

Chapter One: The Nature of Public Administration

1.1. Introduction

Public Administration, an ancient activity of the state, is vital to the efficient running of the government. As a specialized academic field, it deals essentially with the machinery and procedures of government. It is the action part of the government. It is both an institution of public service and a centre of power. As an institution of public service, it provides services to the people and promotes public interest. As a centre of power, public bureaucracy tends to be concerned with its own privileges.

In recent years, the discipline has been undergoing rapid changes and has vastly expanded its frontiers. As a discipline, it has evolved and is still evolving to respond to the challenges of the changing times.

With the onset of Liberalization, Privatization and Globalization (LPG), one can see a number of significant changes are in the roles of individuals and institutions and public administration is no exception. It represents a paradigm shift from the traditional model of public administration to New Public Management (NPM), which favours a dominant presence of market forces over the State, for effective governance and efficient delivery of the goods and services.

Many new concepts like Competition State, managerial orientation, contracting out, de-bureaucratization, downsizing, etc., have started gaining prominence in many countries. The new perspective has emerged as a management tool through which the developmental goals can be achieved. It has brought in reforms, which have attempted to create a new entrepreneurial, user-oriented culture in public organizations, with focus on performance measurement and autonomy to the organizations and individuals in contrast to the traditional model. In fact, managerialism is a ‘determined effort to implement the “3Es” of economy, efficiency and effectiveness at all levels of government activities.’

Public administration, in present times, has thus become complex and is slowly moving towards enlightened public governance. In the light of these introductory remarks, in this Chapter, in the succeeding pages, an attempt has been made to define the terms ‘administration’ and ‘public administration’. Subsequently, it discusses the nature, scope and significance of public administration. Finally, it highlights the relationship between public and private administration.

1.2. Defining Administration

The word administer is derived from the Latin words administrate, which means to care for or to look after people, to manage affairs. According to this wide definition almost every human activity involves some kind of administration. Even in primitive societies, simple activities like hunting, food, gathering, etc., could not be carried on without some form of organization. Somebody had to determine as to who will do what. Certain norms of behaviour had to be laid down to decide the distribution of work among the members of the primitive groups. Of course, the administration at that time was rather simple because the tasks to be carried out were also simple. With the growing

complexity of modern life the administration of private as well as public affairs has become more and more complex.

We would now consider some of the definitions of administration given by prominent scholars.

- **Luther Gulick** has said, “Administration has to do with getting things done; with the accomplishment of defined objectives”.
- **James L. McCann**y defined Administration in these words, “Administration is the organization and use of personnel and materials to accomplish a purpose. It is the specialized vocation of managers who have skills of organizing and directing personnel and materials just as definitely as the engineer has the skill of building structure or a doctor has the skill of understanding human ailments”.
- **Pfiffner and Presthus** have defined administration as “Organisation and direction of human and material resources to achieve desired ends”.

From the above definitions, it becomes clear that administration is essentially a group activity which involves co-operation and coordination to achieve desired goals or objectives. This also means that administration has an element of rationality. Administration is thus a rational action, an endeavour to maximize the achievement of goals or objectives, by a group of human beings. For example, for rolling off a stone to a fix place, persons are put to the stone in such a relationship as to maximize their efforts in a certain given direction. This arrangement of persons in relation to the stone i.e., the job is called the “Management”. These two factors, namely, Organisation and Management are special features of administrative activity. It must, however, be remembered that while administration is basically a collective activity, every collective action is not administration.

1.3. Defining Public Administration

Public administration is a segment of the larger field of administration. It is simply regarded as bureaucracy, heedless to the fact that bureaucracy as a particular organizational form is not only found in the government, but also in private and third-sector organizations (*Dhameja, 2003, 2*).

Public administration is a discipline which is concerned with the organization and the formulation and implementation of public policies for the welfare of the people. It functions in a political setting in order to accomplish the goals and objectives, which are formulated by the political decision makers. It is also called governmental administration as the adjective 'public' in the word 'public administration' means 'government'. The focus of public administration, thus, is on public bureaucracy, i.e., bureaucratic or administrative organization of the government.

Different scholars have defined public administration in different ways, which needs to be discussed here in order to get a clear picture as to what actually is meant by public administration. Some of these definitions are as follows:

1. Woodrow Wilson, father of Public Administration, has defined it as “detailed and systematic execution of law. Every particular application of law is an act of administration” (*Wilson, 1953, pp. 65-75*).
2. L.D.White in his book defined Public administration as a discipline which “consists of all those operations having for their purpose the fulfillment or enforcement of public policy” (*White, 1958, p.1*).

3. According to Corson and Harris, "public Administration is decision making, planning the work to be done, formulating objectives and goals, working with the legislature and citizen organizations to gain public support and funds for government programmes, establishing and revising organization, directing and supervising employees, providing leadership, communicating and receiving communications, determining work methods and procedures, appraising performance, exercising controls, and other functions performed by government executives and supervisors. It is the action part of the government, the means by which the purposes and goals of the government are realized"(Corson and Harris, 1963, p.12).
4. Like Corson and Harris, Pfiffner too gives a very comprehensive definition of Public Administration. According to him, "public administration consists of doing the work of the government whether it be running an X-ray machine in a health laboratory or coining money in the mint... Public Administration consists of getting the work of government done by coordinating the efforts of the people so that they can work together to accomplish their set tasks. It also involves managing, directing and supervising the activities of thousands, even millions of workers so that some order and efficiency may result from their efforts..." (Pfiffner, 1946, p.6).
5. In the words of M.E. Dimock, "administration is concerned with 'what' and 'how' of the government. The 'what' is the subject matter, the technical knowledge of a field, which enables the administrator to perform his tasks. The 'how' is the technique of management, the principles according to which cooperative programmes are carried to success. Each is indispensable; together they form the synthesis called administration"(Quoted in Sharma and Sadana, op.cit. pp.6-7).
6. According to Luther Gulick, "public Administration is that part of the science of administration, which has to do with government and thus concerns itself primarily with the executive branch where the work of government is done, though there are obviously problems in connection with the legislative and judicial branches"(Gulick,1937, p.191).
7. Similarly, Herbert Simon too defines "public administration as concerning the activities of the executive branches of the national, state and local governments"(Quoted in Sharma and Sadana, op.cit. p.6).
8. F.A.Nigro has defined public administration in the following words: " (a) it is a cooperative group effort in a public setting; (b) covers all the three branches executive, legislative and judicial, and their inter-relationship; (c) has an important role in the formulation of public policy and is thus part of the political process; (d) is different in significant ways from private administration; and (e) is closely associated with numerous private groups and individuals in providing services to the community".
9. **Nicholas Henry defines public administration as "a device used to reconcile bureaucracy with democracy".** It is a broad-ranging and amorphous combination of theory and practice; its purpose is to promote a superior understanding of government and its relationship with the society it governs, as well as to encourage public policies more responsive to social needs and to institute managerial practices attuned to effectiveness, efficiency, and the deeper human requisites of the citizenry".

To which of the following scholars does the definition of public administration as a device used to reconcile bureaucracy with democracy associate?

A. M.E. Dimock

- B. Nicholas Henry
- C. Luther Gulick
- D. Herbert Simon
- E. F.A.Nigro

On the basis of the above definitions, thus, it can be said that public administration is concerned with the determination, formulation and implementation of public policies for the welfare of the people. It is the principal agency of the State which delivers the public goods and services in an efficient and economical manner as also provides continuity to the policies of the government.

In a nutshell, it can be said be said that **public administration is nothing less than the whole government in action.** It is an instrument through which the goals and objectives of the government are fulfilled. In other words, it is “the action part of government, the means by which the purposes and goals of government are realized” (*Chakrabarty and Bhattacharya, 2003, p.2*). In fact, Public Administration lends itself to two usages: it is an activity; and it also refers to the discipline (*or subject*) of intellectual inquiry and study. Before proceeding to the nature of public administration, it becomes pertinent to define the three terms, viz., administration, organization and management, which are used interchangeably. Though the three terms are used interchangeably, yet there is a specific difference in their meanings.

This distinction is made clear by William Schulze (2010). According to him, "administration is the force which lays down the object for which an organization and its management are to strive and the broad policies under which they are to operate. An organization is a combination of the necessary human beings, materials, tools, equipment and working space, appurtenances brought together in systematic and effective co-relation to accomplish some desired object. Management is that which leads guides and directs an organization for the accomplishment of a pre-determined object." Administration, thus, is a broader concept and includes within its fold both organization and management.

1.4. Scope of Public Administration

The thrust of the various definitions of public administration is that it pertains to the administrative activities of the government. As is well known, the activities of the government are commonly divided into three major branches, namely, Legislative, Executive and Judicial.

The question naturally arises as to which of the activities of the government are included in the study of public administration. There are two views on this subject.

1. View one: public administration is conceived in a comprehensive sense to include all the activities of the government, whether falling in the sphere of legislative, executive or judicial branch of the government. L.D. White supports this view.
2. View two: public administration' is concerned only with such activities of the government which pertain to the executive branch. Luther Gulick supports this view.

There is a further narrowing down of the scope of public administration by restricting it to these activities of the executive branch which are connected with the execution of the policies. It means that the policy formulation has to be separated from the execution of the policy. It is only the execution which is supposed to form part of public administration according to this narrow view.

Another complication in the scope of the study of public administration is introduced by the two views of administration, namely, **integral and managerial views**. Public administration, being a part of the more general term administration, is subject to these two views of administration also.

The differences of opinion about the scope of study of public administration thus centers around the crucial points whether public administration is only the managerial part of the government work or the entire complex of the activities or only the executive branch of the government or of all branches and finally whether administration is mere execution or application of policy or is a factor in the formulation of policy also.

1.5. Approaches and schools in Public Administration

There are three main theoretical approaches, namely the managerial view, the subject matter view and reconciliation view which have influenced the understanding and practice of public administration.

1.5.1. Managerial View of Public Administration

The view that administration is made of managerial tasks only is mainly held by the writers on business administration though most of the American writers on public administration also accept it either as a matter of principle or for practical convenience.

The natural question then arises as to what is included in public administration according to this view. **Henri Fayol** felt that principal categories of administration are five, namely, Planning (including research and forecasting), Organisation, command, coordination and control. According to him, these are the actual steps which successively occur in the administrative process. When any task is to be accomplished the first natural step is enquiry or research leading to planning. The Plan requires the necessary organization of men and material which have to be coordinated, commanded and controlled to achieve the objectives.

L. Urwick supported this analysis of Henri Fayol. Their work was carried forward by Mooney and Reiley, P. McQueen and others who attempted to deduce the fundamental principles of administration.

Willoughby was the first to write about this aspect. In this well-known work “Principles of Public Administration”, he divided the study of principles into five parts, namely:

- a) general or overhead administration (including allocation of functions, direction, supervision and control);
- b) organization, i.e. building up of administrative structure;
- c) Personnel management;
- d) Materials and supply; and
- e) Finance

Refining and elaborating these sub-divisions further, American administrative thought on the scope of public administration appears to have crystallized around the functional elements indicated by the letters of the word POSDCORB coined by Luther Gulick. This word stands for the following activities: P – stands for Planning, O – stands for Organisation, S – stands for

Staffing, D – stands for Directing, CO – stands for co-ordination, R – stands for Reporting and B – stands for Budgeting. The POSDCORB activities are said to represent the techniques, which are common to all the fields of administration or management. These were, therefore, taken to be the essential core or substance of administration.

1.5.2. Subject Matter View of Public Administration

For quite some time, the above-mentioned managerial view of public administration dominated the scene. It was however, realized that the POSDCORB activities were not the whole of administration. Some scholars of public administration went to the extent of suggesting that these were only the common housekeeping activities or tools of administration, the real core of which consisted of the various functions or services like law and order, education, public health, social security, defense, etc. These programmes or services have important and specialized techniques of their own and are not covered by POSDCORB activities. For example, Food & Agriculture administration has its own techniques of production, distribution, extension, etc, which are not covered by POSDCORB. It was also realized that the common techniques of management are very often influenced by the subject matter of the services to be rendered by a particular department of the Government. For example, the Organisation for maintenance of Law & Order is very much different from the organization for education, public health or agriculture.

1.5.3. A Reconciliation View

The two views about the scope of public administration have been discussed above. It is, however, not necessary to accept only one of them to the exclusion of the other. Just as the human organ has both an anatomy and a physiology of its own, the public administration has the common techniques of POSDCORB as its skeleton and the specialized methods of various programmes as its muscles and sinews. Without either of them the public administration cannot function.

Reconciling the two views, the scope of public administration ought to include:

- Administrative theory – which is general and abstract and largely consists of POSDCORB techniques common to all administration.
- The study of the concrete application of the common administrative theory to the various fields of administrative activity, such as agriculture, animal husbandry, public health, social welfare, defence etc.

In addition, the scope of public administration should also include the administrative organization and methods at different levels of the Government, such as, local administration, national administration and international administration. It may also include the study of the administrative system in different countries and under different forms of philosophies of Government.

1.6. Ecology (environment) of Public Administration

Public Administration cannot operate in vacuum. It has to interact with the political executive, social political interest groups, commercial and economic organizations etc, and above all with the people. Public Administration can be taken as a sub-system of the overall social system and has to interact with other sub-systems. A study of such interaction would constitute what has come to be known as ecological approach to the study of public administration. We propose to discuss in brief the ecological aspects of Public Administration.

The word “ecology” comes from the field of biology where it suggests the interdependence between animal species and their natural environment. In 1947, John M. Gaus attempted to employ the concept of ecology in the study of Public Administration. By this he meant the interdependence of Public Bureaucracy and its environment. In the same year Robert Dahi stressed the need for cross cultural studies that emphasizes environmental effects on administrative structure and behaviour. He observed that Public Administration cannot ignore the effect of national psychology and political, social and cultural environment in which it works. These developments in fact reflected the general interest in the study of comparative Public Administration in the newly independent nations during post-World War II period.

It was realized that the administration of these countries could not be understood in terms of the then existing theories which developed in a totally different setting, mainly in the USA. This interest in the study of Comparative Public Administration (CPA) in the developing countries was encouraged by the following factors:

- American occupational administration during and after World War-II.
- The emergence of a large number of developing countries
- The extension of technical assistance to these countries.
- Involvement of academicians in the administration of these assistance programs, and
- Rapid growth of behavioral sciences in general and comparative politics in particular.

In fact, a whole group of scholars in Comparative Administration Group (CAG) emerged which engaged itself in the study of the administration in developing countries of Africa, Latin America and Asia. They found that the study of Comparative Administration requires new concepts which can take care of the dynamic and developmental aspects of administration in cross cultural perspectives. They have also found that such concepts have to take into account the ecological aspects which can explain the impact of environment on the administrative system and vice versa. In fact, Riggs has observed that truly comparative administrative studies have necessarily to be ecological in character.

The basic premise of the ecological approach is that public administration may be regarded as one of the several institutions of the society. Its structure and functions can, therefore, be studied only in relation to these other institutions. In a system approach, public administration is a sub-system of the society and is constantly interacting i.e. affected by and affecting the economic, political and socio-cultural sub-systems. Riggs, in his “The Ecology of Public Administration” has explored the interaction between Public Administration and the environment in which it develops. From the environment he chose, social, Political, communication, and economic fields to study such interaction in the USA, ancient Siam and modern Philippines and Thailand. A brief discussion of some of the relevant parameters is given below.

1.6.1. Economic Factors

In ideal type of diffracted societies to which America approximates closely, the economic organization revolves round the market which is characterized by the use of rational criteria for the allocation of scarce resources for maximization of output. This rationality of the market mechanism is carried over into the administrative bureau, where recruitment obviously takes place on the basis of merit for the job to be performed. Similarly, the market-oriented practices of planning, communication, line and staff organizations etc, are taken over to the Public

Administration. On the same count, the performance Budgeting has been introduced in the Government.

On the other hand, the market needs administrative services for enforcement of contracts for regulating trade practices, for provision of infrastructural facilities etc. The money to run these administrative services is, in turn, provided by the economy. The inter-dependence between the economy and public administration thus becomes obvious. The economy could not survive without the administrative system which in turn was shaped by the needs of the economy. Moreover, the survival of the administration depends on the support provided by the economy.

In a traditional society (termed by Riggs as “fused society”) there is no market. The redistributive functions of the economy are performed by the administration which becomes co-terminus with it.

In traditional societies, the economy is governed by Bazaar- Canteen model which is characterized by “Price-indeterminacy”, “pariah entrepreneurship” and “subsidized” and “tributary” canteen for the favored and the disfavored respectively. Business of entrepreneurship is not favored and not taken up by “stronger” class. They have to buy protection from influential men, mostly from those in administration. This, on the one hand, leaves little with the entrepreneur for capital formation and on the other hand corrupts the administration. Low capital formation makes for low productivity leading to poor population and low tax collections. The administrators are paid less and have all the incentives for corruption. Inter-twining relationship of the economy and the administration is thus apparent.

1.6.2. Socio-Cultural Factors

American way of life is characterized by the existence of a large number of functionally specific voluntary associations who recruit members universally on contractual basis. Apart from its members, the association may also have some staff which serves as its agent. The staff, when big, becomes its bureaucracy. This pattern of associations has affected both economic and administrative fields. The business field is dominated by big corporations whose members are shareholders. Similarly, the public bureaucracy is the agent of the American people who form one big association. This social organization gives to the public administration its very important characteristics of universalistic recruitment and functional specificity. The inter-dependence between associations and the administration is very significant. Most of the important associations have their counterparts in the administration which depends on them for interest aggregation and articulation. This facilitates the task of administration in policy formulation and executing, which in turn, helps the associations in furthering their objectives.

In fused societies there are no specific associations, but, only family and kinship groups based on status. Higher the status, larger the family with kins family is at the apex. Since groups cannot aggregate or articulate the specific functional interests, the administrative order is based on a particularistic group structure which it also helps to sustain.

In prismatic societies, characterized by a high degree of heterogeneity, formalism and overlapping, the social structure is characterized by poly-communalism. Due to improving communication system, the mobilization in the society takes place faster than assimilation. Instead of nation-wide

functionally specific associations, we have such associations on community basis. Such associations, called elects by Riggs, tend to further the interests of their community and not the professional interest on national basis. The emergence of elects has profound influence on public administration which tends to carry many traits from the former. The formal bureau chief while paying lip service to the formal laws and rules feels compelled to help the members of his family and elects. This gives rise to selectivism in recruitment to the positions in Government as well as selection of beneficiaries of the Government programmes. This is some way between universalism and particularities. This leads to nepotism and coupled with the corruption induced by bazaar-canteen model of economic system may lead to differentiated groups hostile to the ruling elite. The efficiency of the administration goes down and so does the efficiency of economic organizations. In this way, the socio-cultural institutions and administration interact in a prismatic society.

1.6.3. Political Factors

Public Administration is most intimately connected with the political sub-system of the society. In fact, it has grown out of the political system of which it was earlier taken to be an integral part. Early theorists of Public administration believed in politics administration dichotomy. They believed that Public Administration has to execute policies laid down by political masters. The political system needs a lot of information to lay down policies and feedback to readjust them. This information and feedback are provided by Administration. This neat division of the policy making and policy execution functions comparatively diffracted societies to a large extent, though not fully. This need not be the case in the fused and prismatic societies.

In fused societies the two functions are not distinct. In political model, termed “archaic” by Riggs both political and administrative functions are performed but cannot be understood in terms of making and enforcing the policies. The situation is much more complex in prismatic societies. The prismatic characteristic of overlapping is very much in evidence among the political and administrative sub-systems. The formal political structure may be universalistic, but in practice laws and policies often discriminate selectively against the excluded groups. The legislators attempt to secure positions for their protégés and devote little time to important functions like legislation and policy making. The strength of elects makes universalistic policies impossible. Political system thus does not perform its functions but tends to enter the field of administration. The administrative system is then called upon to interpret and adopt the laws and policies to practical realities. In the absence of clear-cut policy guidelines and effective control by the political system, the Public Administration acquires considerable leeway in either enforcing policies ritualistically or circumventing them according to the convenience of administrators. Thus, in a prismatic society, the administrative and political system, not only show a good deal of interdependence, but also considerable overlapping.

1.6.4. Legal Factors

The symbol system of a country has a bearing on its legal system. It includes “myth”, “formula” and “code”. “Myth” means symbols to define source of sovereignty; “Formula” determines the structure of the Government, and “Code” includes laws and regulations. For example, the myth of popular sovereignty determines the democratic form of government with its universalistic laws. Whenever this myth is based on consensus among the population, the formal political structure also becomes the substantive one. The legislative, judicial and the executive wings of the

government perform their functions as laid down in the basic law i.e. constitution. Within the executive wing, the political executive is able to exercise control over the administrative wing as the guardian of the popular will. Laws enacted by the legislative wing represent the popular will and are faithfully implemented. In other words, there is a great degree of realism in the enactment and enforcement of laws. Any difficulties in implementation by the administration can be brought to the legislature for amendment in the laws. The legal system thus creates interdependent legislatures and executives although they are assigned different specific functions.

The discussions will not be complete without showing the effects of this inter-dependence in the prismatic system. Here the myth of popular sovereignty based on equality is superimposed on the traditional system with a different myth based on divine origin of king or family and kingship loyalties.

The result is that the structure of the government and the laws enacted by the legislature will not represent the consensus and may not be enforced. This gives rise to constitutional and legal formalism with a great deal of difference between the formal and substantive political and power structure. Some obvious symptoms are:

- 1) The political executive may not be able to lay down realistic policies due to lack of consensus and unrealistic laws may be enacted. Obviously, they cannot be implemented. This places great power in the hands of the administrators who may choose to implement laws which serve their interests.
- 2) Since the laws and rules and regulations do not lay down realistic goals, the administrators may be very ritualistic in implementing them. This may result in the red tape for which the bureaucracy is so well known.
- 3) This fluid situation may prompt the political executives to overlap into the administrative functions to further their partisan interest.
- 4) This also encourages the reverse process in which the administrators by distorting the rules and laws acquire a lot of political power.

The above discussion makes the interdependence of the political, administrative and the legal systems amply clear to have a sound administrative system; the laws and rules and regulations should be clear and policies should lay down clear goals. On the other hand, the enforcement of laws and regulations and implementation of policies depends on a sound administrative system.

1.7. Public Administration as an Art and Science

There has been a controversy over the status of Public Administration. Some scholars consider it as a science while most of the practitioners of management theory stress that it is an art. Let us now consider and then try to establish whether Public Administration is a Science or an Art. Considering Public Administration as Science has two implications i.e. it could be a Science or it could be a Social Science.

Let us first examine as to how Public Administration can be considered as a science. “Science” has two branches i.e. ‘Pure Science’ and “Social Science”.

The ‘Pure Science’ has the following characteristics:

- Universality of laws

- Exactness of the results based on these laws
- Predictability of events.

In Public Administration there has been a quest to find out universal laws. But such universal laws have so far not been established. Similarly the results are in excess to some degree and the events, since they involve human behaviour, are also not totally predictable. Hence Public Administration cannot be considered to be a 'Pure Science' in its present status of understanding.

