i.e. USA? In the research made by the drafters, the only thing that is tried to be indicated is the prone and cons that exist in the trends followed by the civil and common law tradition, and questions are also included in questioners and interview for choosing among the available means's. The writer of this research does agree on the issues pointed out by the drafters about the prons and cons of the common law and civil law tradition. Still it is true that entrusting such

³⁶² Ernest, *supra* note 86, at 15.

³⁶³ *Id.*

³⁶⁴ *Id.*

matter to special courts conflict with the constitutional provisions which give such matters to the judicial branch of the government.

However, even among those that entrust such matter to the ordinary courts a research needs to be made to determine which one of the trends is suitable to go with the practical situation of Ethiopia. It is also good to make sure that the country has similar reason as that of England in choosing some what similar format for this mechanism. In England, when they entrusted this task to Queens Bench Division of the High Court what they have in mind is to create some degree of specialization and to create efficiency and some consistent dispatch of court business. So the Country needs to make a choice whether above all other reasons this reasons out weight the other choices. Moreover, a deep though needs to be given to equip this administrative bench by judges who have such experience as it is required in the draft proclamation. Other wise delay of justice will be an imminent problem.

Besides, the proclamation also provides on the availability of judicial review mechanism on administrative actions. As it is provided in chapter two of this research the proclamation also makes it clear that for excluding the remedy of judicial review there must be an express provision for this effect.³⁶⁵ In all other cases, there is a presumption that citizens have the right to ask for such a remedy in case there right is infringe by the decision of the administrative branch of the government. This provision of the draft proclamation close any possibility that might possibly arise in connection to citizens right of having this remedy by clearly providing that the door is only closed when there is a clear provision for this effect. The progressive nature of this provision is even become bold when one see that even the more developed APA doesn't have such express provision for this effect. In this system courts apply such kind of presumption of reviewability concept only by applying the developed jurisprudence with this regard.

³⁶⁵ Draft Administrative Procedure Law, supra note 95, Art. 58(1).

Moreover, under article 57(2) it is also stated that even the stipulation that the administrative finality doesn't stop courts from exercising this remedial action. Besides to this article 58(2) also broaden citizens right of judicial review over administrative actions by make inclusion that even in the case of discretionary acts courts can intervene and exercise this power on the bases of abuse, legal error, or procedural defects. But when we see APA, the law fails to allow the judiciary to intervene in the administrative agencies exercise of discretion power. The practical reviewing of this power by the courts is described as a judiciary crafted one.

However, the legislator or the one that exercises the delegated rule making power needs to refrain from making a repetitive restriction on this remedy. Since judicial review is one of a safe guard against the possible abuse by the other branches, its exclusion should be interpreted narrowly even in a situation where a statue is silent on judicial review matters the interpretation for judicial review should be infavour of the existence of the mechanism than its exclusion.

With regards to grounds of review courts are allowed to disregard the decision of an agency if they find that it is illegal and unreasonable.³⁶⁶ As it is stated above with respect to discretionary acts of agencies they are also given the power to review for abuse, legal error or procedural defects.³⁶⁷ In addition, they are also given the power to compel agency action that has been unlawfully withheld or unreasonably delayed.³⁶⁸ However, when they are compared with the already set practice this draft provides some what a restrictive ground than what the experience of other countries witness. Even if there is variation on the classification made on such grounds by different writers, now days there is a general consensus on the division made by Lord Dip Lock in connection to the England legal system. He stated in the case of [*Council of Civil Service Unions v Minister for the Civil Service*](#) that the

³⁶⁶ Id at Art. 58.

³⁶⁷ Id at Art.58(2)

³⁶⁸ Id at Art.65.

main grounds for judicial review in modern world can be classified as “illegality” “irrationality” and “procedural impropriety”.

Under the ground of illegality different sub grounds can be mentioned. These are: when the decision is in contrary to the law, is *ultra vires* and made by a wrong person. In addition, the way discretion of power is exercised also comes under this illegality ground. Even though the decision maker keeps its decision within the legal boundary set by a statute, its motive may be improper, it may be influenced by irrelevant factors or it may overlook relevant factors. In addition, in case of irrationality also in connection to England experience it is defined as the decision is irrational when it is so unreasonable that no reasonable authority could ever have come to it. Even if the end result is similar in the USA legal system the parameter in this point is arbitrariness. Finally, a decision also can be quashed under this ground when it suffers from procedural impropriety if in the process of its making the procedures prescribed by statute have not been followed or if the rules of natural justice have not been adhered to. In addition, situations like failure to give a chance to be heard and being biased are incorporated.