Now we may consider as to how Public Administration is considered as a 'Social Science'. Social Science is defined as - 'a systematic body of knowledge derived from day-to-day experience, observations and practice'. A social science contains concepts, hypothesis, theories, experimentation, principles, etc. and to develop these principles it used either inductive approach or deductive approach.

Hence based on above definition, Public Administration can be considered to be Social Science because:

1. It contains a body of exact knowledge derived from experiences and observations which are applicable in practical situations. Hence in this respect it is as much a general science as economics or psychology or biology.
2. Through continued efforts, a body of principles which is applicable in any administrative set up has been developed. These principles are required to be applied in order to secure efficiency in administration.
3. It employs scientific methods of investigations in its study e.g. research and analysis is an indispensable part of any public policy.
4. It uses scientific process i.e. facts and data are collected and analyzed and based on this analyze generalizations are arrived at. Hence an administrator applies science in much the same manner as an Engineer or a Doctor.
5. It has also developed its own body of subject matter as distinct from other social science disciplines, though it is inter-disciplinary and multi-disciplinary.

Therefore, it can be said that Public Administration is a corpus of demonstrated truths and hence a social science.

However, as a social science, Public Administration has deficiencies, which present impediments in the path of it being considered as a social science. These are:

1. Public Administration involves dealing with Human Behaviour in organization which is not amenable to experimentation in laboratory conditions. Besides, most part of the subject matter of Public Administration is not amenable to experiments.
2. Simon in "Administrative Behaviour" has criticized that the principles propounded in the discipline of Public Administration are mutually contradictory and he has said that they are nothing but homely proverbs.
3. The subject matter of Public Administration is not free from values and hence its study can't be completely objective, while objectivity is the prime criterion for a discipline to be considered as a science.
4. Public Administration is also culture-bound i.e. Public Administration in one country is quite different from Public Administration in another country.

However, one can still regard Public Administration as a social science with following characters:

1. It is a new undeveloped science where conscious theorizing has gone on for only in the past 100 years.
2. It is primarily a science of observation than experiment while other social sciences are amendable to experiments. In case of public administration every new policy which is implemented in it becomes a social experiment.
3. It is both a positive and a normative science i.e. it is concerned with what “is” in the administration and also what “should be” in the administration. In other words it takes account of existing facts and tendencies and hence it is more than a mere wishful thinking.
4. It is a progressive science meaning thereby that its “generalizations” and “principles” are bound to be constantly revised and restated.

However, there exists a rival group of practitioners who claim that Public Administration is an Art. The arguments behind their belief are as follows:

- A. Administration, as has been established over the years, requires specialized skills and specialized knowledge and it is not possible for everyone to carry out administration just as it is not possible for everyone to perform a drama or a dance.
- B. Administration requires leadership and conviction, which cannot be taught in a class.
- C. It requires a body of special talents in the field of administration to become a manager/administrator. For example, tactfulness, conflict management etc are such special talents.
- D. Success in administration is directly proportional to the extent of skills applied. This is supported by the fact that in a group of 15-20 people only one person turns out to be a good manager who leads the others.

In the light of the above discussions, the following two conclusions may be arrived at:

1. There are strong reasons to believe that Public Administration is both – a ‘Science’ and an ‘Art’ i.e. though it can make predictions, the predictions are not absolutely correct. It also means that a contingency approach is required in the practice of administration i.e. there is a need to modify the science of administration to suit the situation and then apply it. The ability to modify it and to apply it is an art.
2. The word “Science” could be used here in the connotation of a ‘social Science’. It has the traits of a science since predictability is there though limited only up to some degree.

Hence, one can say that the methodology applied in Public Administration is scientific while its application is an art.

1.8. Significance of Public Administration

Public administration has become an essential segment of modern society, which has witnessed the emergence of what administrative thinkers call as 'Administrative State'. This means that every activity of individuals from 'Womb to tomb' is regulated and controlled by the State agencies, that is, the administrative agencies. The significance of public administration is increasing day by day as it has encompassed many new concepts within its fold. The functions, which it performs have expanded in scale, range and nature and is still increasing. It is necessary for not only maintaining public order, social security, welfare and economic infrastructure but also for the delivery of goods in terms of services like safety, utilities and enforcement of contractual obligations as also for

ensuring the rule of law and treating all the citizens equally. Its nature, contents and scope – all go to make it the ‘heart of the problem of modern governments

- (1) The significance of the public administration can be studied from points of view, namely,
- (2) Its significance as an instrument of governance;
- (3) Its significance as an instrument of development and change;
- (4) Its significance in modern domestic welfare state;

1.8.1. Significance of Public Administration as an Instrument of Governance

The most important function of the Government is to govern i.e. to maintain peace and public order and **to ensure the safety and security of the life and property of the citizens.** It has to ensure that the contracts are honored by the citizens and their disputes settled. This most significant role of the Government is to be fulfilled through the instrument of public administration. In the beginning of the civilization this was probably the only function performed by the public administration. As the civilization has advanced, many very important functions have been taken over by the Government, but, the importance of this basic function should not be minimized. Worthwhile progress or development is possible unless the citizens can live in peace. The continuing performance of this function is like the presence of oxygen in the air we breathe. It is hardly noticed so long as it exists. However, in its absence civilized life is impossible.

It is also a mistake to think that this regulatory function of the public administration has been static. It has been growing with the growing complexity of modern civilization. For example, new methods of investigation have had to be devised to take care of the better equipped criminals. New sets of controls had to be devised to enable the citizens to share the scarcity of food and other essential articles.

1.8.2. Significance of Public Administration as an Instrument of Development & Change

The public administration has to play a very significant role as an instrument of development and change. The administration of the country reflects the genius of its people and embodies their qualities, desires and aspirations. Whenever the people decide to proceed on the road to development, their main instrument is the public administration. They need trained manpower to run these schools, colleges and the technical institutions. They need technical manpower to build roads, bridges, buildings and to run the machines in the industry. **They need scientific manpower to undertake research and development.** It is the well-developed public administration which makes all this possible. It is true that part of the effort comes in the private sector, but it alone cannot complete the task. A lot of basic infrastructure has to be developed for which the private initiative is usually not forthcoming. For example, nationwide rail transport, telecommunication network, fundamental research is all to be organised by the Government.

In several development areas initial thrust has to be provided by the Government. All this is not possible without a well-developed public administration. This fact was also highlighted by the American administrators and private aid giving agencies who took up the task of assisting the developing countries. It was their experience that the recipient countries could not make much use of their assistance because they did not have the well-equipped administrative machinery to absorb it. The equipment provided by them could not be used for want of skilled manpower. **Financial**

assistance could not be channelized into productive schemes. The first task of developing countries is, therefore, to develop adequate administrative machinery which can take up the diverse tasks required for all round development.

The above discussion may create an impression that the public administration plays a significant part only in economic development. Nothing could be farther from truth. In a developing country, the public administration is also an instrument of social change and development. A number of social welfare measures have to be taken up. New laws have to be enacted and enforced. The obvious examples are anti-untouchables, anti-dowry laws and laws for the protection of weaker sections like labour, children, women etc. While the impetus for social change may come from the political process, somebody has to draft the laws and enforce them. This is the task of public administration.

1.8.3. Significance of Public Administration as an Instrument of Welfare State

In a modern democratic welfare State, the Government has to provide many services for the welfare of its citizens. It includes the **provision of schooling, medical facilities and social security measures.** With the breakdown of joint families, the problem of looking after the old and infants, orphans and widows comes up. With the slowing of economic activity, the problem of unemployed youth crops up. The development process brings up many new problems like those of urban slums and juvenile delinquents. The welfare State has to identify these problems and devise solutions for them. The formulation of these schemes and their implementation is another significant function of public administration.

The public administration is thus not only a protector of citizens from external dangers or internal disorders, but has become the greatest provider of various services. The welfare of the people depends very much on the way the public administration functions. No wonder today's state has been called an "Administrative State". Prof. V.V. Donham has rightly said, "If our civilization fails, it will be mainly because of administration".

1.9. Public and Private Administration

Public administration refers to the business of the State and is concerned with the ends and strategies of government policies, programmes and decisions. It operates in a political/governmental setting.

Private administration, on the other hand, refers to the management of business owned and operated by private individuals. It operates in the non-governmental setting, that is, business enterprises.

Hence, they are also known as governmental administration and business administration respectively.

1.9.1. Differences between Public and Private Administration

Scholars like Paul H. Appleby, Sir Josiah Stamp, Herbert A. Simon and Peter Drucker are of the view that public and private administrations are two different things.

The two types of administration can be differentiated on the following grounds:

- (1) Public administration is public in nature. Hence the main aim of public administration is to serve the public and to promote community welfare. It is characterized by service motive. The private administration, in contrast, is characterized by profit motive, not social service. Its objective is to maximize profit. All their efforts are directed to this end. Also, the public administration carries a greater social prestige than the private administration because of its social role.
- (2) Public administration operates strictly according to laws, rules and regulations. The administrators cannot do anything contrary to, or in excess of legal power. In private administration there are general laws which regulate the business. Individual business firms have considerable flexibility.
- (3) Public administration is subjected to political direction in most policy matters. It is the minister who lays down the broad policy outlines under which the bureaucrats have to implement the policy. In private administration, there is no such political direction. Only in emergency situation such political direction can be exercised. The ends which it pursues are its own and its objectives do not depend upon political decisions.
- (4) Public administration has to be consistent in its treatment. In other words, the principle of consistency of treatment is the watch word of public administration. Its acts and decisions are regulated by uniform laws, rules and regulations. It means that in public administration any show of discrimination, bias or partiality will evoke public censure or legislative commotion. Administrators have to be very consistent and impartial while dealing with the public. They must give equal treatment to all the citizens without any favour or prejudice. Private administration, on the other hand, can practice preferential treatment. In private administration discrimination is freely practiced in the selling of products, choice of products and in fixing the prices of the products.
- (5) Being public, public administration is open to constant public scrutiny. The actions of the administrators are much more exposed to the public gaze. The achievements of administrators rarely get publicity but a little fault hits the newspaper headlines in no time.
- (6) A public administrator is accountable for all the acts and the decisions through legislative oversight and judicial review. In other words, the moral and ethical standards in public administration are much higher as compared to private administration. Public gaze is absent in private administration and it is not so closely watched by the public and publicity media.
- (7) The tenure of the administrators is quite secure as compared to the private sector employees. Apart from this, they enjoy many benefits and privileges while in job and even after retirement. This kind of privilege is not available to the private sector employees.
- (8) In public administration there is monopoly of government and it does not allow private parties to compete. Services like post and telegraph, railways currency and coinage are exclusively provided by the government. Monopolism in private sector is missing. Several organizations compete with each other to supply the same commodity and product.
- (9) Public administration is subjected to external financial control. It means that finances of public administration are controlled by the legislature. In other words, legislature authorizes the income and expenditure of the executive branch.

The executive cannot collect or spend money of its own will. Thus, we see that the administration and finance are separated in public administration.

Private administration, on the other hand, is not subject to the principle of external financial control. It is free to manage its finances as it likes.

(10) The nature of functions performed by public and private administration is also different. Public Administration is **more comprehensive**. It deals with the various types of needs of the people of the people. It carries out functions, which are of urgent importance and vital for the very existence of the society, for example, defence and maintenance of law and order. Private administration, on the other hand, carries out less vital functions, like manufacture of cloth, supply of sugar, etc.

(11) Public administrators function anonymously. In other words, the functioning of civil service in government is characterized by the doctrine of anonymity which is the counterpart of the principle of ministerial responsibility. Thus, the minister assumes responsibility for the actions of the civil servants working under him. This is not so in private administration.

(12) Public administration differs from private administration in the measurement of efficiency as well. Private administration functions on a level of efficiency superior to that of public administration. Since the motive is to make profit, individuals are whole heartedly devoted to their work and business. In other words, the resource use or profit earning (i.e., input- output relationship) is the criterion of measuring efficiency in private administration. But the same criterion cannot be applied while measuring efficiency in public administration.

Thus, public administration has acquired certain distinctive features which distinguish it from private administration. Public accountability is its hallmark; consistency of treatment its watchword; and consciousness of community service, its ideal.

1.9.2. Similarities between Public and Private Administration

Even though, they differ in certain respects, there are many similarities between public and private administration. In fact, a group of administrative thinkers like Henry Fayol, M.P. Follet, Luther Gulick and Lyndall Urwick do not make a distinction between public and private administration. They are of the view that all administration, whether public or private, is one and possess the same basic features and it is undesirable to separate public from private administration. There is much in common between the two and the difference is only of degree not of kind.

The specific similarities between public and private administration are as below:

- ✓ The managerial techniques and skills of planning, organizing, coordinating, controlling, and so on are same in both.
- ✓ Both are organized on the basis of the principles of hierarchy.
- ✓ Both have uniformity in accounting, office management and procedures, purchases, disposals, statistics, stocking, and so on.
- ✓ Both are being influenced by the practices and standards of each other. Thus, Pfiffner and Presthus have described the emergence of public corporation as "a halfway house between its commercial prototype and the traditional governmental department." (*Pfiffner and Presthus, op.cit., p. 4*).
- ✓ Both have similarities so far as the problems of organization, personnel and finance are concerned. The similarity between them is demonstrated by the fact that there is a mutual exchange and rotation of personnel between the two. In India, we have seen that the

Administrative Staff College of India located at Hyderabad organizes common training programmes for the personnel of both public and private sectors.

With the onset of globalization and the new management perspective, the boundaries between public and private administration are getting blurred. The public sector is expected to work on the lines of the private sector. In other words, it is expected to follow the principles of three E's i.e., efficiency, economy and effectiveness along with profitability. The informal organs such as people's associations, community-based organizations along with formal organs of the state participate and discharge activities that were earlier in the public domain.

Apart from this, the private sector, functioning along market lines and the regulatory framework of government, undertakes functions that have been the prerogative of the public sector (*Medury, 2010, p. 193*). We can, thus, conclude that in many ways, the differences between public and private administration are diminishing. They complement and supplement each other.

Chapter Two: The Nature of Public Law

Law is everywhere an enduring social phenomenon. Even if it is a familiar concept because it touches every aspect of societal life, there is no single universally accepted framework and perspective in the understanding and conceptualization of law.

2.1. Meaning and Definition of Law

Law has been equated with the will of God, as a mirror of a divine world order. It has also been viewed as an expression of human nature, pure reason, general will and class ideology. Law has been seen as a historical fact and as a command.

It is more broadly conceived of as a form or type of social control. According to this view, it is a universal feature of the human experience that human beings have always and everywhere attempted to exercise control over other human beings. Such social control is accomplished by different types of means: normative, utilitarian or coercive. That is;

- 1) The normative approach attempts to obtain compliance by fostering belief in the rules of the social order;
- 2) The utilitarian approach offers some practical rewards or inducement for compliance;
- 3) The coercive approach threatens or uses force to achieve compliance.

Religious institutions rely primarily on the normative, business entities on utilitarian and prisons rely on the coercive means of social control. But most social and political institutions attempt to control the behavior of its members by mixture of these approaches.

The law affects every aspect of our lives; it governs our conduct from the cradle to the grave and its influence even extends from before our birth to after our death. We live in a society which has developed a complex body of rules to control the activities of its members. That is, there are;

- ✓ Laws which govern working conditions (e.g. by laying down minimum standards of health and safety),
- ✓ Laws which regulate leisure pursuits (e.g. by banning alcohol on coaches and trains travelling to football matches), and

- ✓ Laws which control personal relationships (e.g. by prohibiting marriage between close relatives).

So, what is 'law' and how is it different from other kinds of rules?

The law is a set of rules, enforceable by the courts, which regulate the government of the state and govern the relationship between the state and its citizens and between one citizen and another.

As individuals we encounter many 'rules'. The rules of a particular sport, such as the off-side rule in football, or the rules of a club, are designed to bring order to a particular activity.

Other **kinds of rule may really be social conventions, such as not speaking ill of the dead.** In this case, the 'rule' is merely a reflection of what a community regards to be appropriate behaviour. In neither situation would we expect the rule to have the force of law and to be enforced by the courts.

2.2. Classification of law

There are various ways in which the law may be classified; the most important are: public & private law.

2.2.1. Public law

Public law is concerned with the relationship between the state and its citizens. This comprises several specialist areas such as:

1. **Public Constitutional law.** Constitutional law is concerned with the workings of the British constitution. It covers such matters as the position of the Crown, the composition and procedures of Parliament, the functioning of central and local government, citizenship and the civil liberties of individual citizens.
2. **Administrative law.** There has been a dramatic increase in the activities of government during the last hundred years. Schemes have been introduced to help ensure a minimum standard of living for everybody. Government agencies are involved, for example, in the provision of a state retirement pension, income support and child benefit. A large number of disputes arise from the administration of these schemes and a body of law, administrative law, has developed to deal with the complaints of individuals against the decisions of the administering agency.
3. **Criminal law.** Certain kinds of wrongdoing pose such a serious threat to the good order of society that they are considered crimes against the whole community. The criminal law makes such anti-social behaviour an offence against the state and offenders are liable to punishment. The state accepts responsibility for the detection, prosecution and punishment of offenders.

2.2.2. Private law

It is concerned with the relationship between individuals towards each other. Private law is primarily concerned with the rights and duties of individuals towards each other. The state's involvement in this area of law is confined to providing a civilized method of resolving the dispute that has arisen. Thus, the legal process is begun by the aggrieved citizen and not by the state.

Private law is also called civil law and is often contrasted with criminal law.

1. **Criminal and civil law.** Legal rules are generally divided into two categories: criminal and civil. It is important to understand the nature of the division because there are fundamental differences in the purpose, procedures and terminology of each branch of law.

2.3. Purpose and Significance of Law

Despite relentless scholastic efforts and disagreements, every society has established and developed set of rules. In this part of the discussion, we will elaborate the need for and importance of law.

From the outset we need to take note the fact that there is strong dissent among scholars on the purpose of law. There are those **who celebrate** and **criticize laws.** Thus, in the subsequent discussion attempt is made to present both positions.

I. The conventional view

- 1) It is propagated by many political leaders & thinkers, taught in civic classes and held by many citizens. It views law in the following ways.

- a) Law is not only **something good in itself**, it is also the principal means of ensuring that people can enjoy all the goods of life. Thus, it *guarantees the possibility of a civilized existence and contributes to the enhancement of such an existence.*
 - b) *Law alone makes **freedom** possible, for law provides choices, rights & privileges.*
 - c) Law not only **maintains order**; it makes order possible. Law provides for the orderly, non-violent resolution of conflicts and disputes. More specifically; law allows social catharsis or the release of justifiable anger and outrage directed at those involve in harmful and anti-social conduct. **In so doing, the law minimizes further suffering and loss to members of the society.**
 - d) Law broadly is an instrument for the realization of justice. Law restores what has been lost, to the extent possible or desirable, to plaintiffs and victims, allocates responsibility and costs and imposes appropriate penalties on guilty and negligent parties.
 - e) **In the positive view**, law is & must serve as the key element in fostering & maintaining democratic political order. Law provides a fundamental constraint on the exercise of power by the political leadership. In this context law is regarded as the primary form of protection against tyranny. Law provides the framework for identifying and protection rights in general and human rights in particular. It allocates power and at the same time supervises the exercise of power.
 - f) **Law both creates and promotes desirable social values.** Law symbolically defines boundaries within society, clearly delineates the differences between right and wrong and between the fundamentally acceptable and unacceptable behavior. **In this regard law both encourages and compels us to respect the life, property, personhood and respect of others.**
 - g) It also tells us to pay tax. **Law promotes an orderly and healthier relationship and working condition.** It creates special opportunities and privileges for specific groups. In this regard it suffices to remind the immunities and protections accorded to parliamentarians. **Anti-discrimination, equal opportunity and affirmative action laws are also meant for protecting the vulnerable.**
- 2) Law has also some practical & mundane/ordinary/humdrum functions. That is;
- a) Law provides a structure for & facilitating a range of private transactions & productive activities.
 - b) It defines what constitutes wealth & property.
 - c) It provides opportunities for acquiring & maintaining wealth.
 - d) It identifies and distributes all kinds of benefits to qualified citizens.
 - e) It is a mechanism through which relationship between & citizens, political actors, families, interest groups are shaped and guided.
 - f) We need law to protect us from the anti-social behaviors of some groups or individuals.

If we need no laws and punishments (fines and penalties) how many more harmless people would be robbed, murdered or raped. In the words of one scholar “Without the rule of law and courts to enforce it, each one of us would be free to push and bully our fellow citizens, and which may be thought more importantly, our fellow citizen would be free to push and bully us.”

But it could be doing injustice if one leaves this discussion here. Such is the case because there are also at least equally convincing **critical negative views on the role of law**. **Thomas Cooper (1830)** has that “The law, unfortunately, has always retained on the side of the powerful. **Laws have unfortunately been enacted for the protection and perpetuation of power.**”

II. The Radical critique view

- a) **Law advances and protects elite interests and values.** It is a mechanism that the powerful uses to coerce, dominate & intimidate the powerless. Hence, law is inherently oriented toward the preservation of the status quo.
- b) It plays an instrumental role more specifically in the preservation of private property & grossly disproportionate share of wealth by the few.
- c) Critics contend that law is either directly a tool of the wealthy class or is 'relatively autonomous' but oriented toward the long-term survival of the system.
- d) Law contributes importantly to the legitimation of domination and maintenance of hierarchy.
- e) In sum, law perpetuates injustice, fosters conflict and promotes selfish interests. This latter view seems proper if one looks at some draconian and predatory laws of dictatorial and racist regimes.

2.4. An Introduction to Public Law

What is public law?

Public law is about the exercise of power by public authorities, such as local authorities or government departments. It is different from private law, which governs relationships between individuals and private companies.

If a decision made by a public body acting in a public capacity is unlawful, or if the decision-making process is unfair, it can be challenged;

- by using a complaints procedure, or
- by judicial review if there is no other way to challenge it.

What is a public body? **Public law controls public bodies acting in a public capacity.** Sometimes it is obvious what is a public body, for example a local authority or a government department.

The following are all public bodies:

- ✓ Government ministers,
- ✓ Departments and agencies,
- ✓ Health authorities,
- ✓ The police, prisons, & courts,
- ✓ Statutory tribunals,
- ✓ Regulatory and supervisory bodies, and
- ✓ Local authorities (including social services, housing departments & local education authorities).

Because many functions are now carried out by other agencies, you sometimes have to consider carefully if a body is "public" or not. In general, it will be controlled by public law principles if it is authorized by an Act of Parliament or carrying out a public function. If a public body is acting in a private capacity, for instance as an employer, or in a contractual relationship with a supplier, or if it acts negligently, its actions are governed by private, not public law.

2.5. Major types of Public Law

2.5.1. Administrative Law

2.5.1.1. Definition

There is a great divergence of opinion regarding the definition of concept of the administrative law. This is because of the tremendous increase in the administrative process that it makes impossible to attempt any precise definition of administrative law which can cover the entire range of the administrative process.

Hence one has to expect differences of scope and emphasis in defining administrative law. This is true not only due to the divergence of the administrative process within a given country, but also because of the divergence of the scope of the subject in the continental and Anglo-American legal systems.

However, **two important facts** should be taken into account in an attempt of understanding & defining administrative law. These are;

1. Administrative law is primarily concerned with the manner of exercising governmental power. The decision-making process is more important than the decision itself.
2. Administrative law cannot fully be defined without due regard to the functional approach.

This is to mean that *the function (purpose) of administrative law should be the underlying element of any definition.* The ultimate purpose of administrative law is controlling exercise of governmental power. The *control aspect 'impliedly shades some light on the other components of its definition.*

Accordingly, the following are some of the definitions scholars & administrative lawyers given to administrative law. That is;

1. **Austin** has defined administrative law, as the law which determines the ends and modes to which the sovereign power shall be exercised. In his view, the sovereign power shall be exercised either directly by the monarch or indirectly by the subordinate political superiors to whom portions of those powers are delegated or committed in trust.
2. **Schwartz** has defined administrative law as the law applicable to those administrative agencies, which possess delegated legislation and adjudicative authority. 'This definition is a narrower one. Among other things, it is silent as to the control mechanisms and those remedies available to parties affected by an administrative action.
3. **Jennings** has defined Administrative law as the law relating to the administration. It determines the organization, powers and duties of administrative authorities. **Massey** criticizes this definition for it fails to differentiate administrative and constitutional law.
 - ✓ It lays entire emphasis on the organization, power & duties to the exclusion of the manner of their exercise.
 - ✓ This definition does not give due regard to the administrative process, i.e. the manner of agency decision making, including the rules, procedures and principles it should comply with.
4. **Dicey** like Jennings without differencing administrative law from constitutional law defines it in the following way.

- a) It relates to that portion of a nation's legal systems which determines the legal status and liabilities of all state officials.
 - b) It defines the rights & liabilities of private individuals in their dealings with public officials.
 - c) It specifies the procedures by which those rights and liabilities are enforced.
 - This definition is mainly concerned with one aspect of administrative law, namely judicial control of public officials. It should be noted, that the administrative law, also governs legislative and institutional control mechanisms of power.
 - Dicey's definition also limits itself to the study of state officials. However, in the modern administrative state, administrative law touches other types of quasi-administrative agencies like corporations, commissions, universities and sometimes, even private domestic organizations.
5. **Davis** who represents the American approach defines administrative law as; the law that concerns the powers and procedures of administrative agencies, specially the law governing judicial review of administrative action.
- The shortcoming of this definition according to Massey is that it excludes rule - application or purely administrative power of administrative agencies.
 - However, it should be remembered that purely administrative functions are not strictly within the domain of administrative law, just like rule making (legislative) and adjudicative (judicial) powers.
 - Davis's definition is indicative of the approach towards administrative law, which lays great emphasis on detailed, and specific rule-making and adjudicative procedures and judicial review through the courts for any irregularity. He excludes control mechanisms through the lawmaker and institution like the ombudsman.
6. **Massey** gives a wider and working definition of administrative law in the following way. "Administrative law is that branch of public law which deals with the organization and powers of administrative and quasi administrative agencies and prescribes the principles and rules by which an official action is reached and reviewed in relation to individual liberty and freedom"

On the basis of these definitions the following are the concerns of administrative law.

1. It studies powers of administrative agencies.

The nature & extent of such powers is relevant to determine whether any administrative action is **ultra-vires** or there is an abuse of power. That is,

- a) It studies the rules, procedures & principles of exercising these powers.
- b) Parliament, when conferring legislative/adjudicative power on administrative agencies, usually prescribes specific rules governing manner of exercising such powers.
- c) In some cases, the procedure may be provided as a codified act applicable to all administrative agencies.
- d) It studies rules & principles applicable to the manner of exercising governmental powers such as principles of fairness, reasonableness, rationality & the rules of natural justice.

2. It studies the controlling mechanism of power. That is;

Administrative agencies while exercising their powers may exceed the legal limit-abuse their power or fail to comply with minimum procedural requirements. Administrative law studies control mechanisms like;

- 1) Legislative & institutional control and
- 2) Control by the courts through judicial review

3. **It studies remedies available to aggrieved parties.** Unlawful/unjust Administrative actions affects the rights & interests of aggrieved parties which administrative law is there to redress. Administrative law is concerned with remedies through the following. That is,

- a) **Judicial review** [(in the UK) a procedure by which a court can pronounce on an administrative action by a public body, or'
- b) **Review by the Supreme Court** [(in the US) of the constitutional validity of a legislative act,] such as;
 1. **Certiorari-** a writ by which a higher court reviews a case tried in a lower court;
 2. **Habeaus corpus-** a writ requiring a person to be brought before a judge/into court, especially to investigate the lawfulness of their detention.
 3. **Injunction-** a judicial order restraining a person from an action/compelling a person to carry out a certain act/an authoritative warning, and
 4. **Mandamus-** a judicial writ issued as a command to an inferior court or ordering a person to perform a public or statutory duty;

2.5.1.2. Purpose of Administrative Law

1. **Administrative law is primarily concerned with the control of power.**

- With the increase in level of state involvement in many aspects of everyday life during the first 80 years of the twentieth century, the need for a coherent and effective body of rules to govern relations between individuals and the state became essential.
- The 20th century saw the rise of the **regulatory state** and a consequent growth in administrative agencies of various kinds engaged in the delivery of a wide variety of public programs under statutory authority.
- This means, in effect, the state nowadays controls and supervises the lives, conduct and business of individuals in so many ways.
- **Hence controlling the manner of exercise of public power so as to ensure rule of law and respect for the right and liberty of individuals may be taken as the key purpose of administrative law.**

2. According to **Peer Leyland and Tery Woods**, administrative law embodies general principles applicable to the exercise of the powers and duties of authorities to ensure that the myriad and discretionary powers available to the executive conform to basic standards of legality and fairness. **The ostensible purpose of these principles is to ensure that there is accountability, transparency and effectiveness in exercising of power in the public domain, as well as the observance of rule of law.**

3. **According to Peer Leyland & Tery Woods** the underlying purposes of administrative law are the following.

- 1) It has a **control function**, acting in a negative sense as a brake or check in respect of the unlawful exercise or abuse of governmental/ administrative power.
- 2) It can have a **command function** by making public bodies perform their statutory duties, including the exercise of discretion under a statute.
- 3) It **embodies positive principles** to facilitate good administrative practice in ensuring that the rules of natural justice or fairness are adhered to.
- 4) It **operates to provide accountability & transparency**, including participation by interested individuals and parties in the process of government.
- 5) It may **provide a remedy for grievances** at the hands of public authorities.

4. **I.P. Massey** (**Administrative Law, 5th ed.**) identifies ***four*** basic elements/blocks of the foundation of administrative law as:

- 1) To check abuse of administrative power.
- 2) To ensure to citizens an impartial determination of their disputes by officials so as to protect them from unauthorized encroachment of their rights and interests.
- 3) To make those who exercise public power accountable to the people.
- 4) To realize these basic purposes, it is necessary to have a system of administrative law rooted in basic principles of rule of law and good administration.

5. A comprehensive, advanced and effective system of administrative law is underpinned by the following ***three broad principles***:

- 1) **Administrative justice**, which at its core is a philosophy that in administrative decision-making the rights and interests of individuals should be properly safe guarded.
- 2) **Executive accountability**, which has the aim of ensuring that those who exercise the executive (and coercive) powers of the state can be called on to explain and justify the way in which they have gone about that task.
- 3) **Good administration**- Administrative decision and action should conform to universally accepted standards, such as rationality, fairness, consistency and transparency.

2.5.1.3. Sources of Administration Law in Ethiopia

Administrative law principles and rules are to be found in many sources. The followings are the main sources of administrative law in Ethiopia.

2.5.1.3.1. The Constitution

The F.D.R.E constitution contains some provisions dealing with the manner and principle of government administration and accountability of public bodies and officials. It mainly provides broad principles as to the conduct and accountability of government, the principle of direct democratic participation by citizens and the rule of law. It also embodies the principle of separation of powers by allocating lawmaking power to the HoPRs, executive power cumulatively to the Prime Minister and Council of Ministers, and finally the power to interpret the laws to the judiciary.

Art, 77(2) talks about the power of Council of Ministers to determine the internal organizational structure of ministries and other organs of government, and also Art 77(3) envisages the possibility of delegation of legislative power are also relevant provisions for the study of the administrative law, (see also Articles 9(1), 12, 19(4), 25, 26,37,40, 50(9), 54(6)(7) 55(7), (14)(15), (17),(18),58,66(2),72-77,82,83,93,101-103 of F.D.R.E constitution).

2.5.1.3.2. Legislation

Laws adopted by parliament, which may have the effect of creating an administrative agency, or specify specific procedure to be complied by the specific authority in exercising its powers, can be considered a primary source for the study of administrative law.

The statute creating an agency known as **enabling act or parent act**, clearly determines the limit of power conferred on a certain agency. An administrative action exceeding such limit is **ultra-vires**, and in most countries the courts will be ready to intervene and invalidate such action. Moreover, parliament, when granting a certain power, is expected to formulate minimum procedure as to how that power can be exercised to ensure fairness in public administration. This can be done in two ways.

1. By imposing a general procedural requirement in taking any administrative action mainly administrative rule making & administrative adjudication just like the American Administrative Procedure Act (APA).
2. Parliament in every case may promulgate specific statutes applicable in different situations.

2.5.1.3.3. Delegated Legislation

Rules, directives and regulations issued by Council of Ministers and each administrative agency are also the main focus of administrative law.

Administrative law scholarship is concerned with delegated legislation to determine its;

- a) Constitutionality and legality
- b) Validity
- c) Ensure that it has not encroached the fundamental rights of citizens.

One aspect of such guarantee is subjecting the regulation & directive to comply with some minimum procedural requirements like;

- 1) Consultation (public participation) and
- 2) Publication (openness in government administration).

Arbitrary exercise of power leads to arbitrary administrative action, which in turn, leads to violation of citizen's rights and liberty. Hence, the substance and procedure of delegated legislation is an important source of administrative law.

2.5.1.3.4. Judicial Opinion

The doctrine that envelops and controls administrative power is found in judicial analysis of other sources. Yet, much of administrative law will not be found solely in **judicial opinions**.

Still, the opinions themselves must be carefully pursued to avoid generalizations about controls on agency behavior that may not be appropriate, as the outcome of many cases may turn on particular statutory language that may not necessarily reflect the nature of disputes in other agencies.

The American experience as to judicial opinion influencing administrative law is characterized by lack of generalization and fluctuating impacts. These may be due to two reasons.

- a) Cases coming before the courts through judicial review are insignificant compared to the magnitude of government bureaucracy & the administrative process.
- b) Even as between two apparently similar cases, there is a possibility for points of departure.

In Ethiopia, judicial opinion is far from being considered even as the least source of administrative law.

- a) Only cases less than 1% go to court through judicial reviews.
- b) The subject is not known by judges, lawyers, the legal profession & administrative officials, let alone by the poor and laypersons that are expected to seek judicial remedy for unlawful administrative acts and abuse of power by public officials.

However, given the fact that presently *the rule of precedent* is applicable, judicial opinion, it is hoped, may have a limited role as one of the sources of administrative law in Ethiopia.

2.5.1.4. Scope of Administrative Law

2.5.1.4.1. Public Law/Private Law Divide

The boundaries of administrative law extend only when administrative agencies and public officials exercise statutory or public powers, or when performing public duties.

In both *civil and common-law* countries, these types of functions are sometimes called public law functions to distinguish them from private law functions.

1. *Public law* governs the relationship between the state & the individual, whereas *private law* governs the relationship between individual citizens & some forms of relationships with the state, like relationship based on government contract. For example,
 - a) If a citizen works in a state-owned factory and is dismissed, he or she would sue as *a private law function*. However, if he is a civil servant, he or she would sue as a *public law function*.
 - b) If residents of the surrounding community were concerned about a decision to enlarge the state-owned factory because of environmental pollution, the legality of the decision could be reviewed by the courts as *a public law function*.
 - c) Yet, a contract between an individual or business organization with a certain administrative agency is a *private law function* governed by rules of contract applicable to any individual – individual relationship. However, if it is an administrative contract it is subject to different rules (see civ. code art 3136 ff).

The point here is that the rules and principles of administrative law are applicable in a relationship between citizens and the state; they do not extend to cases where the nature of the relationship is characterized by a private law function.

2.5.1.4.2. Substance vs. Procedure

Many of the definition & approaches to administrative law are limited to procedural aspects of the subject. The focus of administrative law is mainly on the manner and procedure of exercising power granted to administrative agencies by the legislature.

With respect to *judicial review*, the basic question asked is not whether a particular decision is right, or whether the judge, or a Minister, or officials have come to a different decision. The questions are what is the legal limit of power or reasonable limit of discretion the law has conferred on the official? That power been exceeded, or otherwise unlawfully exercised?

Therefore, administrative law is not concerned with the merits of the decision, but with the decision-making process.

2.6. The Relationship of Administrative Law to Constitutional Law & Other Concepts

2.6.1. Difference between Constitutional Law and Administrative Law

Administrative law is categorized as public law since it governs the relationship between the government and the individual. The same can be said of constitutional law. Hence, it is undeniable that these two areas of law, subject to their differences, also share some common features.

2.6.1.1. Unwritten Constitutions

In countries having unwritten constitution such as English, it has been difficult to make a clear distinction between administrative law & constitutional law. Many administrative lawyers agree that administrative law cannot be fully comprehended without a basic knowledge of constitutional law. That is,

- a) In view of Justice Gummoy the subject of administrative law cannot be understood without attention to its constitutional foundation. This is true because of the close relationship between these two laws.
- b) To the early English writers there was no difference between administrative & constitutional law. Therefore, Keitch observed that it is logically impossible to distinguish administrative law from constitutional law and all attempts to do so are artificial.

2.6.1.2. Written Constitutions

In countries having written constitution the difference between administrative law & constitutional law can easily be identified. The differences can be seen from the following perspectives. These are;

1. In terms of scope

- a) While constitutional law deals with the power and structures of government, i.e. the legislative, the executive and the judiciary, administrative law in its scope of study is limited to the exercise of power by the executive branch of government.
- b) The legislative and the judicial branches are relevant for the study of administrative law only when they exercise their controlling function on administrative power.

2. In terms of formulating rights

- a) Constitutional law, being the supreme law of the land, formulates fundamental rights which are inviolable and inalienable. Hence, it supersedes all other laws including administrative law.
- b) Administrative law does not provide rights; yet, it provides principles, rules & procedures & remedies to protect & safeguard fundamental rights.
- c) Administrative law is a tool for implementing the constitution whereas constitutional law lays down principles like separation of power and the rule of law.
- d) By providing rules as to the manner of exercising power by the executive, & simultaneously effective controlling mechanisms and remedies, administrative law becomes a pragmatic tool in ensuring the protection of fundamental rights.
- e) In the absence of an effective system of administrative law, it is inconceivable to have a constitution which actually exists in practical terms.

3. In terms of interdependence

- a) Administrative law and constitutional law are interdependent. For example,
 - ✓ Administrative laws have role to implement basic principles of good administration enshrined in the F.D.R.E. constitution.
 - ✓ The constitution in Articles 8(3), 12(1) and 12(2), respectively provides the principles of public participation, transparency and accountability in government administration.
- b) The presence of a developed system of administrative law is a *sine qua non* for the practical realization of these principles.

4. In terms of promoting values

- a) Administrative laws are instrumental in enhancing the development of constitutional values such as rule of law and democracy.
- b) The rules, procedures and principles of administrative law, by making public officials, comply with the limit of the power as provided in law, and checking the validity and legality of their actions, subjects the administration to the rule of law.
- c) Only, in a government firmly rooted in the principle of rule of law, can true democracy be planted and flourished. This in turn sustains democracy.

5. Judicial review, although mostly an issue within the domain of administrative law, should look in the constitutional structure for its justification and scope.

- a) In most countries, the judicial power of the ordinary courts to review the legality of the actions of the executive and administrative agencies emanates from the constitution.
 - ✓ The constitution confers the mandate on the ordinary courts. Most written constitutions contain specific provisions allocating judicial review power to the high courts, or the Supreme Court, including the grounds of review and the nature and type of remedies, which could be granted to the aggrieved parties by the respective courts.
- b) A basic issue common for administrative law & constitutional law is the scope of judicial review.
 - ✓ The debate over scope is still continuing and is showing a dynamic fluctuation, greatly influenced by the ever changing and ever-expanding features of the form and structure of government and public administration.
- c) The ultimate mission of the role of the courts as custodians of liberty, unless counter-balanced against the need for power & discretion of the executive, may ultimately result in unwarranted encroachment, which may have the effect of paralyzing the administration & endangering the basic constitutional principle of separation of powers.
 - ✓ This is to mean that the administrative law debate over the scope of judicial review is simultaneously a constitutional debate.

2.6.2. Similarities between Constitutional Law and Administrative Law

1. Administrative & constitutional laws share a common ground & supplement each other in their mission to bring about administrative justice.

- a) Concern for the rights of the individual has been a fundamental concern of administrative law.
- b) Sometimes, the constitution may clearly provide right to administrative justice. It ultimately tries to attain administrative justice.

c) Recognition of the principles of administrative justice is given in few bills of rights or constitutional documents. Australia and South Africa may be mentioned in this respect.

2. Constitutional law includes more than the jurisprudence surrounding the express & implied provisions of any constitution.

- ✓ In its broader sense, it connotes the laws & legal principles that determine the allocation of decision-making functions amongst the legislative, executive & judicial branches of government, & that define the essential elements of the relationship between the individual & agencies of the state.
- ✓ **Wade** has observed that administrative law is a branch of constitutional law and that the connecting thread is the quest for administrative justice.

2.7. Administrative Law in Ethiopia

It is very difficult and challenge to talk about the history of administrative law in Ethiopia. Administrative law is still not well developed, and it is an area of law characterized by the lack of legislative reform. It is also a subject in which too little attention is given in terms of research and publication. Even though it cannot be denied that there are some specific legislations scattered here and there, which are relevant to the study of administrative law, are still at a very infant stage.

When one looks into some of the specific legislations, one could easily realize that they are not in effect rules and procedures of manner of exercising power, or in general terms tools of controlling governmental power. Rather they are enabling acts conferring power on administrative agencies. However, since administrative law is in essence the mechanism of controlling power such enabling acts granting judicial and legislative powers it could not in any way signify the existence of administrative law in one country.

Hence, the historical development of the administrative law should be studied in terms of the process of legislative and judicial movement to curb the excess of power. In Ethiopia, the history of government is largely characterized by arbitrariness and lack of effective legislative, judicial and institutional control of power. That is why it is challenging to record the historical development or growth of administrative law.

In the final analysis, it becomes convincing that the issue has to be dealt with in terms of describing the growth of administrative power and the respective absence or few instances of legislative, judicial institutional attempts to control the exercise of administrative power. Ultimately, this task becomes the study of the constitutional history of Ethiopia, as the administrative law history could not be significantly different from its constitutional history.

2.7.1. Administrative Law during the Era of Haile Sellassie

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

- a) The 1931 constitution was simply a means of centralizing power of the Emperor, and as Markaris has explained, it was designed as a legal weapon in the process of centralization of governmental power.
- b) The 1955 revised constitution has showed little improvement in this regard as it tried to define and distribute powers of government. It also included provisions entitling the citizen's fundamental rights and freedoms. But it failed to do away with the accumulation of power in the hands of the Emperor.

The Emperor still retained law-making power sharing it with parliament, and judicial powers, which were ill-defined in the constitution as the power to maintain justice and the essential executive powers were vested directly on him. Such being the constitutional set up during that time, it is naïve to talk about the control mechanisms of power of the executive since that ultimately means checking the unquestionable power of the Emperor. However, it is be unfair to inter this conclusion as an indicative of the total picture.

There were some attempts and signs towards addressing the grievances of citizens against maladministration. There was, for instance, a legislative effort to establish the Ombudsman during

the last days of the Emperor Haile Selassie's regime. In attempt to come up with a new constitution, a draft constitution was prepared which devoted the ninth chapter to the establishment of the office of the Ombudsman. This draft, and thereby the establishment of the Ombudsman, remained in paper as a result of the fall of the Emperor in 1974. In 1974, an unsuccessful attempt was made to introduce for the first time an Administrative Procedure Act that governs the decision-making process of the administrative agencies. The draft was not actually as comprehensive as the American Administrative Procedure Act since it failed to deal with the rule making procedure of the agencies.

Its scope is limited only to providing mandatory adjudication procedures of the agencies and the establishment of the administrative court reviewing their decision.

In addition to such unsuccessful attempts, the establishment of some the administrative courts like the Civil Service Tribunal and an administrative tribunal entrusted with the power of reviewing assessment of tax may be taken as one step ahead for the evolution of the administrative law in Ethiopia.

The courts were also not totally silent in exercising their proper role of checking the legality of power of the executive. In very few instances, the courts used their ordinary power of interpretation of laws and entertained disputes between the citizen and the government. In one reported case, a court issued an order of *mandamus* compelling the agency to discharge its legal duty towards the plaintiff. This, even though, is a single and isolated incident is an indicative of the uncoordinated effort of the judiciary to wake up from the deep sleep of judicial restraint. It should also be remembered that the judiciary be totally blamed for failing to assert its proper place as the guardian of liberty. This is mainly due to the fact that the citizen didn't look to the judiciary seeking redress against the government. There is no role for the court to play in the absence of a petition made to it. Too many reasons could be mentioned for such incident.

But, lack of public confidence in the judiciary reflective of absence of independence of the courts may be cited as one of the contributing factors for the lack of an active judiciary. This is true not only with respect to the scope and extent of judicial control of administrative action during the Imperial era, but can also be taken as a general truth about the judiciary to the present day.

2.7.2. Administrative Law during the Dergue Era

Administrative law did not show any progress during the Dergue regime.

The 1987 constitution was not devised to limit the power of the government. Hence, one should not expect administrative law to deviate from the prevailing constitutional structure and develop as an instrument of checking the executive.

2.7.3. The Present State and Future Prospects of Administrative Law in Ethiopia

The present Federal Democratic Republic of Ethiopia of the 1995 has laid down the constitutional framework for the development of the administrative law. It contains key principles of government administration like accountability, transparency, and public participation. It also envisages the establishment of the Ombudsman and the Human Rights Commission. Six years after the constitution, the two institutions were established by the parliament.

Around 1880, the renowned English constitutional lawyer professor A.V.Dicey, misled by his misconception of the rule of law, proudly stated that England did not have administrative law. Almost after a century, in what can be said a total reversal of the Dicey's position, the renowned English judge Lord Denning commented that it may truly now be said that we have a developed system of administrative law.

Given the current situation in Ethiopia as to the scope and impact of the administrative law, it may be unfair to say that Ethiopia does not have administrative law. But, it is equally true that no one can boldly declare that we have a developed system of the administrative law.

Still there is no administrative procedure governing administrative decision-making or delegated legislation, either at the federal or state level. There are only few administrative courts poorly organized, highly subject to executive control and ineffective due to lack of expert administrative judges and absence of clear guidelines regarding their qualification, procedure of appointment and dismissal.