When we come to the Ethiopian situation we find that all these grounds aren't incorporated. The draft makes exclusion of procedural impropriety from being served as a general base for quashing the decisions of the administrative agencies. In addition, as it is stated above even if the inclusion itself is a positive thing when it is compared with England experiences the bases for reviewing discretionary power is limited to the abuse, legal error or procedural defects. But in England this also go some steps further and include improper motive, influenced by irrelevant factors or may overlook relevant factors. In addition, the meaning of these grounds is defined in many legal systems through case laws in the common law legal system and by codifying the most important laws for influencing the legal system in the civil law countries. Since Ethiopia has no tradition in these both cases a question is forwarded to Ato Hagos on may be defining these words can simplify this problem. However, he answer by saying that it is difficult to include every possible problem in the proclamation and those in judiciary have a consensuses what these terms really

means. But since the power of courts is limited to these grounds an effort to be made to define such terms by consulting the experience of other countries so as to avoid confusion.

When a court finds that the decision has error of law and this can materially affect the agencies or tribunal decision, the court should remand it for further action consistent with the court's determination, with or without detailed court discretion.³⁶⁹ In addition, it is also stated the court can make a decision that affirms the original decision, or where the later is obviously unfair, modifies or reverses the same. As it is stated above the rule with this regard is to give direction to the administrative agency that makes decision. It's only up on exceptional circumstance that replacement of decision by courts allowed. But in the draft some how a different situation is provides and it introduce that the decision will return to the agency if the decision materially affect the decision. But this kind of qualifications can't justify the exception made and also can contradict the principle of separation of power.

Finally, the other important thing that needs to be mentioned is the absence of public and private remedies that are available in case of infringement. Even if the private law remedies are provided in other laws of the country and the remedy of Habeas corpus are included in the constitution other remedies that are left out from the draft. To make the picture full still those responsible needs to make inclusion of the remedies that are available to citizens in case their right is infringed by the actions of the administrative agencies.

Conclusion and Recommendations

³⁶⁹ Id at Art.65(2(a)).

Administrative law is part of the public law which includes provisions and principles on how the administrative branch of the government should function. In doing so, this law has the objective of protecting individuals from the possible abuse that they can encounter from this powerful administrative branch of the government. This law also governs the conditions and procedures in which administrative decisions are review by court. Judicial review should be understood to refer to two situations: judicial review of administrative actions on constitutionality ground and other legally recognized grounds. With this regard countries follow different trends. In common law countries like USA and England they entrust their ordinary courts to conduct such function. On the other hand in case of civil law countries like France and Germany special administrative courts are entrusted to review the decisions of the administrative branch of the government on other legally recognized grounds. However, for reviewing these kind of decisions on constitutional ground like Ethiopia France opt for the constitutional Council which is a political organ to do such job. In case of German the country entrust such task to a constitutional court.

In the years before 1974, Ethiopia was ruled by monarchs. Before the centralization of the country finalized by Minilik II, there was a high decentralization prevailed in the country. Different localities were ruled by their own kings by preserving the title of “king of kings” to the one who was considered as the ruler of all. At this time the country was ruled far from a modern form of government. In this system the rulers were made above the law and it was impossible to know the limits of their power and to question their decisions. At this juncture it is good to mention that in this period Ethiopia had no experience of written constitution. Eve upon the coming into effect of the written constitution of 1931 and then 1955 the Emperor make sure he is at the top of the decision of the three branches of the government. During this time, it was difficult to find concepts like limited government, democratization, rule of law, due process of law, separation of power and the like, which justifies the existence of modern government and administrative law in general and judicial review in particular.

Even if there were different progressive ideas the 1987 constitution also make sure that power was concentrated in the hands of the president by putting himself at the top of the three branches of government. In addition, the practice also proved that things were far from being democratic and it was difficult to make the human right provisions of the constitution in operation. Besides, the modern constitutional law concepts like rule of law and due process of law was difficult to be implemented since power was concentrated in few hands. So thinking about the existence of judicial review of administrative action was in general an ideal concept.

After over throwing the military government, a federal form of government which made ethnicity its base was established. The founding of this form of government was taken as a manifestation for the recognition of different ethnic groups found in the country. Based on the constitution, both the federal and state governments together with their own three branches were established. Moreover, the constitution also stipulated for the supremacy of the constitution which makes any law, customary practice or a decision of an organ of state or a public official which contravenes the constitution null and void. This constitution also managed to incorporate constitutional principles like rule of law, due process of law, independence of the Judiciary. Besides, two-third of the constitution also devoted to the recognition of fundamental rights and freedoms. Moreover, in the constitution the establishment of the three branches of government is also clearly provided.

Just like what was experienced in the previous legal systems, in this time also there is no administrative law. From the wording of the 1995 constitution, the civil code and other concerned legislations, we can understand that judicial review of administrative action is a shared power between the HOF and courts. Based on Art.62 (1) the primary task given to the HOF is the power to interpret the constitution. In addition, Art. 83(1) mentions that all constitution disputes shall be decided by the HOF. But the question in this point is Is HOF the only organ to make interpretation of the constitution? The answer for this question is NO! In addition to their power to make judicial review over the decisions of the administrative agencies on other grounds they also share the power to do the same on

constitutionality ground with the HOF. This conclusion also supported by the constitution provision of article 79 and 37 which give indication that courts have judicial power.

To determine the power of the HOF it is difficult to know what types of actions are included in the meaning of constitutional interpretation and constitutional dispute as it is provided in article 62 and 83 of the constitution. The constitutional section which talks about this issue under Art 84(2) only mentions about the interpretation of federal and state laws. In a more restrictive manner the Amharic version confines itself to those federal and state laws made by the law makers of these levels of governments. As per the constitution itself the law making bodies for the federal or states are the HOPR and State Councils, respectively. So this leaves a room for courts to make interpretation of other laws made by other organs through delegation: Regulations, Directives and etc. This kind of formulation of the constitution also goes along with the parliamentary supremacy provision of the constitution.

The problem in this regard comes together with the enactment of proclamation No. 250 and 251 in the year 2001. In this proclamation, the CCI and HOF is given the power to entertain the constitutionality of Federal and State laws. In the definition part of these proclamations the definition given to “law” includes Regulation and Directives. This means the constitutionally recognized courts power on judicial review of constitutionality of laws made by organs other than the Federal and State law making bodies are snatched and given to the HOF by the above cited laws. As far as I am concerned the constitution is the source of powers and duties of the institutions that it establishes. Further legislations are needed only for providing detail rules so as to make these established institutions workable but not to broaden their scope. In addition, even if it is said that the HOPR have the power to enact such legislation, in no way that it can come up with laws that have the effect of contradicting the Constitution. Since this laws narrow the courts role which wasn’t intended by the constitution, it is logical to conclude that they are unconstitutional, and at the end they also contradicts courts independence as recognize by the Constitution. So until such time come and such law contested and declared unconstitutional, the proclamations remain valid and the HOF should be the one that has the power of judicial review of constitutionality of

primary and delegated laws. In other word courts can't exercise the power of judicial review power over any kind of laws on constitutionality issue.

Since judicial review of administrative action is highly connected to protecting citizens from the possible administrative abuse the next important matter with this regard is judicial review of constitutionality of fundamental rights and freedoms. The FDRE constitution devoted two-third of the constitution for recognizing fundamental rights and freedoms. Under the chapter which is dedicated to this purpose it is indicated that all federal and state legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the chapter which talks about fundamental rights and freedoms. On the same token, in connection to the supremacy of the constitution Art. 9(2) state that all citizens, organs of state, political organizations, and other associations as well as officials have the duty to ensure observance of the constitution and to obey it. If we conclude that HOF is the only organs that have the power to interpret every issue that involve a constitutionality issue we are making the above cited provisions of the constitution inapplicable. In addition a curiosity also may arise how the judiciary can make a decision without first determine the scope and limits of the right without making interpretation. In addition we are also denied the unavailability of the task of interpretation. To connect it to the point under consideration, since the administrative organs makes decisions that affect the day to day life of individuals, the possible abuse they can inflict on fundamental rights and freedoms is high. So there must be an organ which is easily accessible to see these kinds of issues and give protection to citizens.