Control of administrative action through judicial review is almost non-existent. Institutional control through the Ombudsman and the Human Rights Commission is not as developed and effective as it should have been. Generally, the legal instrument to bring about administrative justice, executive accountability and good governance is far from being developed in a comprehensive and systematic manner. Presently, the need for such a developed system of administrative law is beyond necessity. The question of the administrative justice is still an unanswered question for the citizens of Ethiopia.

The implication of the federal structure is that there is a possibility of the Federal and the state administrative law. Since the constitution envisages for the establishment of the executive branch at the state level as one organ of government, it is up to the states to formulate their own administrative law. This means that the decision making and rule-making procedure of one regional state may be different from that of the other state, or even from that of the federal state.

Chapter Three: Public Institutions of Ethiopia

3.1. The institutions of Government in Ethiopia

3.1.1. The Cabinet, Government Ministries and Civil Service

3.1.1.1. Cabinet

A Cabinet is a body of high-ranking members of the government, typically representing the executive branch. It can also sometimes be referred to as the Council of Ministers, an Executive Council, or Executive Committee. It is a system of government in which the most important decisions are made.

According to FDRE constitution, cabinet in Ethiopian context is refers to as council of ministers. **The council of ministers is an institution with the highest executive powers of the federal government.** Its members up on the nomination of by the prime ministers are appointed by the

House of Peoples Representative (HPR) from among the members of Federal Houses or otherwise. It is responsible to Prime Minister and HPR in all its decisions. Its memberships include the prime ministers, ministers of federal government and the other officials whose membership is determined by law.

The council of ministers' main powers and functions may be categorized as falling into organizational, legal and economic areas. There is no question but that the council of ministers exerts strong influence in economic matters. It draws the annual budget of the federal government and implements it upon approval by the house of representative. Much of the work planning and formulation and, implementation and execution connected with the budget are still carried out by the executive, and the council of ministers is fully responsible for it. Hence, the formulation and implementation of economic, social and development policies and strategies are provided for in powers and functions of the council of ministers.

As part of economic competence it enjoys, the council of ministers is specifically empowered with ensuring the proper execution of financial and monetary policies. It administers national bank, decides on the decision of money and borrowing of internal and external loans and regulates the circulation of money and foreign currency.

The competence of the council of ministers in legal matters is varied and vast. It is first of all empowered to ensure the overall implementation of laws and decisions adopted by the house of people's representatives. It also ensures the observance of the law and order through its law enforcement agencies. The council of ministers in exceptional situation would issue decree of state emergency and submit it to HPR and thereby start the state of emergency machinery rolling with all its constitutional implications.

The council of ministers as part of powers and functions in organizational matters decides on the organizational structure of all administrative agencies responsible to it. It thereby coordinates their activities and provides the leadership. The council of ministers is specifically empowered to formulate foreign policy and exercise overall supervision over its implementation. Other specific areas provided by the constitution as falling within the charge of the council of ministers include protection of patents and copyrights and providing uniform standard of measurement and calendar.

The major task of organizing power lies with cabinet of the government. Under art. 72 of FDRE constitution, the council of ministers is responsible for working structural organization of administrative agencies. After the council of ministers decides on the structural information of administrative agencies, each administrative agency is expected to consolidate its internal structure. Similarly, the task of organizing responsibilities lies with regional cabinet.

The council of ministers has also directing power. The council of ministers delegates this directing power to ministers, commissioners, managers and others at different agencies. At the regional level, the directing power lies with the chief executive of each region and the corresponding regional cabinet.

The council of ministers exercises the overall supervision of administrative agencies at the federal level while chief executive and regional cabinet conduct the supervisory power at the regional

level. Each members of federal cabinet is in turn responsible for supervising the activities assigned to them and other departmental responsibilities.

3.1.1.2. Government Ministries

Historical Background of Ministries in Ethiopia

Even though, Ethiopia had a long history of government, there was no institutional extension of the central authority until the end of 19th century. Before Emperor Menelik, it was Emperor Tewodros who undertook a number of reforms in the mid-19th century. After he subdued different regions under this central administration, he embarked on a number of socio-economic reforms which included an attempt to abolish slavery, suppression, the custom of vendetta, regulation of power and lands of the Ethiopia Orthodox church as well as an attempt to turn local chiefs to salaried officials.

Although many efforts had made by the emperor, a number of factors contributed for his failure. The major one was the reminiscence made by Mekuannents (nobility) and priests. They thought that the reforms would undermine their powers. The second reason was lack of trained personnel who could implement the reform. Even though, the reform ideas were very important for the development of the country, they required educated people. The absence of a fixed government financial resource was also third factor that contributed for the failure of the reform. The fourth reason for the Tewodros's failure was to conduct the reforms effectively was the geographical isolation of regions of the country.

The next emperor who tried to continue with the reforms started by Emperor Tewodros was Yohannes IV. He was also interested to undertake socio-economic reforms. However, his time was characterized by a series of wars against the imperialist forces of Egyptians and Europeans. He could not get time to address the internal problems and execute his reforms.

The entire attempt to modernize the country's administration was begun at the time of Emperor Menelik II. Menelik II had conducted a number of programs in the areas of health, education, internal and external trade and public administration. For the successful implementation of different modernization programs, he had established the first ministerial offices in the country in 1907. These ministries include:

- | | |
|---|--------------------------------|
| 1) Ministry of Justice | 6) Ministry of War |
| 2) Ministry of Finance | 7) Ministry of Pen |
| 3) Ministry of Agriculture and Industry | 8) Ministry of Foreign Affairs |
| 4) Ministry of Public Works | 9) Ministry of Palaces |
| 5) Ministry of Interior | |

These ministerial offices were established traditional titles. The 'Afe-Negus' became the minister of justice; Tsehafe Tizaz became the minister of pen. With regard to the powers of ministers, there was no effective delegation of powers to these offices rather ministers were regarded as persona servants of the crown.

The effort to create a strong administrative structure has continued during Emperor Haile Sellassie. The emperor promulgated the first constitution in 1931 which counts to a major change in the country's government history. The constitution, through laying the foundation for the doctrine of

separation, established the three branches of the government including the executive branch. Article 11 of the constitution empowered the Emperor to lay down ‘the organization and the regulation of all administrative departments’. Pursuant to this power, the Emperor established a number of ministerial posts and other administrative bodies that were directly accountable to him. However, power was centralized in the executive branch of the government headed by the Emperor.

In 1943, Order No.1 and No 2 were issued to regulate and decentralize the power of the executive. The orders introduced the title of Prime Minister for the first time in Ethiopian history. This has changed the accountability structure. The role of the Emperor, as the head of each and every agency, was terminated and replaced by the Prime Minister. The Ministers became accountable to the Prime Minister rather than to the Emperor directly. The Prime Minister was, in turn, held accountable to the Emperor and by this the essence, and of delegation of power began to actualize.

But, the Revised Constitution of 1955, under article 22, changed the early attempt to decentralize administrative power by making the ministers and the Council of minister directly accountable to the Emperor. Further, the Constitution empowered the emperor to appoint, transfer and dismiss all ministers including the prime minister. He had the power to determine the internal organization of the executive branch. A number of ministers were established in various fields and all of them were answerable to the parliament as per article 73 of the constitution. Until the end of Imperial power in 1974, the Emperor established various administrative agencies bearing the names ministry, commission, authority or agency.

There were about twenty-one ministerial offices at the end of the regime. They were:

- | | |
|--|---|
| 1) Ministry of Land Reform & Administration | 11) Ministry of Agriculture |
| 2) Ministry of Public Health | 12) Ministry of Foreign Affairs |
| 3) Ministry of National Community Development & Social Affairs | 13) Ministry of Finance |
| 4) Ministry of Communication | 14) Ministry of Imperial Court |
| 5) Ministry of Mines | 15) Ministry of Pen |
| 6) Ministry of Public Works | 16) Ministry of Justice |
| 7) Ministry of Education and Fine Arts | 17) Ministry of Planning & Development |
| 8) Ministry of Commerce and Industry | 18) Ministry of Posts, Telegraph & Telephones |
| 9) Ministry of National Defense | 19) Ministry of Stores and Supplies |
| 10) Ministry of Interior | 20) Ministry of Pension |

After the provisional Military Administrative Council (PMAC) assumed political power, one of its tasks was reorganizing the already existing agencies. Pursuant to proclamation number of 1975, the Ministry of national resource development was added to the list. When PDRE Constitution was enacted in 1987 all administrative powers were granted to the council of ministers.

Major change occurred in the government structure of Ethiopia in 1991 when the current government came in to power. The country was transformed from unitary form of government into federal. The state was divided in to 9 regional states and one federal government. Both the regional states and the federal government are composed of law making executives and judicial organs. At

the federal level ministries and other public agencies are established for executing government policies and strategies. In Ethiopian context, there are three modes of administrative agencies i.e. some administrative agencies are established by the constitution, others are established by house of Peoples Representatives and there are also government agencies which are established by the regulations of council of ministers.

Ministries are established by House of People Representatives. The House establishes administrative agencies through using its general power to issue a proclamation provided under article 55(1) of the constitution. By using this power to issue the proclamation in this regard is **proclamation No. 256/2001** enacted for the reorganization of the executive organs of the government. According to the proclamation, the following ministries are established. These are:

- | | |
|---|--|
| 1) Ministry of Capacity Building | 10) Ministry of Revenue |
| 2) Ministry of Education | 11) Ministry of Social Affairs |
| 3) Ministry of Trade and Industry | 12) Ministry of finance & Economic Dev't |
| 4) Ministry of Health | 13) Ministry of National Defense |
| 5) Ministry of Youth, Sports & Culture | 14) Ministry of Water Resources |
| 6) Ministry of Capacity of rural dev't | 15) Ministry of Federal Affairs |
| 7) Ministry of Justice | 16) Ministry of Foreign Affairs |
| 8) Ministry of Mines | 17) Ministry of Agriculture |
| 9) Ministry of Urban dev't & infrastructure | 18) Ministry of Information |

Administrative powers and agencies assumed and exercised by ministries vary from minister to minister. For instance administrative power which is provided for ministry of Justice is different from Ministry of Education. This is because of different nature of the two agencies. Proclamation No. 256/2001 provides the powers and the functions of each Ministry.

3.1.1.3. Civil Service in Ethiopia: Historical background

3.1.1.3.1. The Ethiopian Civil Service during the Imperial Era: An Overview

The Civil Service is the operational arm of the government charged with the implementation and administration of public policy (Atkilt 1996: 55). Like its counterparts in the rest of the world, the Ethiopian Civil Service undertakes similar tasks. The genesis of the "modern" civil service in Ethiopia dates back to 1907 when Menelik II initiated the formation of a few ministries with the aim of lending an orderly and efficient arrangement to the workings of government. In the subsequent years, the institution underwent a series of changes commensurate with a host of new needs and imperatives.

Emperor Haile Selassie's Government, noted for a number of accomplishments shouldered the burden of persevering with the innovation of his predecessor. The Emperor undertook a series of institutionalization and restructuring measures in the hope of bringing about an effective and efficient civil service governed by specified rules and procedures of a uniform nature. This was a landmark in the sense of creating an enabling environment to withstand the effects of new challenges, which came to the fore as a result of modernization drives that took full swing after Haile Selassie's return from exile. Despite several Improvements regarding the operation of government mediated by periodic reforms, the Ethiopian Civil Service was fraught with problems that impeded the realization of expected outcomes.

It is worthy to note that the civil service under the monarchy suffered from irregularities that resulted from the rampancy of several ills. These included, among others,

- a) Cronyism, discretionary interventions, prevalence of political clientelism, and the taking effect of individual and group interests to the detriment of established rules and procedures. Such malpractices militated against the smooth functioning of the Civil Service thereby reducing its prowess to gear development endeavors in the desired direction. Faulty practices that pervaded the modus operandi of the Public Administration realm incapacitated its potential to serve as a locus for realizing socio- economic progress.
- b) There was no responsible body to ensure that ethical values were spread here and there over various legislations and were not compile properly as code of ethic. Besides, there were no mechanisms to make civil servants aware of the values.
- c) The public was no enlighten enough to know how to pursue and obtain services from public institution
- d) Lack of transparency and accountability and lack of mechanisms necessary for the effective and efficient service delivery. No institution was held accountable for not providing information. As a result, there was wide room for corruption and maladministration. Consequently, citizens were forced either to look for someone with a helping hand in civil service institutions or resort to offering a bribe to receive services they are looking for.

3.1.1.3.2. The Impact of the Dergue/Socialist Era on Ethiopia's Civil Service

The Imperial era, gave way to the Dergue/socialist system, which was characterized by a concerted drive to radically redesign the administrative machinery in line with the socialist/ central-planning ideological ethos of the new government.

The rule of the Dergue was consequently marked by intensive mobilization and politicization during the first few years of its incumbency. The nationalization measures, along with the proliferation of new government institutions and corporations led to a tremendous expansion of the public sector. The swiftness of the transition, dictated by the imperatives of revolutionary transformation, did not allow the Civil Service adequate respites to ponder on means and ways of adjusting to the new situation.

The fluidity of political developments marking the post-revolutionary years did not enable the Civil Service prepare itself for effecting corresponding changes. Deprived of the preliminaries necessary for smooth transition in terms of institutional, manpower and statutory adjustments, the sector was, nonetheless, expected to cope with the burdens entailed by its tremendous expansion. This constituted one of the most formidable challenges that the Civil Service encountered. The other dimension depicting the predicament of the agency was that it was required to accommodate diverse claims and demands triggered by the syndrome of extensive politicization, mobilization, and (re) organization within the public realm. In the absence of pertinent changes, the Civil Service was required to expedite the implementation of new decisions within the context of old regulations.

Moreover, the eviction of skilled and experienced top and intermediate level officials and civil servants, and their replacement with new recruits and political supplicants with a different profile, compounded the predicaments of Public Administration. The Dergue put the Civil service in disarray by fusing the institutions of party, state and government. It also encouraged the proliferation of parallel structures by appointing party functionaries to key decision-making civil service positions. Hence duplication and fragmentation of public functions and the downplaying of merit and professionalism became the order of the day.

The subsequent years characterized by the centralization of administration witnessed a situation where corruption, inefficient service delivery and increased neglect of due process of law in matters of public concern became a routine exercise. Given this bleak picture, the perpetuation of the Dergue regime was partly jeopardized due to its gross fail in delivering the "public good".

3.1.1.3.3. The Quest to Reform in Post-Dergue Era

Upon its assumption of power in May 1991, the EPRDF came to grips with the deficiencies that featured as the hallmarks of the Civil Service. Dictated by the demands of the Structural Adjustment Program and the zeal to usher in new arrangements in accordance with its drives and preferences, the EPRDF introduced a Civil Service Reform Program.

The adoption of the Structural Adjustment Program focused on two major areas, namely, macroeconomic policy reform, and institutional reform. Accordingly, a task force was established under Prime Minister's office to examine the overall arrangements and operations of the civil service from federal to regional level.

According to the study which was conducted from 1994 to 1996, the task force produced a 'comprehensive report on the existing condition of the Ethiopia civil service. According to the

report of the Task Force, the existing civil services had the following major shortcomings and identified one of areas requiring reform.

- 1) Management concentrated on the administration and control of inputs and activities rather than executing government policy
- 2) Management systems were outdated still reflecting the features of 1960s. consequently, they became unable to respond to the changing environment in which the civil service currently operates;
- 3) The public saw the bureaucracy as an obstacle to their lives, not a facilitator, with unnecessary and time consuming procedures;
- 4) The civil service was under resourced. Government expenditure was one of the lowest in the world;
- 5) The civil service culture gave managers little scope to manage properly. The service was highly centralized, i.e there was no pragmatic delegation; and
- 6) Staff remuneration was ridiculously low and these staff generally lacked requisite skills. This was because of lack of opportunities for international exposure by implication they were not expected to be innovative in their performance.

Measures Taken by the government of FDRE

In response to the challenges of civil service, the current government has taken civil service reform to improve the management and operation of the government in general.

It is difficult to define what civil service reform mean. World Bank states that it is difficult to define but it is easy to express the procedures how civil service is reformed.

According to World Bank the following steps are followed in the reformation of civil service.

- a) A first step in reform is often a basic attempt to codify and control the work of the core civil service. Once this is achieved, more complex systems of performance management can be attempted. Civil service reform may consist of establish fundamental management practices of establishing job descriptions, lines of reporting and basic disciplines of time-keeping and attendance. More advanced reforms focus on increasing efficiency.
- b) The second element is to move from a 'career' to a 'position' appointment system, in which people are hired for specific jobs, and required to be qualified and trained for those jobs, rather than hired as a generalist and then posted to different positions. 'Second generation' reforms involve setting up new management arrangements for the civil service, often including a 'civil service commission' with responsibility for recruiting, training and promoting civil servants. They also include trying to correct some of the civil service problems, such as low pay, 'pay compression' and the widespread use of non-monetary compensation such as cars and vehicles as part of the pay package. The idea behind these reforms is to make the civil service employment system more like a labor market, complete with the disciplines and incentives implied in such a market.
- c) More advanced reforms take this idea further and introduce competition for individual positions, including candidates from outside, performance-related pay, promotion based on merit instead of seniority and the ending of permanent tenure, irrespective of merit or performance.

What are the aims and major pillars of civil service reform in Ethiopia?

Civil Service Reform Program aims to promote the development of an efficient, effective, transparent, accountable, and ethical civil service.

The civil service reform program encompasses five major pillars: expenditure management and control, human resource management, service delivery, ethics, and top management system.

- 1) *Expenditure Management and Control (EMC)*** includes procurement, budgeting process, auditing and accounting reforms, review of fees and charges, and an overhaul of the internal and external control systems, development and introduction of new and improved financial administration as well as legal frameworks and associated regulations and directives;
- 2) *Human Resource Management (HRM)*** is about overhaul of the Civil Service Law, which was in place for many years, and reform of systems and procedures governing job classification and grading, remuneration and conditions of service, performance appraisal and time management, recruitment, selection, promotion and transfers, human resource planning, and the human resource management information system (HRMIS).
- 3) *Service Delivery (SD)*** is concerned with the development and introduction of a comprehensive service delivery policy, complaints handling mechanisms, and service standards to facilitate positive changes in the culture, attitude and work practice of government officials towards the provision of effective and equitable public services;
- 4) *Ethics*** focuses on the development and implementation mechanisms and best practices to combat corruption and impropriety, as well as, enhancing accountability and transparency within the civil service and the government.
- 5) *TOP Management System (TMS)*** involves reforms to enhance the quality and speed of decision-making through the development of top officials' and senior managers' capacity to manage, and to improve systems and process governing institutions policy development and management, annual and strategic planning, performance evaluation and monitoring, delegation of responsibilities, and reporting.

The major elements of the Civil Service Reform Program are strengthening staffing and incentives, and setting service standards for responsiveness to the public. Significant changes have been initiated and important results have been achieved in the last few years under the five pillars.

The following are the most **visible and significant reform achievements**:

- 1) New and improved policy frameworks and legislations such as the financial administration proclamation, the Federal Civil Service Law (still needs amendment), the National Service Delivery Policy, and associated regulations, directives, procedures and manuals;
- 2) Federal and regional civil service staff trained on many of the new and improved legislations and working systems;
- 3) Improvements in service delivery speed, efficiency and fairness in federal and regional institutions as an outcome of the initiatives to implement the National Policy for Service Delivery through a “*Quick Win*” reform approach;
- 4) Attitudinal change among increasing number of civil servants, towards the need for accounting of resources under their control in a professional manner, arching for better ways of using scarce public resources, and responsiveness to citizens' demands and requirements;

- 5) Establishment of a Federal Ethics and Anti-corruption Commission representing a solid step toward combating corruption through enhancing ethics, accountability and transparency; and,
- 6) Encouraging trends in internalizing civil service management problems and the need to resolve them through systemic reform measures.

3.2. Budgeting and Taxation in Ethiopia

3.2.1. Budgeting: Conceptual Background

Although most counties depend greatly upon markets, market determined prices, and the private enterprise system to allocate resources, government plays an active role in promoting economic growth and stability.

Government's intervention is required mainly because markets usually fail to function at the optimum. Market failures could in turn arise from public goods, externalities, economics of scale and incomplete consumer information.

Government plays its economic functions in various ways.

3.2.1.1. Market Failure and the Functions of Government

Why private businesses selling their products in free markets can't be relied upon to provide all goods and services that ought to be available? The argument for the efficiency of markets is powerful. In a world of limited resources, it is a valuable result. But there remains an important role for government, even if private markets can deliver most goods and services, and deliver them at low cost.

Indeed, there is an important cooperative relationship between healthy government and healthy markets. Markets need government to function efficiently: "Deals must be enforced and fraud discouraged." Without a governmental legal system to guarantee property rights and enforce contracts, corporate organizations and market exchange would be virtually impossible.

Anarchy and the free market are not synonymous. Government at least its protective elements are necessary if markets are to exist. And governments can obtain important information from market data, use markets as efficient mechanisms for implementing public policy, and acquire goods and services in market transactions to provide government services. The market economy needs government to function properly, and governments need the market economy if they are to serve the public interest.

3.2.1.2. Public Goods

Some goods will not be supplied in the market or insufficient amounts because of their very nature. The problem comes from two properties:

- (1) Non exhaustion, or non-rivalry, occurs when benefits of the service can only be shared, meaning that a given quantity of the service can be enjoyed by additional people with no reduction in benefit to the existing population, and
- (2) Inability to exclude non payers occurs when benefits cannot be easily limited to those who have paid for the services.

What do these public-good properties mean? When services are non-rival, use of the service by one person does not preclude concurrent full use by others at no additional cost of providing that service.

Public goods include national defense, mosquito abatement, pollution control, and disease control. The common characteristics of these services are

- (1) Once they are made available, denial to those who have not paid is impossible (non exclusion), and
- (2) Any number of people can consume the same good at the same time without diminishing the amount of that good available for anyone else to consume (non exhaustion, or non rivalry).

The failure of exclusion is the other public-good characteristic. Within the range of exclusion failure, if someone provides the services, all receive that service. When one structure in an urban area receives fire protection, given the propensity of fires to spread, nearby structures receive protection as well. Within a specific geographic area, however, all receive the service regardless of payment, whether they want it or not. Such is the special monopoly position of governments: Not only are alternative providers unavailable, but residents also do not have the option of not paying for the service because public revenue systems operate independently from service delivery.

Common-pool goods are goods or services for which exclusion is not feasible, but there are competing and exhaustive uses. Examples include aquifers, oil and gas deposits, and fisheries. There are no normal means of exercising exclusive property rights on the resource, but when used, the resource becomes unavailable for others. Left to private processes, the resource may be rapidly exhausted because it is valuable and is not, in its natural state, subject to normal ownership controls.

3.2.1.3. Externalities

Market transactions between buyer and seller may affect third parties. The consequences may be negative as with the exhaust fumes from automobiles or positive as with the protection provided pregnant women when a boy receives a rubella vaccination but, either way, that value is unlikely to be fully recognized in the market transaction. For these goods and services, the private return from their consumption is substantial, so the market will not fail to provide. It will not, however, provide at a socially reasonable level.