However, the above analysis shouldn't be interpreted in the context that HOF is excluded with this respect. Under Art.23(1) of proclamation No. 250/2001 it is stated that any person who alleges that his fundamental rights and freedoms have been violated by the final decisions of any government institution or official may present his case to the CCI for constitutional interpretation. By seeing the above articles it becomes apparent that dual protection is extended to citizens in the infringement of their fundamental rights and freedoms in the decision of different government bodies. Therefore, it is logical to conclude

that both organs share this judicial review power on constitutionality ground with regards to fundamental rights and freedoms.

Apart from this, courts also have the power of judicial review by using other grounds over the decisions of administrative organs. Overseeing the decisions of the other branches of the government by courts taken as one of the manifestation of a democratic and limited form of government. Such kind of mechanism become very meaningful with respect to the administrative organs of the government because since in most cases its part of the executive branches of the government it has the very potential of infringing the rights of citizens. Watching the decision of this organ is taken as a guaranty and protection to citizens. In addition, it's also taken as a means for confining the decision of this organ within the power granted to it by law. Because of this, the court role with this respect is taken as a means to preserve the separation of power as its set by the constitution. From this logically it follows that this mechanism also serves as a good input for the rule of law. For the judiciary itself the existence of this mechanism serve as preserving its independence since there is a consensus that taking away judicial matters out of the courts jurisdiction affects its independence. For the administrative branch also having a court to rule against its decision incase of its infringement gives it legitimacy. This jurisprudence also applies to the Ethiopian case. In addition to art 37 and 79 of the constitution which give indication that court are entrusted with the judicial power are also supporting constitutional article on courts power. Besides in the civil code also there is recognition that courts have the power to rule on the decision of the administrative branch of the government. Art. 401(1) of the civil code provides that acts performed by the bodies referred to in this chapter in excess of the powers given to them by law or without the observance of the conditions or formalities required by law shall be of no effect.

Another point that needs to be considered with this respect is laws that can possibly have the end result of limiting the rights of citizens in exercising the power of judicial review. The Proclamation for the Agency for Government Houses Establishment state that the agency has the power to give and execute expulsion orders to tenants of government houses who have breached their obligations under their lease contracts and to persons occupying such

houses without having any lease contracts; enforce, as may be necessary, the demolition of illegal construction works undertaken on government houses and possessions. This means the agency can make expulsion order by itself without taking the case to the court of law. In addition the Income tax Proclamation No.286/2002 and the Value added tax proclamation also gives the power to seize property belonging to persons' who fail to pay tax.

Moreover, the proclamation also state that the Authority's power in making the seizure extends to on the accrued salary or wages of any employee. At this point one thing is clear judicial review is a constitutional remedy provided for citizens. So for excluding this remedy in a particular situation Countries experience show us that there needs to be an express provision for such effect. From this it is evident that the above provisions of the cited Proclamations can't bare citizens' right for claiming for judicial review over the decisions of the administrative organs since there is no express provision for such effect. But one thing is obvious the existence of these provisions which exclude courts from the view of making a decision on some relevant issues opens the door for arguments among those judges and lawyers who doesn't have a deep knowhow on the matter. Therefore, the law maker should take one step further and devote a provision for reaffirming the existence of such constitutional remedy.

At present time in Ethiopia there is some initiation for making administrative law. Such initiative is made by having the purpose of making administrative organs to work within the constitutional parameters and other legal boundaries, for make suring the supremacy of the constitution, for limiting the legislative and judicial powers of administrative organs, a make the administrative bodies to do their job in case of their failure and also to elevate the problem of lack of lucid and consistent implementation procedure.

For making this law a research was conducted by the drafters to find an input. In here it is provided that literature review, questionnaire, interview and case study methods are used as a methodology. But with this regard one thing is worthy of being mentioned. Using questioners and interviews for seeing into the practice and identify the existing problems is

appropriate. But on those points that need extensive research, it is inappropriate to make a recommendation by only using these two methods and as a result the findings and conclusions became a result of mere opinion of those concerned. This problem in the research is noticed and more importantly aggravated by the existence of questions in the said methods that needs to be answered by deep research than conducting questioners and interviews. According to Ato Hagos there is no need to make a deep research on the matter and the inputs gathered from those concerned is enough to reach at conclusion. He also added that the methods that they use together with the questions provided are intentionally made in that way for the purpose of creating legitimacy to the law and awareness among those that have a stake in the draft proclamation. However, even if the effort for creating a sense of belongings is a good thing it shouldn't compromise the quality of the research.

When we come to substance of the draft proclamation on administrative law, if it isn't failed as the countries previous initiatives made in the year 1967 and 1993 E.C, there is no doubt on its need and the difference that it's going to bring. Even if there are some developments that need to be made in the draft, the initiative by itself should be appreciated. As it is provided under article 3 of the draft proclamation the applicability of the draft is limited to federal government agencies. Therefore, still there needs to be similar initiatives in the States level to come up with similar legislations.

In addition administrative agency also defined as a regulatory or supervisor body of the federal executive and a service rendering public office. However, it's pointed out that it shouldn't be applicable to the House of Representative, House of Federation, Council of Addis Ababa and Dire Dewa as well as courts and state owned economic institutions. In this regard recent development in England show that there is a need in extending judicial review principles to powerful private bodies such as sports regulatory bodies, powerful commercial companies etc., which express control over aspects of public life. Among other important reasons since the basic rationality for having judicial review mechanism over the decisions of the administrative actions is to protect citizens from the possible abuse from the regulatory administrative organs it is beneficial to extend the availability of such remedy to institutions which decisions can have the same end. Therefore, the draft

proclamation needs to make consideration of this important point before its coming into effect.

Moreover, under Art. 2(4) the draft also define what administrative decision means. It states that it means an individual legal decision which is issued by an agency for the purpose of resolving a specific case and which applies to an individually specified person or persons establishing, amending, ascertaining or completing concrete legal relations. More progressively this definition also includes failure to take decision under the ambit of this sub article. Since this provision has a great implication in stimulating the administrative organs, this provision needs to be maintained in the law. Furthermore, in the draft judicial review is defined as a procedure whereby final administrative actions for which all available administrative remedies have been exhausted are to be reexamined by courts upon complaint of persons aggrieved by the actions of the agency. From this definition we can understand three points. The first is to initiate an action of judicial review the decision needs to be final. Based on article 30 to be regarded as final a decision needs to be made by a higher organ of the administrative organ. However, in some instances getting the final decision of an agency become impossible. Unlike other countries experience the draft proclamation fails to deal the possibility of this kind of situation. Therefore, since this loophole can enable administrative organs to prevent themselves from making a final decision to bar citizens from using such mechanism, for protecting citizens right from possible abuse there needs to be such kind of exception in the law.

Secondly, the definition also provides that before submission to judicial review one needs to exhaust all available remedies in the concerned agency. In a clear word the draft proclamation provided that exhaustion of administrative remedies by the aggrieved party shall mean resorting procedurally to all available grievances hearing mechanism within the respective agency. However, the experience of USA and England gives a different definition to “exhaustion” by obligating citizens to resort and exhaust all remedies including of appeal before they submit their claim for judicial review. Despite such variations since judicial review and appeal are two different sets of remedies which isn’t connected hierarchically the writer can’t see the reason for requiring individuals to go first to appeal before using

their judicial review right. Therefore, the position maintained by this draft law is more convincing than the experience of other countries.

In relation to the two requirements mentioned above in legal systems like USA the requirement of ripeness is also included. As per this requirement, if a decision isn't matured enough and isn't yet rip for affecting individuals' right courts can't intervene and entertain the case. This is because the agency can still change its mind and make right its own decision. With respect to this requirement there is no specific stipulation in the draft proclamation. However, in article 2 (4(e)) an indication for this effects is made by excluding from the ambit of administrative decision those matters that are only made for the purpose of inspection and test. But since one of the aims of administrative law in general is to make sure the implementation of constitutional principle the draft administrative law should make an inclusion of this concept which can contribute for the implementation of the separation of power principle of the constitution. As a third component of the definition of judicial review is the requirement of standing is provided. As it is indicated in the judicial review definition, only a person who is aggrieved by the decision of the administrative agency can make a petition for such a remedy. The draft also stated that lack of capacity, authorization or vested interest can be one of the requirements for rejecting a petition for such effect.