An attractive (or positive) externality causes the good in question to be under produced.

In the case of the rubella vaccination, those people who are vaccinated receive the benefit of reduced probability that they will contract the disease, a direct benefit to them for which they could be expected to pay. But they also provide protection against the disease to others in that they will not infect others if they themselves do not have the disease. That is a third-party, or external, effect of the vaccination. It is unlikely that everyone considering the vaccination will take full account of these benefits when weighing the advantages of vaccination against the disadvantages (minimal discomfort and some small risk of adverse reaction, time spent and inconvenience met in receiving the injection, and the out-of-pocket price of the service), and some will decide not to be vaccinated.

Fewer people would be vaccinated than would be in the best economic interests of society, because of the external benefits from the personal choice about vaccination. Governments require young boys to get rubella vaccinations not simply to protect them rubella itself is not much worse than a common cold—but because we do not want them to give the disease to a pregnant woman and cause birth defects in her child.

An undesirable (or negative) externality has the opposite effect, an overproduction of the good.

Automobile operators choose to pay the operating costs of their cars to enjoy the great personal value of mobility that cars provide, without full attention to the undesirable health and esthetic effects of the exhaust fumes produced by their vehicles or of the congestion delays caused by having many vehicles competing for highway space.

Again, this leads to a misallocation of resources: more car miles traveled than would be the case if their operators based their choices on the full social cost (internal plus external) of using the car.

Governments regularly subsidize/tax to try to correct market failures caused by externalities. For instance,

- (1) Governments may pay producers or consumers of goods with positive externalities to encourage more consumption of the good in recognition of benefits to third parties.
- (2) They may also levy corrective taxes to make purchasers and sellers respond to the external damage done by other products.
- (3) The idea is to make buyers and sellers respond to the external effects of the product, to bring the third-party effect into their decision-making in an economically tangible way.

3.2.1.4. Failure of Competition

The efficiencies of markets arise from competition among firms. When only a few firms serve a market, those firms may exercise monopoly power to charge prices higher than justified by economic conditions and, thereby, to collect excess profits. Governments watch markets to ensure that barriers do not prevent new firms from entering such markets, because entry of new firms in the industry is the best deterrent to monopoly pricing. And governments strictly police practices that unfairly restrain trade.

Sometimes governments choose to regulate industries that, because of cost advantage to larger firms (or increasing returns to scale), seem destined to be dominated by a few large firms (the natural monopoly case). This may be the situation for electrical, telephone, water, and some other utilities, although new technologies (e.g., lower production cost for alternative electricity

generators with small production capacity, and diverse telecommunication systems) have opened new competitive options in many such industries.

As this occurs, governments have rightly moved from strategies of legalistic regulation of firm operations and the prices they charge to removing barriers to the entry of new firms, thereby allowing competition to allocate resources and establish reasonable prices for products. Nevertheless, expecting private businesses to regulate failures of competition—without the government’s prompting is not reasonable.

3.2.1.5. Incomplete Markets and Imperfect Information

Governments often intervene in markets when customers have incomplete information about products and there is fear that unfettered market forces will not provide necessary information in a timely fashion. Governments test (or supervise the testing of) new drugs, guard against the sale of hazardous products, establish certain disclosure standards, and so forth.

The market may ultimately provide information but not until after much grief and suffering by the unwary. Reasoned government intervention involves securing widespread coverage (to prevent adverse selection) and regulating markets to ensure that decision-makers see the accurate cost implications of those choices. Social insurance systems (public pension, health and disability, unemployment, etc.) throughout the world stem from these market problems.

3.2.1.6. Economic Stabilization

Governments seek to stabilize the macro economy- preventing high unemployment, controlling inflation that could erode purchasing power and distort financial markets, and improving the prospects for economic growth and a higher quality of life.

Governments use monetary policy (manipulation of the money supply) and fiscal policies (changes in expenditure and taxation) to correct for these aggregate failures of the market, although there is continuing controversy about the extent to which those policies can make an active improvement in performance. Nevertheless, evidence does indicate that poor government decisions in use of national resources and financing of government programs in a misguided fashion can cause severe economic problems.

Central governments worry about the condition of the national economy, whereas sub national units (states, regions, cities, etc.) seek to improve their own particular share of that national economy.

And some governments attempt industrial policy, targeted subsidies and tax advantages designed to stimulate particular industries, in the belief that they can increase economic growth and reduce unemployment by giving an extra boost to activities destined to be national or even global leaders. Again, the capacity of politicians and government bureaucrats to pick winners better than can markets is decidedly mixed, but that does not stop them from trying as they arrange the public finances. There is also not much evidence to support the idea that sub national government use of targeted tax and expenditure programs can have much of an effect on economic development, but that does not stop the political leaders from trying.

3.2.1.7. Redistribution

Markets distribute products of the economy to those people having resources (talents, properties, etc.), not distinguishing whether those resources were earned, inherited, stolen, or whatever. Those who own the resources get the goods. People with few resources property or skills may fall below acceptable living standards and may be destined to a life of poverty in a pure market economy.

Governments may correct injustices in the distribution of affluence in society, seeking to improve the conditions faced by the less well-to-do that the market alone would leave them with.

Some argue for a degree of redistribution out of a social conscience and a desire for a safety net for all humanity; others argue for a degree of redistribution out of a fear that the poor will revolt, taking property from the affluent. Regardless of motives, most politicians believe that the public wants some protection for the very poor and at least some mild redistribution by the government of the result produced by pure operation of the market. Those concerns are reflected both in government spending programs and in systems for finance of those programs.

Governments employ a variety of different approaches toward redistribution. These include the followings.

- ✓ **Tax structures** that levy relatively higher tax burdens on high affluence households than on low-affluence ones (income taxes that levy higher effective rates on high-income households),
- ✓ **Direct income payments** to low-affluence families (the earned income tax credit),
- ✓ Programs that provide assistance services for which only low-affluence families qualify (Medicaid), or
- ✓ Programs available to all that low-income families use more heavily (unemployment benefit programs).

In all these involvement, government units operate by spending money. The decision about how much to spend and who to spend crucial to evaluate both how desirable it's spending is and how effective that spending is in its goods.

To implement its economic functions, government raises revenues through taxation, fees and charges, and spend the on different program and activities. This process of raising revenues and spending by government is performed through budgeting. Budget thus stands for the yearly plans forecasts of government revenues and expenditure.

3.2.2. The Concept of Government Budgeting

The government budget' represents a plan/forecast by government of its expenditure and revenues for a specified period. Commonly government budget is prepared for a year; know as a **financial year of fiscal year**. Other definition of government budget is an estimate of financial resource available to the government in the budget year and the allocations up to specified ceiling and specified imposes.

Several definitions on government budgeting have been made by several writers, ranging from the more preparation of specific documents to a process of determining the health of the entire economy.

Budgeting is the process of allocating scarce resources to unlimited demands and a budget is a Birrs/ Dollars and cents plan of operation for a specific period of time. At minimum, such a plan should contain information about the types of amounts of proposed expenditures, the purposes for which they are to be made, and the proposed means of financing them.

Snyder (1977) defines budgeting in the following ways: in broad terms, budgeting is often used to refer to the overall process of allocating resources as well as to the preparation of specific documents. It is the central elements of public fiscal management. It is both a document and a complex collective decision process.

Wildavsky (1979) defines a budget in the simplistic and most literal sense, as a document containing words and figures, which proposes expenditures for certain items and purpose.

As a complex process, it involves aspects of planning, policies economics, and accounting. i.e.

- ✓ It is a **planning process** because it involves making decision under conditions of uncertainty that have consequences for future time periods. Goals and objectives must be formulated, policies analyzed, and comprehensive plans and programs delineated before the budget can be formulated.
- ✓ Budgeting also becomes a **political process** because it is “allocative” mechanisms whereby decisions are made about “who gets” what in the public sector how the resources are allocated to different levels of government.
- ✓ It is also an **accounting process** whereby revenue and expenditure information are structured to facilitate continuous inspection, evaluation, and management control.

By allocating money to some purpose rather than others, the government may alter the shape of society. As demands for government spending are always greater than its capacity to pay, technical ways therefore have to be devised in order to decide whether to spend money on, say locating hospital at one site or another, or on one school or another school.

Axelord (1988) also believes that budgeting plays a most important role in governments. He defines budgeting as the nerve center of government. It is a decision-making system for allocating funds and tapping resources in order to achieve governmental priorities and objectives efficiently, economically, and effectively. It answers big questions of politics. Who gets how much for what purpose and who pays? The decisions influence the proportion of national resource that go the public sector and public priorities; the goals and objectives of thousands of programs and projects and public purse. As a result, the budget is **the sum total of the aspirations, values social and economic policies and services of government**. It comprises expenditures and the means of funding them: taxes, other sources of revenue, and borrowed funds.

Cleveland (1992), in his detailed and explicit definition, contends that a budget is not merely a document but a plan for financing an enterprise or government during a responsible executive to a representative body (or other duly constituted agent) whose approval and authorization are necessary before the plan may be executed.

Cleveland further explains that:

- 1) A “budget” is classed as a “plan” instead of a “document” or a “statement” for the reason that it is in the nature of a definite proposal calling for approval or disapproval with such

details and specifications attached as are thought to be useful to the approving body or agents in arriving at a decision.

- 2) It is differentiated from other plans by the phrase “financing an enterprise or government during a plan for financing an enterprise or government. For this reason, it is further differentiated by the requirement that to be a budget it must be “prepared submitted by the plant may be executed”.
- 3) One other essential is added, that it must be submitted to a “representative body (or other duty constituted agent) whose approval and authorization are necessary before the plan may be executed.

Globally, the Government Accounting Standards Board [GASB] recognizes the importance of the budget process in the following principle:

- ✓ Every governmental unit should adopt an annual budget(s)
- ✓ The accounting system should provide the basis for appropriate budgetary control
- ✓ Budgetary comparisons should be included in the appropriate financial statements and schedules for governmental funds for which an annual budget has been adopted.

3.2.3. The Functions/Roles of Government Budgeting

The budget process makes it possible for governments to cope with unprecedented problems of priorities, expenditures, revenues and debt financing. Government budgeting, therefore, performs the following interrelated functions.

3.2.3.1. Allocates Resources to Achieve Governmental Priorities, Goals and Policies

Budgeting furnishes a framework or debate and decision about the size, allocation and financing of limited resources to achieve policy and program goals. The determination of these goals and the proportion of resources committed to their fulfillment the stuffs that make up politics. As result, budgeting is conflict-ridden every step of the way, either openly or not. The intensity of the “conflict” will depend on the nature of the society and the scarcity of resources.

For all its seeming technical, and sometimes dreary, appearing, the budget is a supreme political document. The figures found in the budget tell the tale of those who “won”, “lost”, or stayed even in the contest for available resources. The budget also synthesizes the total by project, the budget reflects thousands of decisions on what will be done at what cost. Such allocation results form a highly routinized and ritualized decision-making system at the executive and legislative levels.

The budget process itself is inherently neutral. In the relative affluence of the late 1950s and 1960s, it was a mechanism for initiating new programs and expanding existing ones.

In recent years, it has served as a tool to re-deploy funds from domestic to defense programs & to cut back programs & project, federal aid & subsidies to hitherto favored groups in society. Given more favorable economic and political circumstances, the budget process will take new directions at the behest of its political masters.

3.2.3.1. Raises Funds through Taxes and Finance to budget

Budgets are also financial plans that lay out not only proposed expenditures but also the revenues and loans necessary to support them. They can be as simple as in the case of small local governments or as complex as the budgets of federal governments.

The financing of the budget raises a host of issues on fair play, equity, and economic and fiscal policy such as: what proportion of national or state income should taxes consume? Who should bear the tax burden? What impact will raising or lowering taxes have on the economy in terms of economic growth, price stability, and employment? How much of the budget should be supported by taxes? By loans? To what extent, at all, are deficits tolerable? Should tax limits be set? Should taxation be directed to social ends such as redistribution of income from high- to low-income groups?

These are just some of the questions that the financing of budgets raises. Other issues could be on the “mix” of taxes (personal income tax, business tax, etc.) that is deemed appropriate or the social and economic criteria that should govern decision as to the relative amount of taxes that should be progressive or regressive. Other fiscal tools are also significant, though less obvious than taxes, such as loans and loan guarantees to various groups in society such as small businesses, farmers, homeowners, and the like.

3.2.3.3. Stabilizes the Economy through Fiscal Policy in Relation to Monetary policy

The economy has always shaped budgetary policy at all levels of government. A recession results in lower personal income and corporate profits, hence, resulting in a decline in revenue. At the same time, expenditures for welfare programs rise and deficits mushroom. As the economy recovers, taxes increase, expenditures decline, and deficits shrink.

What is relatively new, at least during the fifty years, is the attempt of national governments, through fiscal and monetary policy, to promote economic growth and employment, control inflation, and lower interest rates. This approach has taken several forms, in recessions; government cuts taxes, increases expenditures, borrows funds extensively, and through the central bank, reduces interest rate. The aim then is to stimulate the demand for goods and services by individuals and businesses so that the economy will pick up.

Conversely, in a booming economy with full employment, the maximum utilization of resources and a sharp demand for goods and services will most likely raise inflation as money chases scarce goods and services. In this situation, government's inflation as money chases scarce goods and services. In this situation, governments will try to dampen the overheated economy through expenditures cuts, tax increase, and the rise of interest rates. Whether the budget process can or should be in this fashion is one of the major controversial issues in budgeting.

3.2.3.4. Hold Operating Agencies Accountable for the efficient & Effective use of resources in the Budget

The annual (or biennial) budget cycle offers the executive and legislative branches or government a periodic means of taking stock of the performance of programs and projects and the use of available resources by agencies. In requesting funds for the ensuing fiscal year, agencies

must account for, through the budget system, the efficiency and cost effectiveness of their programs. In theory then, the budget process enforces accountability.

Over the years, the chief executive and the legislature have institutionalized budgeting and other systems of accountability to control the bureaucracy. Legislatures rely on the appropriation and oversight process to exercise control. Through spending and revenue bills, they can authorize, curtail or limit programs, specify administrative powers and functions, determine the funding levels, give or withhold discretion in the use of funds, and raise the necessary revenues.

3.2.3.5. Control Expenditures

Of the many roles served by the budgetary system, it's most traditional and fundamental function is the control of expenditures to make certain that are legal valid, appropriate, and accurate. Such basic control is the bedrock of budgeting. Without it no other budgetary function can develop successfully.

Budget office's exercise their control through two powerful instruments: the allotment process and the accounting system.

[The allotment process](#)

In most governments, money does not flow automatically to agencies after the legislature approves appropriations. It is allotted monthly, quarterly, or at other intervals, by the budget office for at least three reasons: 1) to avoid premature exhaustion of appropriations; (2) to keep the rate of expenditures in line with flow of budget implementation.

[The accounting system](#)

The accounting system control actual expenditures, from appropriations to allotments. Every proposed expenditure must run through the accounting system to make certain that it complies with the terms of the appropriation bill, the allotment, and the financial laws of the government.

Purchase orders, payrolls, vouchers and contracts that fail to meet this test are turned down. In addition the accounting system provides essential data for budgeting. It sets up an account for each appropriation and allotment and accumulates all the expenditures and obligations against the appropriations. Thus, it is in a position to signal periodically the status of the appropriations, the amounts spent and obligated, and the unexpected and obligated balances.

This early warning alerts the budget offices to the possible dangers of over spending, and enables them to take corrective action.

3.2.3.6. Provides a mechanism for Transferring Funds from one level of government to another

With major revenue sources preempted by the national government, state and local governments rely on an inadequate tax base to finance their own programs. As a result, they claim for a larger share of national revenue.

As a result of intergovernmental financing, all levels of government share, in varying degrees, the costs of the major domestic programs, specially welfare, education, health and transportation. In the surface, the financial arrangements seem intricate and complex. But for all the untidiness and the seeming lack of pattern, the intergovernmental grant system serves some major purposes in

addition to sharing up the finances of state and local governments. For one, it enables the national government to delegate the implementation of major programs to state and local governments by holding out the lure of extensive funding. But then to receive the funds from the national government, local governments must pursue national objectives and follow national policies and guidelines similarly, state governments exact as a condition for the grants to local governments compliance with numerous fiscal and program requirements.

Transfer Payments assume varying forms: (a) revenue sharing, (b) block grants, and (c) categorical grants. The overwhelming favorite of state and local governments is **revenue sharing** since it has few strings attached to it. On the other hand, more constrains at the federal level **block or broad-based grants**, which are lump sums dedicated to major program areas such as community development, health, education, law enforcement, and other functions. Recipients must comply with an array of planning policy, fiscal matching, and reporting requirements.

The most restrictive grants are the categorical grants whereby the federal government transfers funds to state and local governments for specific programs and projects and attaché numerous conditions to the use of these funds. This is not accident. Such kind of grant enjoys wide support among interest groups, legislative committees and professional groups since they fund specific programs favored by this coalition. By the very nature of categorical grants, chief executives and legislature have little discretion in allocation funds.

Political pressure and controversy exist in transfer payments. Each state and local government wants to be sure of getting its fair share. Interest groups compete with each other for grants. Poor governments request more grants in order to equalize resources among governments. Wealthier governments resist any equalization that takes from the rich and gives to the poor. While sub-national governments are eager to receive grants, they nevertheless resent the control attached to their use. Wider and more far-reaching budgetary issues surface periodically. What taxes should remain the sole preserve of the national, state, and local governments? What taxes should they share? What function should the various levels of government assume? How should the functions be funded?

3.2.3.7. Serves as a Mechanism for Achieving Planned Social and Economic Development

Once limited to “socialist” countries and views with suspicion in market economy countries, medium-(usually spanning five years) and long-term (spanning five years plus) social and economic planning serve as a framework for budgeting in most countries in the world despite skepticism about the effectiveness of such planning.

Despite a strong ideological bias in the United States against such kind of planning, it persists in various forms in the public sector. One mechanism for five year planning was PPBS or Planning and Programming Budgeting System in the federal government and among several states during the 1960’s. The aim was to translate the goals in the five-year plan into the annual budget. While the system failed for a variety of reasons areas of government such as health and mental health, education, housing agriculture and energy at all levels of government.

3.2.3.8. Provides Leverage through the Power of the Purse to pressure Operating Agencies to manage their programs more efficiently and effectively

From its earliest days, the budget process has offered a singular opportunity to examine systematically the efficiency, productivity, and effectiveness of all programs and projects through the power of the purse, and to initiate appropriate remedial action where needed.

In making a case for continued and/or additional funding, agencies attempt to demonstrate the positive impact of their programs and the efficiency of their organizational structure, operating systems, policies, staff utilization, and resource management. It is the task of budget analysts to challenge all these claims and, on the basis of a searching review, to recommend higher or lower funding levels and way and means of achieving improved program management.

The leverage of budgeting to effect management improvement is powerful if the political leadership and central budget office have the will has flattered perceptibly because of the political of the budget process.

3.2.4. Classification of Budget

State and local governments typically prepare and utilize several types of financial plans referred to as “budgets”. It is important, therefore, to distinguish among various types of budgets, to understand the phases through which each may pass, and to be familiar with commonly uses budgetary terminology.

For purpose of this discussion budgets may be classified into the following five types. These are;

3.2.4.1. Capital Vs Current Budget

Sound governmental fiscal management requires continual planning for several periods into the future. Most governments are involved in programs to provide certain goods of services continuously (or at least for several years); in acquisition of buildings, land or other major items of capital outlay/expenditure that must be scheduled and finance; and in long term debt service commitment.

Although some prepare comprehensive multi -year plans that include all of these, such multi- year plans most frequently include only the capital outlay plans for the organization such a plan generally covers a period of two to six years and is referred to as a **“capital program”**.

Each year the current segment of the capital program is considered for inclusion as the “capital budget”, in the “current budget”, The current budget also includes the proposed expenditures for the current operations and debt service, as well as estimates of all financial resources expected to available during the current period.

3.2.4.2. Tentative Vs Enacted Budgets

One key distinction among budgets is their legal status. Various documents may be called “budgets” prior to approval by the legislative body. Such documents have varying degrees of finality, but none is a final, legally enacted budget. For example, capital programs represent plans but not requests by the executive branch and are subject to change from year to year.

Similarly, while a department budget request may be called a budget, it may be changed several times by the department heads or higher authority before being included in the chief executive's final budget presented to the basis of its control over the executive branch. Only the legislature may revise the terms or conditions of this final "illegal enacted" budget which is the basis for executive branch accountably to the legislature.

3.2.4.3. General Vs Special Budgets

The budgets of "general governmental" activities-commonly known as operating budget or referred to us recurrent expenditure financed through the general, special revenue and debt service funds.

A budget prepared for any other fund is referred to as a "special" budget. They are commonly limited to those for capital projects funds commonly categorize as capital budget and expenditure.

3.2.4.4. Fixed Vs Flexible Budgets

Fixed budgets are those in which appropriation are for specific (fixed) dollar or Birr amounts of expenditures or expenses. These appropriated amounts may not be exceeded because of changes in demand for governmental goods or services. Fixed budgets are relatively simple to prepare and administer and are more easily understood than flexible budgets governmental fund budgets are almost invariably fixed expenditure budgets.

On the other hand, expenditures of expenses authorized by flexible budgets are more realistic when changes in the quantities of goods or services provided directly affect resource availability and expenditure or expense requirements, and when formal budgetary control (in the account structure) is not deemed essential. Flexible budgets- on the expense or expenditure basis are most appropriate for enterprise and internals service funds.

3.2.4.5. Executive Vs legislative Budgets

Budgets are also sometimes categorized by prepare. In most cases, budget preparation is usually considered an executive function, though the legislature may revise the budget prior to approval. In some instances, however, the legislative branch prepares the budget, possibly subject to executive veto, in other instances, the budget may originate with a joint legislative-executive committee (possibly with citizen representatives) or with a committee composed solely of citizens or constituents. Such budgets are frequently referred to by terms such as "executive budget," "joint budget", and "committee budget" respectively.

Governmental budgets can also be classified by the period the budget covers. There are generally three classifications: Annual, Biannual, and Long term.

- 1) **Annual or current budget:** is the finical plan for a single fiscal year. Thesis is the most common types of governmental budget. An annual budget for all current operations is called an operating budget. Even if their meanings are not identical terms annual (current) budget and operating budget are often used interchangeably.
- 2) **Biannual budgets:** are sometimes used by state governments and cover two consecutive years. These two-year periods is treated as one fiscal period.

- 3) **Long-term budgets:** are planning documents that typically emphasize major program or capital outlay plans, the latter being referred to as capital involvement programs or capital budgets. These long-term budgets usually cover four to six years.

3.2.5. Method and types of Budgeting

3.2.5.1. Methods of Budgeting

When developing the budget and reviewing the planned fiscal program, one of three general methods is often followed, line item (or traditional), program, or performance. These methods essentially related to the format of the budget document and how it is presented for review and evaluation.