Moreover the draft also selects the common law tradition by entrusting such matter to ordinary courts. To be specific under article 55 it is provided that an administrative court which reviews administrative decisions is intended to be established in the federal high court. Even among the common law countries it seems that the country followed the England trend. In this country such matter is entrusted to Queens Bench Division of the High Court. One may ask why is it necessary to entrust such matter to ordinary courts than special courts? Among those who entrust the matter to ordinary courts why it is even important to choose England experience than other countries of the same tradition i.e. USA? In the research made by the drafters, the only thing that is tried to be indicated is the prone and cons that exist in the trends followed by the civil and common law tradition, and questions are also included in questioners and interview for choosing among the available

means's. The writer of this research does agree on the issues pointed out by the drafters about the pros and cons of the common law and civil law tradition. Still it is true that entrusting such matter to special courts conflict with the constitutional provisions which give such matters to the judicial branch of the government.

However, even among those that entrust such matter to the ordinary courts a in addition to the theoretical analysis research needs to be made to determine which one of the trends is suitable to go with the practical situation of Ethiopia. It is also good to make sure that the country has similar reason as that of England in choosing some what similar format for this mechanism. Moreover, a deep thought needs to be given to equip this administrative bench by judges who have such experience as it is required in the draft proclamation. Otherwise delay of justice will be an imminent problem.

Besides, the proclamation also provides on the availability of judicial review mechanism on administrative actions. The proclamation makes it clear that for excluding the remedy of judicial review there must be an express provision for this effect. In all other cases, there is a presumption that citizens have the right to ask for such a remedy in case their right is infringe by the decision of the administrative branch of the government. Moreover, under article 57(2) it is also stated that even the stipulation that the administrative finality doesn't stop courts from exercising this remedial action. Besides to this article 58(2) also broaden citizens right of judicial review over administrative actions by make inclusion that even in the case of discretionary acts courts can intervene and exercise this power on the bases of abuse, legal error, or procedural defects. The progressive nature of these provisions is even become bold when one see that even the more developed APA doesn't have such express provision for this effect. However, the legislator or the one that exercises the delegated rule making power needs to refrain from making a repetitive restriction on this remedy. Since judicial review is one of a safe guard against the possible abuse by the other branches, even in case of its exclusion, courts should interpret it narrowly.

With regards to grounds of review even if there is no one agreed mechanism for classifying now days there is a general consensus on the division made by Lord Dip Lock in connection to the England legal system. He stated in the case of *Council of Civil Service Unions v Minister for the Civil Service* that the main grounds for judicial review in modern world can be classified as “illegality” “irrationality” and “procedural impropriety”. The draft makes exclusion of procedural impropriety from being served as a general base for quashing the decisions of the administrative agencies. Even if the inclusion itself is a positive thing when it is compared with England experience the bases for reviewing discretionary power is limited to the abuse, legal error or procedural defects. But in England this also go some steps further and include improper motive, influenced by irrelevant factors or may overlook relevant factors. In addition, the meaning of these grounds is defined through case laws in the common law legal system and by codifying the most important laws for influencing the legal system in the civil law countries. Since Ethiopia has no tradition in both of the cases an effort needs to be made to define such terms by consulting the experience of other countries so as to avoid confusion.

The other point that is worthy of being mentioned is in the draft it is stated that when a court finds that the decision has error of law and this can materially affect the agencies or tribunal decision, the court should remand it for further action consistent with the court’s determination, with or without detailed court discretion. In addition, it is also stated the court can make a decision that affirms the original decision, or where the later is obviously unfair, modifies or reverses the same. As it is stated above the rule with this regard is to give direction to the administrative agency that makes decision. It’s only up on exceptional circumstance that replacement of decision by courts allowed. But in the draft some how a different situation is provides and it introduce that the decision will return to the agency if the decision materially affect the decision. But this kind of qualifications can’t justify the exception made and also can contradict the principle of separation of power.

Finally, the other important thing that needs to be mentioned is the absence of public and private remedies that are available in case of infringement. Even if the private law remedies are provided in other laws of the country and the remedy of Habeas corpus are included in

the constitution other remedies that are left out from the draft. To make the picture full still those responsible needs to make inclusion of the remedies that are available to citizens in case their right is infringed by the actions of the administrative agencies.

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