Variations of these formats (combined-method budget) may be used; however, these variations tend to be derived from one of the basic methods.

1. **Line-term Budgets:** Line item budgeting is the approach traditionally used in governmental accounting. This method classified expenditures by department or organization according to the object of expenditure. For example, salaries, materials supplies, contractual services, and equipment. It focuses on the resources the government needs to acquire to deliver to deliver services. The line-item approach considers what resources to use and by whom rather than what services to provide or objective to achieve. Line item budget are usually oriented to imposing accountability on department or division heads who expend appropriated monies. Advocates of this approach note that its longstanding use, its simplicity, and its ease of preparation and understanding by all concerned.
2. **Program budgets:** A program budget normally classifies expenditure according to purpose or services delivered (for example, planning and zoning data processing, research and investigate in, mental health). This approach attempts to measure the total expenditures of a service function or activity that makes up a “program” with secondary attention to the organizational units involved. A program budget emphasizes the expenditures of specific programs and services without regard to the number of departments or division that may be involved. Goals may be established for each program. Expenditures can then be estimated to determine the resources needed to accomplish the stated objectives. The advantage of this approach is that it considers the aggregate expenditures of various individual programs and the total resources committed to the area or target group served. A disadvantage of program budgeting is that it is sometimes difficult to impose accountability of individual departments divisions, or other organizational units.
3. **Zero Base Budgeting:** The newest approach to budgetary planning is zero-base budgeting (ZBB). It came on the scene about 1970 from the profit-seeking sector of the economy, was adopted by a few governments. The essential idea of ZBB is that the continued existence of programs or activities is not taken for granted; each service must be justified in it entirely every year.

The advantages of ZBB are:

- a) To enforce an annual review of all programs activities and expenditures
- b) To save money by identifying out dated programs and unnecessary high levels of service
- c) To concentrate the attention of officials on the costs and benefits of services
- d) To improve the abilities of management to plan and evaluate
- e) To improve decisions made by the executive & legislative branches of the government.

3.2.5.2. Types of Budgeting

There are two basic types of budgeting: (a) Expenditure budgeting (b) Revenue budgeting. i.e.

- (1) **Expenditure budgeting** reflects what activities are going to be done & at what cost in a particular year.
- (2) **Revenue budgeting** is the identification of revenue sources & determine the amount of revenue from each source.

An Expenditure budget can either be a recurrent expenditure or a capital expenditure. i.e.

- (1) **Recurrent expenditures** refer to expenditures spent for payment of salaries and other office expenditures that are incurred periodically. Such expenditures do not generate and is financed in principle by taxation (more broadly by domestic revenue from tax and non-tax sources).
- (2) **Capital expenditures**, however, are designed for economic development like the construction of infrastructure. They are usually one time and massive expenditures and is financed through external borrowing and grants.

Under expenditure budgeting therefore are two kinds of budgets: the recurrent budget and the capital budget. In Ethiopia, the budgets are prepared by the Ministry of Finance and Economic Development (MOFED).

A Revenue budget represents the annual forecast of revenues to be raised by government through taxation and other discretionary/optional measures. **The amount of revenues raised this way differs from country to country both in magnitude and structure, mainly due to the level of economic development and the type of the economy.**

In Ethiopia, the revenue budget is usually structured into three major headings: **ordinary revenue, external assistance, and capital revenue.** Hence, the fund expected from these three sources is proclaimed as the annual revenue budget for the country. The revenue budget is prepared by the Ministry of Finance and Economic Development (MOFED) for the federal government and by finance bureau for regional governments.

Ordinary revenues include both tax and non-tax revenues. i.e.

The ordinary revenue from tax revenues is collected from the following. i.e.

- (1) **Direct taxes** (personal income tax, rental income tax, business income tax, agricultural income tax on dividend and chance wining, land useful, and lease);
- (2) **Indirect taxes** (excise tax on locally manufactured goods, sales tax on locally manufactured goods, service sales tax; stamps and duty); and
- (3) **Taxes on foreign trade** (customs duty on imported goods, sales tax on imported goods, excise tax on imported goods, sales tax on imported goods, and Duty and tax on coffee export).

Non-tax revenues include charges and fees; investment revenues.

External assistance is a miscellaneous budget. It includes cash grants; these grants are grants from multi-lateral and bilateral sources.

Capital revenue is the third heading structure of revenue budget. This could be from;

- (1) Domestic (sales of movable properties and collection of loans),
- (2) External (loan from multilateral and bilateral creditors mostly for capital projects, and grants in the form of counterpart fund).

3.2.6. Principles and Practices of Budgeting in Ethiopia

3.2.6.1. Historical Sketch of the Ethiopia Governmental Budget

The first mention of a governmental budget in Ethiopian law was in the 1931 constitution, in Article 55. This 1931 constitution was superseded in 1955 by the revised constitution.

The first governmental budget to be published in Ethiopia appeared at the end of 1944 and covered the 1945 fiscal years. A budget also was published for 1946, but this second budget appeared only a little more than a week before the end of the year that it covered. After laps of seven years in which no budget of any kind appeared, a form of budget was published for 1953 as notice of ministry of finance. It covered not be regarded as a proper budget, however, as it appeared after the end of the year and took the form of a ministerial notice rather than a stature enacted by parliament and approved by the emperor. It thus was more in the nature of a statement of governmental revenues and expenditures for previous year, probably partly actual partly estimated.

The next budget to be published was for 1958, and that year can be considered the turning point in the development of the Ethiopian budget. The 1958 budget, in the proper sense of the word and estimate of anticipated revenues and expenditures could be used as an instrument and of fiscal control. It was however, enacted by parliament and issued as a proclamation as required by the revised constitution of 1955. In addition, it marked the beginning of period of the period of uninterrupted annual enactment of a governmental budget.

3.2.6.2. The Budget Process

Budgeting form the initial stage of forecasting the annual revenues and expenditures, to the final stage of approval of the annual budget by the Council of Peoples Representatives [HPRs], passes through a sequential and an iterative process.

These budgeting processes include:

- (1) Preparation of the macro-economic and fiscal framework;
- (2) Revenue forecast and determination of expenditure budget ceiling;
- (3) Allocation of expenditure budget between Federal and Regional governments;
- (4) Allocation of Federal government expenditure budget b/n recurrent & capital budgets;
- (5) Budget call and ceiling;
- (6) Budget review by MOFED;
- (7) Budget hearing and defense;
- (8) Review and recommendation;
- (9) Submission of the budget to the Council of Ministers;
- (10) Submission of the budget to the HPRs;
- (11) Notification and publication of the budget; and Allotment.

The budget process thus includes all these stages, which obviously are sequential (one after the other) and iterative. Peterson (1996:23) summarized the budget process into three phases: analyzed, fitting and implementing. The analysis phase is the assembly and integration of financial data, which might include processes from the formulation of macro-economic and fiscal framework to the allocation of expenditure budget between Federal and regional governments. The

fittings phases are the process of prioritizing activities to fit with policy and reducing a budget to a ceiling. Referring to the budgeting processes outlined above this might range from the processes of allocation of Federal government expenditures budget between recurrent and capital budget down to the submission of the budget to the Council of Peoples' Representatives. The final phase, implementing, is distributing and using the allocation the notification and publication of the budget instilment and the monitoring processes.

Budget being a one-year plan prepared for the coming fiscal year it required a time schedule (deadlines) for each and every processes that should strictly be adhered to. The time schedule is usually handled through the budget calendar. In effect the budget calendar is the major instrument to manage the budgetary process. Thus far we don't have an authoritative and binding budget calendar that could forces all public bodies involved in the process of budgeting. The only dates proclaimed by law are the final approval and notification dates of the budget.

Financial proclamation 57/1996 states that "the budget appropriation shall be approved by the Council of peoples' Representatives by Sene 30th (July 6) and all public bodies shall be notified by Hamel 7 (July 13). "The other deadlines in the process of budgeting will be set by the budgets, respectively. The MOFED will notify the spending public bodies well ahead of time about the important deadlines, the budget ceiling and other information through the budget circular. The budgeting process usually took between which are given a relative weight of 60%, 25% and 15% respectively. This allocation will first be prepared by MOFED, then reviewed by the PMO and finally approved by the council of peoples' representatives.

3.2.6.3. Allocation of Federal Expenditure between Recurrent and capital Budget

The practice in the allocation of recurrent and capital budget is to consider the latter as a residual. That is first the amount of budget necessary to cover such recurrent expenditures like pensions, debit servicing, wages and non-wages operating costs will be determined. The balance will then be allotted to capital expenditures. This will be performed by the PMO in consolation with MoFED.

3.2.6.4. Budget Call and ceiling Notification

- A. Recurrent Budget:** MOFED will release the budget ceiling to the ministries in a budget call. The budget call provides each ministry such information as the macro-economic environment, an aggregate recurrent budget ceiling, and priorities to budget.
- B. Capital Budget:** MOFED issues detailed capital budget preparation guidelines to spending public bodies along with the ceilings provided to each line institution. The selling for each sector will be set by MOFED.

3.2.6.5. Budget Review by MOFED

- A. Recurrent Budget:** Prior to a formal budget hearing, spending public bodies will submit their budget proposals to the MOFED- will prepare an issue paper on major issues at each head level in the proposed budget. Here, sending public bodies can submit above the ceiling but need to have a compelling justification.
- B. Capital Budget:** The sector departments of MOFED review the capital budget requests from different public bodies. At this stage projects will be screened. If there exists a discrepancy between the respective sector department and the public body, a series of

discussions will be held to reach agreement. After such a process the various sector departments of MOFED will submit their first round recommendation to the Development Finance and Budget Department of MOFED. Then it will be consolidated and prepared for the capital budget hearing and defense.

3.2.6.6. Budget hearing and Defense

- A. Recurrent Budget:** Spending public bodies defined their submission in a formal hearing with the MOFED. The issue paper will be the basis of the hearing. The hearing focuses on policies, program and cost issues, when necessary it might involve discussion down to line item. Spending public bodies could also challenge the ceiling. Present in the hearing will be ministers and/or vice ministers, head/heads of public bodies and the MOFED.
- B. Capital budget:** Spending public bodies will be called to define their projects to a budget hearing convened by the PMO, which will be chaired by the prime Minister or the Deputy Minister or the Deputy Prime Minister or their economic advisors. The hearing customarily includes a review of status of the project, implantation capacity of the institution, compatibility with the country's development strategy and policy, cost structure, and regional distribution. A project description will be presented which includes objectives of the project, main activities of the project, status of the project, total cost, past performance of the project, source of finance, and whether the project is accepted or rejected by MOFED. In consultation with the spending public body will further refine the capital projects.

3.2.6.7. Review and Recommendation

Recurrent Budget: After the hearing and defense with the PMO and MOFED, sector departments of MOFED will give a final recommendation to the Development Finance and Budget Department of MOFED. This will be compiled and put in appropriate formats for submission to the Council of Ministers.

3.2.6.8. Submission to the Council of Ministers

At this stage the two budgets (recurrent and capital) will be consolidated, and MoFED will prepare a brief analysis of the total budget.

- A. Recurrent Budget:** The recommended budget is submitted to the Deputy Prime Minister for Economic Affairs. This will first be reviewed by ministers and vice ministers in economic affairs and then presented to the Prime Minister along with a brief. The Prime Minister may or may not make amendments and then the budget will be sent to the Council of Ministers for discussion.
- B. Capital Budget:** A brief analysis of the capital budget will be prepared by MOFED on the finally recommended budget, and along with a consolidated capital budget, will be submitted to the Council of Ministers. MOFED will define the budget in the Council. The Council of Ministers may make some adjustments and the draft capital budget will pass the first stage of approval.

3.2.6.9. Submission to the Council of people's Representatives

Once approved by the Council of Ministers, the Prime Minister will present both the recurrent and capital budgets to the Council of People's Representatives. The Budgets will then be debated based on the recommendation of the budget committee.

3.2.7. Taxation in Ethiopia

3.2.7.1. Definitions of Taxation

Taxation is a payment levied by government for which no good or service is received directly in return - that is, the amount of tax people pay is not related directly to the benefit people obtain from the provision of a particular good or service.

3.2.7.2. Tax classifications and tax vocabulary

Such a wide variety of taxes exist that it is useful to attempt to classify them.

Direct vs. Indirect taxes: A standard, but not very useful classification of taxes is into direct and indirect taxation. The usual distinction between direct and indirect taxes, then, is that a direct tax is one for which the formal and economic incidence are essentially the same - that is, the taxpayer is not able to pass the burden on to someone else. Thus, income tax counts as a direct tax.

Yet, VAT counts as an indirect tax because the tax burden may easily be passed on. This is not satisfactory in economic terms because whether or not an increase in VAT can actually be passed on in the form of higher prices will depend on market conditions. VAT may, in principle, be passed on but there may be many occasions in which this is not done. Again, during periods of very tight labor markets, some workers may well be able to demand higher wages to make up for increased income tax, in effect passing the tax on to employers and hence, through higher prices, on to consumers.

Hence, it is usual to acknowledge the direct/indirect distinction but to go on to use some other classification.

Income vs. Capital taxes: One possibility is to classify taxes as taxes on (a) income; (b) capital (wealth); or outlay (expenditure).

Musgrave and Musgrave distinguish between taxes on people and taxes on things.

Another distinction sometimes made is between taxes on stocks (wealth) and taxes on flows (income, expenditure).

Both Brown and Jackson (1990, pp. 306-7) and James and Nobes (1998, pp. 12-13) reproduce the much more complex OECD classification which includes seven principal headings with a number of sub-headings under each one. The seven principal headings are:

1. taxes on goods and services,
2. taxes on incomes,
3. profits and capital gains,
4. social security contributions,
5. taxes on employers based on payroll or manpower,
6. taxes on net wealth and immovable property,
7. taxes and stamp duties on gifts, inheritances and on capital and financial transactions and other taxes

Taxes involve two elements: the tax base and the tax rate.

- a) **The tax base** describes *what the tax is levied* on. Thus, the tax base of VAT is the value added at each stage of production to all goods and services minus those goods which are exempt and those that are taxed at a zero rate.
- b) **Tax rates** are then applied to the tax base to determine the amount of tax payments to be made. For example,
 - 1) The majority of taxes are ***ad valorem taxes*** that is, taxes are based on values.
 - 2) ***Excise duties*** are specific taxes - that is, the base is not the value of a product but a physical quantity (so much tax per pint of beer or per packet of twenty cigarettes).
 - 3) ***A poll/head tax***, a type of tax, where the tax payable is not related at all to the tax base. It is a tax in which all taxpayers pay the same amount irrespective of their income or wealth.

3.2.7.3. Principles of Taxation

A tax system is based on certain basic principles. They are equity, progressivity, simplicity and efficiency. The fundamental purpose of taxation is to raise the revenue necessary to fund public services. But there are many ways to achieve this goal, and there is a widely agreed upon set of principles according to which good (and bad) tax systems can be evaluated.

The following is a basic overview of ***six commonly cited principles*** of sound tax policy: equity, adequacy, simplicity, exportability, efficiency, and balance.

3.2.7.3.1. Equity: Two Kinds of Tax Fairness

When people discuss tax “fairness,” they’re talking about equity. Tax equity can be looked at in two important ways: vertical equity and horizontal equity.

I. Vertical equity addresses how a tax affects different families from the bottom of the income spectrum to the top; from poor to rich. Three terms are used in measuring vertical equity:

- a) **Regressive tax** systems require that low- and middle-income families pay a higher share of their income in taxes than upper-income families. *Sales taxes, excise taxes and property taxes tend to be regressive.*
- b) **Proportional or flat tax** systems take the same share of income from all families.
- c) **Progressive tax** systems require upper-income families to pay more of their incomes in taxes than those with lower incomes. *Personal income taxes are usually progressive.*

Most people accept the notion that, at minimum, tax systems should not be regressive. Strategies for making state tax systems less regressive include:

- a) Introducing targeted low-income tax credits such as an Earned Income Tax Credit, a sales tax credit, or a property tax credit to make these taxes less regressive;
- b) Making personal income taxes more progressive by applying higher tax rates to the wealthiest taxpayers;
- c) Reducing sales taxes by cutting tax rates or exempting food and other necessities.

II. Horizontal equity is a measure of whether taxpayers in similar circumstances pay similar amounts of tax. For example, if one family pays much higher taxes than a similarly situated family next door, that violates the horizontal equity principle. Likewise, a tax that hits wage-earners harder than investors (as the federal income tax currently does) fails the test of horizontal equity.

This sort of unjustified disparity undermines the public's support for the tax system and diminishes people's willingness to file honest tax returns.

3.2.7.3.2. Adequacy

An adequate tax system raises enough funds to sustain public services. Two dimensions of adequacy are stability and elasticity. That is,

- 1) **A stable tax** is one that grows at a predictable pace. Predictable growth makes it easier for lawmakers to put together budgets that match anticipated revenues to spending. But stability is not enough to achieve adequacy in the long run. For example, property taxes grow predictably but tend to grow more slowly than the cost of the services that governments provide.
- 2) **Elasticity** is a measure of whether the growth in tax revenues keeps up with the economy an important consideration because the cost of providing public services usually grows at least as fast as the economy. **An elastic tax system is one that grows faster than the economy during good times, and falls faster than the economy during bad times.** Over the course of the business cycle, elastic taxes like the personal income tax are usually the most adequate revenue source.

3.2.7.3.3. Simplicity

Simplicity is an important tax policy goal. Complicated tax rules make the tax system difficult for citizens to understand. Complexity also makes it harder for governments to monitor and enforce tax collections, and makes it easier for lawmakers to enact (and to conceal) targeted tax breaks benefiting particular groups. A tax system full of loopholes gives those who can afford clever accountants an advantage over those who must wade through the tax code on their own.

Beware tax changes described as “simplification” measures are often nothing of the kind. Anti-tax advocates frequently seek to “simplify” the income tax by eliminating the graduated rate structure and instituting a flat-rate tax. This is a red herring: a graduated tax system is no more complicated than a flat-rate tax. The better way to make income taxes simple is to eliminate tax loopholes, not to flatten the rates.

3.2.7.3.4. Exportability

The public services provided by state and local tax revenues are enjoyed by individuals from other states including businesses that hire a state's college graduates and tourists who use a state's transportation infrastructure. Tax systems should be designed in part to make businesses and residents of other states pay their fair share of the state tax burden.

There are broadly three ways in which taxes can be exported: directly, by having nonresidents pay the tax (sales taxes paid by tourists, for example); indirectly, by levying taxes on businesses which are then passed on to non-residents; and through interaction with the federal income tax (state and local income and property taxes can be written off on federal tax forms by those itemizing their federal income taxes. All taxes are at least partially paid by non-residents and policy makers have the power to effectively adjust the percentage of taxes “exported” to residents of other states.

3.2.7.3.5. Neutrality

The principle of neutrality (sometimes called “efficiency”) tells us that a tax system should stay out of the way of economic decisions. If individuals or businesses make their investment or spending decisions based on the tax code rather than basing them on what makes economic sense on its own, that's a violation of the neutrality principle. **State and local governments should not**

use tax policy to create "winners and losers" by promoting one sector of the economy ahead of another or by favoring one type of income over another.

3.2.7.3.6. Balance

One final principle that can be used to evaluate state tax systems is to consider whether they strike an appropriate balance among the types of taxes they levy. States that rely too heavily on a single tax have an especially regressive tax structure.

This is certainly true for the nine states that lack a broad-based income tax. A state that relies too heavily on one form of taxation may also find itself in a precarious fiscal situation should economic factors disproportionately affect that tax.

3.2.7.4. Role of Taxation for Development Strategy/Economic Development

The Role of taxation and fiscal policy in the development strategy has to be viewed in the background of the functions which a taxation system performs.

Its main functions in relation to economic development are as follows.

- 1) To raise revenue for the government for its public expenditure. So, the first goal in the development strategy as regards taxation policy is to ensure that this function is discharged adequately.
- 2) To reduce inequalities through a policy of redistribution of income and wealth. Higher rates of income taxes, capital transfer taxes and wealth taxes are some means adopted for achieving these ends.
- 3) For social purposes such as discouraging certain activities which are considered undesirable. The excise taxes on liquor and tobacco, the special excise duties on luxury goods, betting and Gaming Levy are examples of such taxes, which apart from being lucrative revenue sources have also goals.
- 4) To ensure economic goals through the ability of the taxation system to influence the allocation of resources. This includes
 - ✓ Transferring resources from the private sector to the government to finance the public investment program;
 - ✓ The direction of private investment into desired channels through such measures as regulation of tax rates and the grant of tax incentives etc. This includes investment incentives to attract foreign direct investment (FDI) into the country;
- 5) Influencing relative factor prices for enhanced use of labour and economising the use of capital and foreign exchange
- 6) To increase the level of savings and capital formation in the private sector partly for borrowing by the government and partly for enhancing investment resources within the private sector for economic development.
- 7) To protect local industries from foreign competition through the use of import duties, turnover taxes/VAT and excises. This has the effect of transferring a certain amount of demand from imported goods to domestically produced goods
- 8) To stabilize national income by using taxation as an instrument of demand management. Taxation reduces the effect of the multiplier and so can be used to dampen cyclical fluctuations on the economy.

3.2.7.5. Taxation in Ethiopia: Major Types Taxes Existing in Ethiopia

3.2.7.5.1. Direct Tax

1. Personal Income tax

Income taxable under the Ethiopian 'Income Tax Proclamation No. 286/2002' shall include, but not be limited to:

- a) Income from employment;
- b) Income from movable property attributable to a permanent establishment in Ethiopia;
- c) Income from immovable property and appurtenances thereto, income from livestock and inventory in agriculture and forestry, and income from usufruct and other rights deriving from immovable property that is situated in Ethiopia;
- d) Income from the alienation of property referred to in (c);
- e) Dividends distributed by a resident company;
- f) Profit shares paid by a resident registered partnership;

The Definition of 'Employment' for Tax Purposes: What is Employment Income Tax?

Employment income tax is tax that is imposed upon any payments or gains in cash or in kind received from employment by an individual, including income from former employment or otherwise from prospective employment.

As can be inferred from Articles 2(12) and 12 of the Income Tax Proclamation, employment is any arrangement, whether contractual or otherwise, whereby an individual to be called the employee is engaged, whether on a permanent or on a temporary basis, to perform services under the direction and control of another person to be called the employer.

Contractors are excluded from the ambit of employees by way of Article 2(12), which in (b) defines a contractor as an individual who is engaged to perform services under an agreement by which the individual retains substantial authority to direct and control the manner in which the services are to be performed.

Tax Rate and Tax Base

Like the other countries of the world, **the rate of taxation in Ethiopia is progressive**. Accordingly, the first 150 Birr that forms part of any taxpayer's income is always not taxable. Any amount that is above this first 150 Birr will be taxed according to the Schedule, which has a percentage of taxation from 10% to 35%. As clearly noted in the tax proclamation on employment income per month, the tax base and tax rate look as follows.

Tax Rate and Tax Base for employment income		
	Tax Base	Tax Rate
1	151-650 birr	10%
2	651-1400 birr	15%
3	1401-2350 birr	20%
4	2351-3350 birr	25%
5	3351-5000 birr	30%
6	Above 5001 birr	35%

Exemptions

In addition to the exclusions provided by the income tax regulation, there are certain exemptions that have been provided by Article 13 of the Income Tax Proclamation.

Accordingly, the following categories of income have been exempted from payment of income tax as prescribed by the proclamation:

- (1) income from employment received by casual employees who are not regularly employed provided that they do not work for more than one (1) month for the same employer in any twelve (12) months period;
- (2) pension contribution, provident fund and all forms of retirement benefits contributed by employers in an amount that does not exceed 15% (fifteen percent) of the monthly salary of the employee;
- (3) subject to reciprocity, income from employment, received for services rendered in the exercise of their duties by:
 - a) Diplomatic and consular representatives, and
 - b) Other persons employed in any Embassy, Legation, Consulate or Mission of a foreign state performing state affairs, who are nationals of that state and bearers of diplomatic passports or who are in accordance with international usage or custom normally and usually exempted from the payment of income tax.
- (4) Payments made to a person as compensation or gratitude in relation to:
 - a) Personal injuries suffered by that person;
 - b) The death of another person.

2. Business Profit Tax

Before defining the Business Profit Tax, let us define what does Business mean? According to Article 2(6) of the **Income Tax Proclamation No. 286/2002** ‘business’ or ‘trade’ refers to “any industrial, commercial or vocational activity or any other activity recognized as trade by the Commercial Code of Ethiopia and carried on by any person for profit.

From the definition of business, business profit tax is the tax that imposed on the taxable business income/net profit realized entrepreneurial activity.

According to Article 18 of the Income Tax Proclamation, taxable business income is determined “per tax period on the basis of the profit and loss account or income statement, which shall be drawn in compliance with the generally accepted accounting standards”, subject to the provisions of the Income Tax Proclamation and subsequent directives to be issued by the Tax Authority.

The tax proclamation clearly depicts that net profit per year. Accordingly, the tax rate for business income per year of the ranges falling with the tax base listed in the table below will be taxed annually of the rate enlisted on the left side.

Tax Rate and Tax Base for Business Profit per year		
	Tax Base	Tax Rate
1	1801-7,800 birr	10%
2	7, 801- 16, 800 birr	15%
3	16,801-28, 200 birr	20%
4	28, 201- 42, 600 birr	25%
5	42, 601-60,000 birr	30%
6	Above 60, 000 birr	35%

Deductible Expenses

In the determination of business income subject to tax in Ethiopia, deduction would be allowed for expenses incurred for the purpose of earning, securing, and maintaining the business income to the extent that the expenses can be proven by the tax payer.

The following expenses shall be deductible from gross income in calculating taxable income:

- 1) The direct cost of producing the income. Good examples of such expenses are the expenses incurred in manufacturing, importation, selling, transportations etc.
- 2) General and administrative expenses connected with the business activity. These are expenses incurred for the maintaining of the business activity.
- 3) Premiums payable on insurance directly connected with the business activity.
- 4) Expenses incurred in connection with the promotion of the business inside and outside the country subject to the limits set by the directives issued by the Ministry of Revenue.
- 5) Commissions paid for services rendered to the business provided.
- 6) Salaries & other personal emoluments payable to the manager [s] of a private limited company
- 7) Sums paid as salary, wages or other emoluments to the children of the proprietor or member of the partnership shall only be allowed as deduction if such employees have qualifications required by the post to which they are positioned.

3. Tax on Income from Rental Buildings

What is tax on income from rental of buildings? The Income Tax Proclamation No. 286/2002 is provided by Article 14, states that “It is a type of direct tax that imposed on the income from rental buildings.” The principle that tax has to be paid on income from rental of buildings remaining is that a taxpayer who leases furnished quarters is liable to pay tax on the income that he/she receives from the lease of the furniture and equipment in the leased quarters.

Furthermore, if a lessee sub leases a building; he/she is liable to pay the tax on the difference between the income from the sub-leasing and the rent paid to the lessor; however, provided that the amount received from the sub-lessor is greater than the amount payable to the lessor.

Deduction of Expenses

Gross income shall include all payments in cash and all benefits in kind received by the lessor from the lessee; all payments made by the lessee on behalf of the lessor according to the contract of lease; as well as the value of any renovation or improvement made under the contract of lease to the land or building, where the cost of such renovation or improvement was borne by the lessee in addition to rent payable to the lessor.

However, the Income Tax Proclamation has provided for some deductions to be made to the taxable income. These deductions include:

- a) taxes paid with respect to the land and buildings being leased; except income taxes; and
- b) for taxpayers not maintaining books of account, one fifth (1/5) of "the gross income received as rent for buildings furniture and equipment as an allowance for repairs, maintenance and depreciation of such buildings, furniture and equipment;
- c) for taxpayers maintaining books of account, the expenses incurred in earning, securing, and maintaining rental income, to the extent that the expenses can be proven by the taxpayer and subject to the limitations specified by this Proclamation; deductible expenses include (but are not limited to) the cost of lease (rent) of land, repairs, maintenance, and depreciation of buildings, furniture and equipment in accordance with Article 23 of this Proclamation as well as interest on bank loans, insurance premiums.

4. Dividend Income Tax

It is a type of tax which is imposed the income from dividends from Share Company or withdrawals of profits from private limited company at the rate of 10%.

5. Tax on Income from Royalties

Royalty income means a payment of any kind received as a consideration for the use of, or the right to use any copy right of literacy, artistic or scientific work including cinematography films and films or tapes for radio-television broadcasting.

5.1. Tax on income from games of chances

It is the type of direct tax which is imposed from winning of games of chances. The tax proclamation states that every person deriving from winning of games of chances e.g. lotteries tombolas, and other similar activities shall subject to tax at the rate of 15%, except for winning of less than 100 Birr. The payer shall hold or collect the tax and account to the tax authority.

5.2. Tax on the gain of transfer of certain investment property

It is the tax payable on gains obtained from on gains transfer (sale or gift) of being held for business, factory, office, and shares of companies. Such income is taxable the following rates: building held for business, factory office, and shares at the rate of 15% and shares of companies at the rate of 30%.

5.3. Rendering of technical services outside of Ethiopia

It is also the type of a direct tax which is imposed from all payments made in consideration of any kind of technical services outside Ethiopia. The term "technical service" means any kind of expert advice or technological service rendered. Any person or organization rendered advisory services is liable to tax at the flat rate of 10% which shall be withheld and paid to the Tax Authority by the payer.

3.2.7.5.2. Indirect Taxes

3.2.7.5.2.1. Turnover Tax

Turnover tax is an indirect tax in which is imposed on those not registered for VAT to equalize and enhance fairness in commercial relations and make complete the coverage of tax system so as to increase government's revenue from taxation.

The scope of application of turn over tax proclamation is on: supply of goods, rendition of services and persons not registered for VAT.

“Goods” is defined under Art 2(7) of proclamation 308(2002) as any kind of goods or commodity that has exchange value, utility and brings about satisfaction and includes animals. On the other hand services are defined as a work done for others which doesn't result in the transfer of goods.”

The other term that needs explanation at this juncture is “persons not registered for VAT.” According to Art 2(4) of proclamation 308/2002, “a person not registered” is a person who is not registered for VAT by reason of his annual turnover being below 500,000 or threshold set by the minister, by reason of not having applied for voluntary registration.

Turnover tax is not applicable to every import of goods and an import of services as provided under Art 23 of the VAT proclamation (they are subject to VAT). Though turn over tax is applicable to supply of goods, rendition of services and to persons not registered for VAT, no all transactions are taxable.

The proclamation recognizes certain exemptions: In this respect as per Art 7 the following are exempt from turn over tax:

- (a) the sale or transfer of a dwelling house used for a minimum of two years or the lease of a dwelling;
- (b) the rendition of financial services;
- (c) the supply of national or foreign currency and securities except for that used for numismatic purposes;
- (d) the rendering by religious organizations of religious or other related services;
- (e) the supply of prescription drugs specified in directives issued by the relevant government agency; and rendering of medical services;
- (f) the rendition of educational services provided by educational institutions as well as child care services for child can at pre-school institutions;
- (g) supply of goods and rendering of services in the form of humanitarian aid;
- (h) The supply of electricity, kerosene and water, license fees, etc.

Rates of Turnover Tax

The base to compute turn over tax is the goods receipts in respect of goods supplied or service rendered (Art 5). Thus, the person who sells goods and services has the obligation to collect the turnover tax from the buyer and transfer collected tax authority. Art 4 incorporates two kinds of rates: 2% on goods sold locally and for services rendered locally again in two rates: 2% for contractors, grain mills, tractors and combine-harvesters and 10% on others.

Obligations of Turnover Tax Payers

In enforcing income tax proclamation and VAT proclamation, there are obligations imposed on tax payers and other concerned organs; establishment of organs responsible to enforce the laws; pass decisions and review the decisions in case complaint is lodged by aggrieved party.

Likewise, these obligations and organs are recognized under turn over tax proclamation. Some of the obligations on tax payers include:

Filing of Turn over Tax Return and payment

Turn over tax is to be declared and paid by tax payer. Therefore, outstanding obligation imposed on them is to file their tax return and pay the tax within the time reasonable in the proclamation. In this regard,

Keeping Records

Tax payers of turnover tax are under obligation to have records in similar fashion with business profit tax payers. The records shall also follow acceptable principles of accounting that can be presented as evidence incase conflict arises between tax payers and tax authority with regard to assessment of taxation.

Notification of changes

It is right to impose the obligation of notifying one's address if the tax payer moves from his principal residence to another abode. Therefore, the tax proclamation states that registered tax payers are required to notify the authority if there any change in the name, address, place of business, constitution or nature of the principal taxable activity the person; and any change of address from which, or name in which, a taxable activity is carried on by the registered person.

3.2.7.5.2.2. Excise Tax

Excise tax is one variety of sales tax like VAT and turn over tax but unlike turnover tax and VAT, it is applicable not on all kinds of goods rather on selected goods. It is imposed on luxury goods and basic goods which are demand inelastic, ranging from perfumes to tobacco and tobacco products. It is also applicable on goods which are hazardous to health and societal problems. In certain goods the tax rate reaches 100% implying that the goods are not encouraged to be imported or produced locally.

The excise tax proclamation (proc No 307/2003) states that excise tax has the following purposes.

- 1) It helps to improve government revenue by imposing excise tax payable on selected goods.
- 2) Tax shall be imposed on luxury goods and basic goods which are demand inelastic. The imposition of tax on luxury goods usually has little or no impact on the expenditures of the poor. One basic rational of introducing tax in a certain state is to redistribute income and narrow the gap between rich and poor. Thus, it is logical and acceptable to collect tax from luxury goods that have strong link with capable in certain economy.
- 3) Last but not least, imposition of taxation on goods that are hazardous to health and which are cause to social problems will reduce their consumption.

Tax Rates

As mentioned earlier, the excise tax is imposed on goods imported or produced locally in accordance with the proclamation No. 307/2002. The tax rate is uniformly applied for goods produced locally and imported from abroad, what matters is the type of product. The rate varies from 10% in textiles and textile products to 100% for other alcohol drinks, perfume and toilet waters; and motor vehicles above 1800 C.C.

3.2.7.5.2. 3. Value Added Tax (VAT)

Definition of VAT

There exists confusion to identify VAT from other sales taxes in its introduction for the first time. VAT appears to be imposed on business entities as it belongs to sales tax family. In reality however, business entities are simple agents to collect tax from individuals, who bear the final burden, final consumers.

VAT is a tax on the added value on a good or service. The value added is imposed on the value that the business entity adds to the goods and services that it buys from suppliers or other firms. This value is added partly owing to the fact that processing or handling purchased materials /items requires additional labor or capital that shall be calculated out from the final product/service and partly because buildings machinery, etc are devoted to preserve the good or provide the service to its destination .

Though the VAT proclamation does not provide flat definition for VAT, for the sake of understanding of the concept of VAT, we can define it by borrowing from other sources. According to Encyclopedia Britanica VAT is: a sales tax designed like other sales taxes, to tax private consumption by individuals of the goods or services subjected to tax.

From the definition of Encyclopedia Britanica one can understand that VAT is a Variety of sales tax and the tax is imposed on consumer. But the definition provided above failed to list out other features that distinguishes VAT from other kinds of taxes. Black's law dictionary on the other hand define VAT as it is a tax assessed at each step in the production of a commodity based on a value added at each step by the difference between the commodities production cost and its selling price.

The Introduction of VAT as a tax in Ethiopia

The Ethiopian government has made major economic shift from central planning to market oriented economic system since 1993. In line with this, changing the then mode of collection of revenue in the form of taxation, and introduction modern tax system (VAT) was considered immediate necessity. The older tax laws were issued in accordance with the socio-economic situation of the 1960's (When Ethiopia was following unitary structure).

In Ethiopia, VAT was introduced since January 1, 2003 designed to replace the out dated sales tax, which has served for more than four decades, which was collected at manufacturing level. VAT is taken as dispensable component of tax reforms in Ethiopia by considering it a miracle tax to replace direct and indirect taxes entirely.

The introduction of VAT under Ethiopian tax system, borrowed from foreign systems, clearly signifies advancement in the area of taxation. Of course, wholly introduced, truly until the present moment, there happens sever resistance particularly on the part of business entities fearing that they will be imposed with more onerous obligations connected with collection of taxes on behalf of others , final consumers.

The major rationales behind introducing VAT in Ethiopia include, among others, the following:

- a) Sales tax doesn't allow collection on the added value created wherever sales transaction is conducted but VAT does.
- b) VAT allows little room for evasion. Taxes in VAT are collected at multi stages and business entities are allowed to have refund on the tax they paid for inputs (raw materials such as labor, transportation, ware housing, etc).This leaves little room for evasion. But this is not true in sales tax as it is collected only at one stage.
- c) VAT enhances saving and investment. VAT is a consumption variety tax. The fact that the final burden lies on consumers raises awareness to have means of reduction of payment for consumption at any possible incident. This undoubtedly will change the extravagant way of life imposed from the custom, on the part of final consumers.
- d) Outdated sales tax is not capable to generate adequate revenue for the government to cover necessary expenditures.

Advantage of VAT

The following are some of the main advantages of using VAT.

1. It avoids cascading effect of a tax (Tax on Tax).

VAT works on the principle that when raw material passes through various manufacturing stages and manufactured product passes through various distribution stages, tax should be levied on the incremental value at each stage and not on the gross sales price. This ensures that same commodity does not get taxed again and again and, thus, there is no cascading effect. Putting the concept in simple terms, in VAT system, each input is taxed only once. However, this is not a condition in sales and excise taxes.

2. It is a more comprehensive and equitable tax system.

Even though the ultimate burden of VAT falls on the final consumer, VAT is collected by the government from all sectors, that is, from import, manufacturing, who sales and retail sectors. Therefore, it is a more comprehensive and equitable tax system. On the contrary, sales tax is normally levied at one stage of the whole marketing.

3. It reduces the possibility of tax evasion

In the case of VAT, the tax is divided in to several parts depending on the number of stages of production and sale. In each stage, every transaction is made using VAT invoice approved by the Tax Authority. In addition, each VAT register person (supplier) has to maintain appropriate records on their sales and purchases transaction those obligations make tax evasion difficult.

4. It has less tax burden

Under VAT system, the tax is collected in small fragment at different stages of production and sales, hence, the VAT payers feel the burden of the tax less.

5. It is neutral

Regardless of the number of stages of production and distribution, VAT is collected in each stage. Therefore, VAT is expected to be perfectly neutral in the allocation of resources in the form of production and commercialization.

6. It improves productivity

In VAT system, a firm has to pay tax even though it runs into loss. The firm cannot claim any exemption for loss because it pays taxes on the value produced and not on profits. So, firm will always try to improve their performance and reduce the cost of production. As a result, the overall productivity of the country will be improved.

7. It promotes capital investment and saving

VAT is a consumption tax since one pays VAT on its expenditure and has the option to save so as not to be taxed. Furthermore, relief from tax on capital goods may encourage investment. Potential investors also consider tax legislation as one of the factors in making investment decision.

8. It enhances exports

Exports of goods and services in most countries that implement VAT are liable to VAT at zero-rate. This may make export internationally competitive and, thus, encourages exports.

Criticisms on VAT

VAT is not only with advantages. Scholars raise strong critics against having VAT in a state. Some of the critics are:

1. It is regressive in nature

A straightforward single rate VAT with little exemption would tax lower income groups (the poor) more heavily than the higher income groups (the rich). It is, thus, incongruent with the basic principles of taxation which state that a person should be taxed according to his ability-to-pay. This makes VAT regressive tax system. In order to compensate for its regressive effect, a number of countries have exempted basic goods particularly food items from VAT.

2. It requires advanced economic structure

The proper implementation of VAT system requires organized and advanced financial and economic structure as it is complicated system. VAT system also requires proper record keeping of invoices at each stage of production and sale by both the seller and buyer. Hence, it becomes difficult to implement the system in all types of economy.

3. It puts additional burden to tax authority

In VAT system, the manufacturers, wholesalers and retailers have to fulfill various legal formalities in the form of maintaining various records, accounts, books, etc. the verification of those formalities puts additional burden to the tax enforcing authorities.

4. It is uneconomical

VAT system involves high cost of administration, assessment, verification, collection, etc. hence, it is highly uneconomical.

5. It has ream loopholes for tax evasion

Although VAT system requires proper record keeping of invoices at each stage of production and distribution by both the buyer and seller, it has ream loopholes for tax evasion. This may include the following:

- 1) Taxpayers could over report sales of zero rated goods;
- 2) Taxpayers could use invoices they received for personal purchase to claim tax credit;
- 3) It enables buyers and sellers to strike secret deals with regards the issuance of receipts;
- 4) It could lead to the formation of forged companies' receipts to claim tax credit on input VAT, etc.

3.2.7.5.2.4. Customs Duty

Customs duty is tax like other taxes but imposed on imported goods or exported goods. This type of tax is practiced by all countries to which Ethiopia cannot be an exception. Under the federal state of Ethiopia state have power over taxation [concurrent power of taxation]. It is clearly indicated that **the FDRE constitution of 1995 has given customs duty as exclusive power the federal government.** To this end the federal government has come up with ***proclamation No 60/1997*** to have proper control and follow up power is vested with **Ethiopia customs authority.**

There are acceptable reasons to have customs duty with in a legal system; basically, customs duty since imposed on goods imported or exported relatively high amount of tax is collected to strengthen government's financial power to be devoted on poverty reduction and other programs of development Thus, customs duty raises revenue of the government.

Customs duty is the best instrument to prevent or reduce importation of goods. It serves as trade barrier whenever a state needs to ban or reduce importations to her territory, it can impose high rate in some good (excise taxation) it might reach a rate of 100%. Thus, such importation will be discouraged. Of course, this reduction measure helps to protect infant domestic factories /industries from stiff competitions with the products of competitive and subsidized foreign companies/ importers.

In connection with customs duties, as barrier of importation, the power reduces if a state is a member to WTO, which requires opening of one's door to other members (of course with some privileges to Least Developed Countries (LDCs). It is argued that becoming a member to WTO help to attract investment. It has a lot to do with economic growth of a state. Therefore, currently the sounder argument is in favor of membership.

A foreign exchange measure which restricts trade in goods is normally considered inconsistent with Art XI of the GATT provisions. Besides, there are most Favored Nation, and standard of National Treatment principles that impose obligation on members not to prohibit importations from other members. All these are commitments that members shall respect save some special and deferential treatments for LDCs.

3.2.7.5.2.5. Stamp Duty

Stamp duty is another form of taxation basically imposed on the services given to individuals through affixing seals. Stamp is an official mark or seal placed on a document especially to indicate that a requirement tax has been paid. Thus, stamp duty is a tax raised by requiring stamps sold by the government to be affixed to designed documents, which form one kind of revenue to the governments' treasury.

As can be easily understood from the preamble of stamps duty proclamation proc. No. 110/1998, it has become necessary to amend the stamp study levied on documents in a manner which would contribute to the development of art, the activities of financial and the transfer of capital assets; thus it was appropriate to come up with new legislation so as to strengthen the means of raising revenue from different bases of taxes.

Art 3 of the stamp duty proclamation exhaustively lists instruments chargeable with stamp duty which include: memorandum and articles of association of any business organization cooperative or any other form of association, award, bonds, warehouse bond, contractor agreements and memoranda thereof, security deeds, collective agreement, contract of employment, lease, including sub-lease and transfer of similar rights., natural acts, power of attorney and documents.

3.2.7.6. Tax Assignment in Ethiopia

The power of taxation is of the federal government and member states are carefully delaminated by the constitution.

3.2.7.6.1. Federal Government Revenue

The federal government has the mandate to levy and collect custom duties, other payments on imports and exports. **The federal government levies and collects income tax on employees of the federal government and international organization.** The nature and the character of international organizations vary depending on the legal understanding that is the basis for their work in the country. The agreement that established them within the country would indicate who of their employees may qualify for exemption from income tax for diplomatic or similar taxes.

The federal government levies and collects four different types on the public enterprises owned by the federal government. That is,

- (a) It levies and collects profit tax, employees income tax, and sales and excise taxes.
- (b) Taxes on the proceedings of air, rail, interstate water, sea transport vehicles is another source of revenue for federal government.
- (c) The federal government also taxes rental incomes of federal government houses & properties in addition to fixing and collecting rents.

- (d) The fixing and collection of fees for licenses and services granted by federal agencies is another source of revenue for federal government.
- (e) The federal government also levies and collects on the government monopolies and on the proceeds on national lotteries and other games of chances. It also fixes and collects government stamp duties.

3.2.7.6.2. State Revenue

The constitution similarly enumerates the member states powers of taxation. Member states levy and collect income from state and private enterprise employees. They also levy and collect income from private farmers as well as from those forming cooperatives. Member states collect profit tax from merchants who are state residents. They also levy and collect sales tax.

Member states levy and collect profit, income, sales and excise taxes on public enterprises they own. The levying and collection of taxes on income derived privately owned houses and other properties as well as the collection of rent on houses and property owned by member states is also specified by the constitution as belongs to member states. An important source of revenue for member states would be the fees collected for land usufructuary rights. In regions where mining operation are undertaken, the levying of taxes on income derived from small and medium mining operations as well as collecting of royalty fees and land rent could also be the important revenue sources.

The levying and collection of fees for licenses granted pursuant to the member states competency and the services rendered by state agencies would also be important sources of revenue. Other revenue sources allocated to member states by the constitution, but less importance are fees from water transport within the member states and royalty for fees for use of forest resources.

3.2.7.6.3. Joint Revenues

Member states have also concurrent power of taxation with the federal government on activities specified by the constitution. To begin with the member states and federal government jointly levy and collect income, profit, sales and excise taxes on the public enterprises they jointly establish.

There are other joint venture activities of member states and the federal government. Taxes on incomes from large scale mining as well as any petroleum and gas operations are jointly levied by the federal government and member state. Federal government and member states also jointly levy and collect taxes on the profits of private corporations and on dividends paid to shareholders.

3.3. The Courts and Machinery of Justice in Ethiopia

3.3.1. Legal history of Ethiopia

During the pre-war period, Ethiopia was governed almost entirely by a complex set of traditional, customary and religious laws. Arguably, Ethiopia has a long history of legal frameworks, the most famous of which is the "Book of Kings"-- the Fetha negast. Religious and customary laws remain prevalent throughout the country.

In the 1950s and 1960s, Emperor Haile Selassie founded a university with a law faculty and initiated the drafting of a core group of modern legal codes, including criminal, civil, procedural, commercial, and maritime codes. The university structure and legal codes were based on European models. The Emperor hired a Franco-Swiss team of specialists of comparative law, which crafted a complete set of codes up to the latest standards of the late fifties. While these codes were arguably of an extremely high standard, they were not matched with adequate capacity building or training at the local level. Further, following the development of these codes, procedural provisions subsequently imported wholesale from England, India and the US, with little regard to the coherence of the system as a whole.

During the Derg regime (1974-1991), the basic codes were largely ignored. All land was nationalized and when legislation was imposed it was done so without due process. The Transitional Government (1991-1994) undertook significant legal revisions to replace the socialist-era laws and re-establish a functioning legal system. While many of the imperial codes from the 1960s have been revived, reforms are underway to ensure that such laws are consistent with the 1995 Constitution. Law reform is also being undertaken to implement the many new rights and requirements delineated in new Constitution and to create an environment more conducive to investment and development. The transition to a federal republic and decentralization that began in 1995 added further layers and dimensions to an already diverse and complex legal system. This transition has also greatly multiplied the demands placed on both government infrastructure and the legal system. Of the three branches of government, the judicial branch has the least history and experience of independence, and requires significant strengthening to obtain true independence, equality, and self-sufficiency.

3.3.2. Courts under the Constitution of Ethiopia

The Constitution provides for a three tier Federal and State Court System. At the federal level, the court system is comprised of the Federal First Instance Courts, Federal High Courts and the Federal Supreme Court. This structure is replicated at the state level. The judicial system also comprises of religious (Sharia), customary and social and municipal courts.

3.3.2.1. Federal Courts

The 1995 Constitution declares the independence of the judicial branch and articulates the structure and powers of the courts. The federal courts were established by Proclamation 25/1996, and consist of the Federal Supreme Court, the Federal High Courts, and the Federal First Instance Courts. These courts have original and appellate jurisdiction over cases arising under federal law, and in other specified instances. The vast majority of federal court judges are located in Addis Ababa, with a small group in Dire Dawa. The federal courts are generally seen as central government courts.

Federal courts have jurisdiction over cases arising under the Constitution, federal laws, international treaties, and particular parties and places identified in federal law. Federal jurisdiction also includes major criminal matters and specific types of civil disputes. Federal courts apply federal laws, international treaties, and relevant state laws unless they are in conflict with federal or international laws.

3.3.2.2. State Courts

The Constitution directs the creation of three levels of state courts: the State Supreme Court (which also incorporates a cassation bench to review fundamental errors of state law), High Courts (or the Zonal Courts), and First Instance Courts (or the Woreda Courts).

State Supreme Courts sit in the capital cities and have final judicial authority over matters of state law and jurisdiction; they can also exercise the jurisdiction of the Federal High Court if none exists in that state. Similarly, State High Courts sit in the zonal regions and can assert the jurisdiction of Federal First Instance Courts in addition to state jurisdiction. Arguably, while the federal courts are attempting to maintain control over the state courts; the state courts are trying to claim as much federal jurisdiction as possible.

Although not referenced in the Constitution, some states have established Social Courts (a/k/a Kebele Courts) that handle small claims and minor disputes. These Social Courts are created and recognized under state law, are parts of the official judicial system, and operate at the kebele level. Some situations state law stipulates that cases must be brought first to the Social Courts, although appeals can be made to the First Instance (Woreda) Courts. Non-professional judges who are either elected or nominated within the local community generally staff kebele courts. Social Courts are the source of legal redress for the vast majority of Ethiopians.

3.3.2.3. Sharia Courts

Applying Islamic laws are the only religious courts that have been officially established in states, districts, and municipal districts. Sharia Courts apply only Islamic laws and have their own appellate system. They are, however, required to follow the procedural rules of ordinary courts and receive their budgets from the Federal Judicial Administration Commission. Parties must voluntarily submit to the jurisdiction of these courts, or the dispute should be redirected to ordinary justice.

3.3.2.4. Customary/Traditional Courts

These types of courts are not yet widely established by law, despite their constitutional recognition. Unlike social courts, customary courts are only recognized, not created, by law. The authority of these courts stems from tradition and local customs. These courts have evolved from traditional arbitration committees or elder councils, which do not have legal authority, but carry moral force and still operate widely as primary decision-makers in rural areas throughout Ethiopia. It appears that people often submit disputes to these courts when they do not have adequate evidence to support a case before an official court.

Customary and traditional court's rulings may conflict with the provisions and rights provided under the current constitution, particularly with regards to women and children. At the same time, the continuing widespread use of traditional systems suggests that they may contain features that appeal to users. Strengthening traditional courts, while holding them accountable to constitutional principles, could alleviate the current burden of the formal system on the state. While further diagnostic work is clearly necessary, it is clear that for many people traditional systems are speedier, cheaper, and both physically and culturally closer to them than the formal courts.

3.3.3. Independence of the Judiciary in Ethiopia:

In order to define the term judicial independence, scholars try to identify the elements of judicial independence. There are two elements of independence of the judiciary: Institutional independence and decisional/functional independence. Institutional independence refers to independence of the judicial branch from the executive and legislative branches. Functional independence is the idea that judges should be able to decide cases solely based on the law and facts, without letting the media, politics or other things sway their decisions.

The independence of judiciary can be determined by

- (1) Number and jurisdiction of the courts,
- (2) Budget for the judiciary,
- (3) Their appointment procedure,
- (4) Their length of tenure,
- (5) Procedures to impeach them, and
- (6) Salary.

The degree of independence from would be highest when a variable is either controlled by the judiciary itself, or by at least two organs of government, executive and legislative or a supermajority of the legislature (as in the case of appointment and impeachment of judges), or when a variable is specified in the constitution and thus harder to change than if it was left to be regulated by statute (as in the case of budget for the judiciary, judges' salary).

A democratic constitution is based on the institutionalized independence of the administration of justice. Both the executive and the legislative have to be prevented from interfering with the work of the courts or, indeed, from placing them under pressure. Judges in a democratic system serve only the law; they interpret the law in the way they feel is correct, and the public prosecutor or other higher authorities are not allowed to influence their judgment. Judges can be regarded as being independent only when they have a monopoly on the administration of justice. Assume that someone is set free by a court, but government forces picked up and imprisoned the impossible to happen in democracy. In a constitutional state authorization is required from the courts before freedoms can be restricted or before invasion of the private sphere of individuals.

Article 78 of the Ethiopian Constitution provides for an independent judiciary. To ensure judicial autonomy, the President and Vice-President of the Supreme Court are appointed by Parliament upon nomination by the Prime Minister. The executive has no powers to remove them from office. The other judges are nominated by the Federal Judicial Administrative Council (FJAC) on the basis of transparent criteria and then recommended by the Prime Minister for appointment by the HoPR. There is a disciplinary code of conduct and rules by which the judges are governed.

Constitutionally, judges cannot be removed from their duties until retirement except for violation of disciplinary rules or on grounds of gross incompetence or inefficiency or if found unfit to operate due to ill health. In all cases, the removal has to be sanctioned by a majority vote of the HoPR in the case of federal judges and by the state council in the case of state judges.

Courts at all levels are free from any interference or influence of any governmental body, government official or from any other source. Judges exercise their functions in full independence and are directed solely by the law.

No judge shall be removed from his duties before he reaches the retirement age determined by law except when the Judicial Administration Council decides to remove him for violation of disciplinary rules or on grounds of gross incompetence or inefficiency; or when a judge can no longer carry out his responsibilities on account of illness and the HPR or the concerned state council approves by a majority vote the decisions of Judicial Administration Council.

3.3.4. Machineries of Justice in FDRE

The Judiciary system is supported by law enforcement institutions at both the federal and state level. These include the police at federal and regional level, HPR, Ministry of Justice, House of Federation, Constitutional Enquiry Commission, the Public Prosecution Service, the Penitentiary System, Tax appeal commission, and the Federal Ethics and Anti-Corruption Commission, Human Rights Commission and Ombudsman. The activities of the law enforcement agencies are guided by the constitution and various proclamations and regulations.

3.3.4.1. Executive Branch

Within the Federal Executive branch, there are multiple Ministries and other agencies that have a direct impact on functioning of the legal and judicial system. For instance,

- 1) The Federal Police Commission is responsible for the investigation of federal crimes.
- 2) The Federal Prisons Administration has the duty to enforce and execute federal court judgments. Both entities are subordinate to **the Ministry of Federal Affairs.**
- 3) The federal Ministry of Capacity Building (MCB) was established in 2001 for the purpose of supervising, coordinating, guiding, and monitoring the implementation of national capacity building programs and initiatives. The MCB has also assumed the leading role in planning and coordinating Ethiopia's proposed Justice System Reform Program (JSRP).
- 4) The Ministry of Justice is also another part of executive branch that has a direct impact on functioning of the legal and judicial system. The mandate of the MOJ is to act as a chief advisor to the federal government on matters of law, prosecute federal crimes, study the causes of crime and their prevention, initiate or participate in proceedings where the rights and interests of the public and the federal government so require, issue and oversee licenses of lawyers/advocates practicing before federal courts, and provide legal education for the goal of raising public awareness. Under the current system, the Minister of justice also acts as the Attorney General.

3.3.4.2. Legislative Branch

- 1) The House of Peoples' Representatives is the highest authority of the federal government and can legislate on all matters of federal jurisdiction. In addition to other duties, it also approves the appointment of federal judges. The majority party in this House forms and leads the executive.
- 2) The House of Federation has unique quasi-judicial duties to interpret the constitution, decide constitutional issues, protect the rights of the nations, nationalities and peoples of Ethiopia, and decide issues of secession and self-determination, and direct federal intervention if any State "endangers the constitutional order.

- 3) *The Council of Constitutional Inquiry* is organized by the House of Federation and has eleven members: the President and Vice-President of the Federal Supreme Court, six legal experts recommended by the House of Peoples' Representatives, and three sitting members of the House of Peoples' Representatives. The Council of Constitutional Inquiry investigates issues of constitutional interpretation and acts as an advisory body to the House of Federation, which has the ultimate authority to interpret and resolve constitutional questions. The Council of Constitutional Inquiry conducts the preliminary investigation of all such matters presented. If it determines that no constitutional interpretation is required, it will remand the case to the courts; if the Council decides that constitutional interpretation is necessary, it investigates and submits recommendations to the House of Federation, which makes the final decision.
- 4) *Human Rights Commission/Ombudsman* :The Constitution requires the government to establish a Human Rights Commission and an Office of the Ombudsman. Proclamations were enacted in 2000 to provide for the establishment of these institutions.

Pursuant to these proclamations, the Human Rights Commission is intended to safeguard and enforce fundamental citizen rights and freedoms within a relatively narrow jurisdictional framework; the Office of the Ombudsman is designed to prevent and remedy arbitrary or unjust administrative actions of the executive vis-à-vis its citizens, and to provide an easily accessible means to the public to assure that basic rights are not violated by the executive without an avenue for complaint investigation and redress. In theory, both of these institutions could create important inlets for citizen access to justice and oversight of governmental activities

3.3.4.3. The Civil Service Tribunal

It is responsible for adjudicating cases involving unlawful suspension or termination of services, disciplinary penalties made against civil servants, deduction of salary and employment injury of civil servants.

3.3.4.5. The Tax Appeal Commission

It is one of machinery of justice which is responsible for reviewing cases related to payment of taxes. When the tax payer does not agree with the tax assessment made by the tax authority, the person can appeal to the Tax Appeal Commission. After the commission receive the case, it can affirm or reverse the decision of the tax authority.

3.3.5. Police and Fundamental Human Rights and Freedoms

The protection of human rights and the duties and responsibilities of police in keeping peace and order are controversial issues. Most people argued that it is difficult to keep peace and order of a given country by protecting the human rights of the people and individuals. However, international human rights instruments, the constitutions of the countries established codes of conduct for legal enforcement agencies that enable to protect human rights.

As civic ethical studies students you are expected to know human rights, the codes of conduct of legal enforcement agencies and how police protect human rights of individuals in exercising its power.

This unit therefore, deals the concepts of policing in democracy and human rights, the roles of police in protecting human rights, different codes of conduct of law enforcement agencies provided by international human rights instruments, human rights that stipulated in Ethiopian constitution related to police tasks.

3.3.5.1. Concept of policing in democracies

The word police is related to Greek words *politeuein*, which means to be a citizen or to engage in political activity, and *polis*, which means a city or state. With the expansion of the law over the several centuries, the word police also developed into being increasingly concerned with the prevention of public dangers such as crime and disorder and the prevention or redress of breaches of law.

The police are the most visible governmental institution, the representation of government that citizens are most likely to observe and to have direct contact with on a regular, if not daily basis. To civilians, the police represent “government in action” and thus may influence their overall opinions on and perspectives of the larger government, its philosophy and applicability to their daily lives. The actions of the police may strengthen or weaken the public support necessary to sustain a viable democracy.

It is ironic that the police are both a major support and a major threat to a democratic society. When the police operate under the rule of law, they may protect democracy by their example of respect for the law and by suppressing crime.

Democracy, whether viewed as a process or an end condition, is defined by broad values involving participation and formal rules about procedures such as elections. The fundamental democratic principles set out in human rights texts are the principles of: participatory and representative government, equal access to public service, universal and equal suffrage based on free and periodical elections and respect for fundamental freedoms

Defining the police force with respect to democratic system is also important to understand the roles of police in respecting the fundamental rights and freedoms, which is one of the principles of democracy. Police in democratic society refers to an institution which is subject to the rule of law embodying values respectful of human dignity rather than the wishes of a powerful leader or party and can intervene in the life of citizens only under limited and carefully controlled circumstances

In a democratic society, the essence of policing is public service. They are guardians of the public safety. They are accountable to the public in the execution of that task. Openness and accountability are essential aspects of the role of the police in a democratic society. When highly controversial issues like these arise, the police must be prepared to respond to public concerns if they want to retain the confidence of the citizens. It is suggested that public confidence and trust with the police will increase with a police service that immediately investigates controversial incidents and make the result known, warts and all, as soon as possible.

One of the most elementary requirements for public confidence in the police service is a trust in the fact, that members of the service will be accountable should they mistreat citizens or their public responsibility. That trust is absent with certain parts of the population - particularly among the marginalized and the deprived, which also tend to be among those with the most frequent contact to the police. It should also be self-evident that a prerequisite to convincing the general public that the police service is dedicated to upholding and protecting human rights is a confidence in the fact that members of the service will not abuse their rights. And the best way of generating

that confidence is to convince people that in case of grievances, there is a speedy, effective and independent mechanism for getting it remedied.

Police must orient themselves and always operate in a manner that is consistent with the Constitution and laws of the state. It is the law, created by the democratically elected representatives of the people, which must guide police action. Arbitrary enforcement of the law is inconsistent with this principle.

Chapter Four: Administrative Agencies

4.1. Defining Administrative Agencies

What are Administrative Agencies? Scholars try to define the phrase ‘administrative agency’ in terms of the purpose that agencies dispense, or functions or powers that agencies are vested with. We will discuss some of these definitions in the following paragraphs.

According to a writer, administrative agencies are authorities of government, other than a court or legislative body, with power to make and implement law. The officials of administrative agencies are employed neither as legislators or legislative staff nor as judges or other personnel in the judicial system. From this definition, it is possible to find out that agencies are government organs responsible to implement rules and policies. Administrative agencies are, however, not institutionally structured under the legislative and executive branch of the government; they are endowed with legislative, judicial and executive functions.

The United States’ Federal Administrative Procedural Act (APA) defines administrative agencies similarly, but in a more comprehensive manner as “...each authority of the government of the united State whether or not it is within or subject to review by another agency, but does not include the Congress and the courts of the United States.” Thus, in U.S.A., Federal Agencies consist of the Cabinet (Council of Ministers) level executive departments, the independent regulatory commissions, and other authorities of the Federal government such as Interstate commission, Securities and Exchange Commission and National Labor relations board. Accordingly, it is possible to say that there is no distinction between the executive branch of government and administrative agencies.

Some lawyers define administrative agencies as government entities which have the power to give decisions that might affect the rights of citizens either positively or negatively. Hence, here those organs of the executive branch, such as the defense and foreign affairs, whose powers are turned against the outside world than against private persons or property inside the nation, are not considered as the subject matter of administrative law. To be precise, these latter organs are not considered as administrative agencies unlike the definition given in APA.

H.C. Black, on the other hand, defines the term administrative agencies as a government body charged with administering and implementing particular legislation. He also stated that the term agency includes any department independently established, Commission, administration, authority, board, or bureau and other bodies with a similar name. This definition seems to be narrow, as it disregards the other two powers of agencies i.e. law making and decision making powers of agencies.

A broad definition for the term is given by **John H. Reese**. According to him, an agency is a governmental entity that possesses some combination of the governmental powers constitutionally vested in the three separate branches of the government; executive, the legislative and the judiciary. They are created to achieve legislatively assigned goals. This definition includes that agencies are vested with the three powers

or authorities of the government. Their power may range from prescribing what shall or shall not be done in a given statute to determine whether the law has been violated or not. Some of the agencies have power to impose fines while others dispense benefits for promoting social and economic welfare.

Administrative agencies are created by the legislative body through some formal enactment process in order to achieve a certain goal. Expressions of agency authority and responsibility are contained in the enactment; and from these expressions, its personnel and ultimately the courts, derive the limits of its authority. Thus, an administrative agency is a legislative creation; and as a result, it only has the authority that conferred upon it by that legislation.

In the Ethiopian legal system, it is difficult to get a comprehensive definition for administrative agencies. The only definition that we have to consider is the one given under Article 2(1) of the draft Administrative Procedural proclamation which defines administrative agencies as any ministry, commission, public authorities of the Federal Democratic Republic of Ethiopia, including the Addis Ababa and Dire Dawa Cities Administrations Competent to render administrative decisions and exercising regulatory or supervisory functions. The term shall include the agency's head or agency's employees or other persons directly or indirectly purporting to act on behalf or under the authority of the agency head.

The above definition of the draft administrative procedural proclamation has followed a unique approach. It tries to enumerate those institutions that it considers as administrative agencies. It stated standards that enable to determine which organs of the government are administrative agencies. These standards inform us that in Ethiopia for a certain institution to be considered as an administrative agency, it has to be capable of rendering administrative decisions, and must exercise regulatory or supervisory functions. Unlike the above definitions, the term administrative agency refers not only to an institution but also the head(s) and employee(s) of the institution.

Shortly, from the above definitions, it is possible to pin point the following basic features of administrative agencies:-

1. All administrative agencies are government institutions. This means, for an institution to be considered as administrative agency the first criteria is to be a government entity. In most cases, administrative agencies are structured under the executive branch of the government. But it is wrong to disregard those agencies created as independent institutions, established outside the direct control or supervision of the executive branch. Among such agencies, we have the Election Board and the Federal Auditor General.
2. Agencies are created mainly to implement or execute a particular legislation. They are intended to regulate certain fields of activities. For example, Environmental Protection Authority is established to regulate and implement environmental policies and rules. Administrative agencies are vested with the three basic functions of the government, namely, legislating, implementing and interpreting laws. Even though the main function of administrative agencies is implementation of laws, on top of this, almost all of them are empowered to enact subordinate legislations, in their specific fields of activities, and/or adjudicate cases that are related to their main functions.
3. Even though there is lack of definition for the term administrative agencies in our legal system, we can simply consider the various ministries as well as governmental bodies such as commissions, authorities and agencies as administrative agencies.

4.2. The Rationales for Administrative Agencies

There are three significant reasons for the necessity of Administrative Agencies.

Firstly, administrative agencies are the necessary corollaries of modernization.

They developed in response to development and complexity of life. Traditionally, a state was considered as a police state, defending a country from external action and maintaining peace and justice in its boundary. Through the lapse of time, however, the state was changed to welfare type, started to control the economy and other affairs.

On the other hand, the interests of the people became acute and their industries grew more complex. As a result, the demand on the government increased. Hence, in order to address additional activities of the state, additional government organs became necessary. This is one of the reasons why agencies have been established.

Secondly, the two formal branches-the legislative & the judiciary- are ill-suited to perform the day to day activities that enable the government to carry out its responsibilities. That is;

- ✓ Members of the parliament (legislative) have to deal with a multitude of subjects & they could not be experts in every matter that the government involves.
- ✓ Much of the substance of administrative adjudication is outside the area of judicial competence. Agencies have the required personnel well equipped with experience.
- ✓ Furthermore, there is a belief that the judicial process is slow & expensive while administrative tribunals handle controversies with simple, non- technical hearings and informal proceedings.

Thirdly, agencies handle the day to day public affairs, more than any organ of the government. In order to carry out the activities efficiently, they are equipped with different powers and functions. The following section discusses about these powers and functions that are vested within administrative agencies.

4.3. The Powers of Administrative Agencies

When we say the power of administrative agencies, we are referring to the right, or authority that administrative agencies have in order to carry out their functions. They exercise mainly executive, legislative, adjudicative power, or a combination of them. That is;

- ✓ Their executive power entitles them to manage or supervise the execution, or carry out of public affairs as distinguished from policy or rule making.
- ✓ Using their judicial power, agencies can render decisions to settle disputes or contested cases by interpreting relevant laws.
- ✓ And because of their legislative power, agencies can issue rules and regulations.

The powers of administrative agencies are either mandatory or discretionary/optional.

4.3.1. Mandatory and Discretionary powers of Administrative Agencies

Basically, all administrative powers are statutory in their nature. This means that the statute prescribes the nature and extent of any given power. The legislative may make specific function obligatory for the executive to run certain functions, or it may leave the administration of certain activities to the discretion of the executive.

If the legislature imposes certain conditions of procedure to be followed by the administrative authorities, it becomes a mandatory obligation to the administrator to follow such procedures.

The non-observance of a mandatory condition may give rise to the invalidation of the administrative action. In this case, the administrative authority has to follow the substantive rules

and procedures provided under the statute. It cannot act beyond what is prescribed in that specific legislation. This is a mandatory (non- discretionary) power of administrative agencies.

However, the law may sometimes fail to prescribe every detail rule to be observed by agencies. Or, the law may sometimes not be comprehensive enough to cover all the possible contingencies and problems which arise in the course of the administration. Hence, the administrative authority has to exercise a reasonable amount of **discretion** to adopt its action to the circumstances of the individual cases it deals with.

An agency may make rules which it thinks expedient to carry out its functions, depending on the complexity of problems, and their varying nature. When the problem arises, it should be solved by the administration, even in the absence of specific rules. If not, the administrative authority would be paralyzed. Hence, vesting administrative agencies with discretionary power is crucial. In addition to this, the expertise and knowledge of administrative agencies by itself calls for discretionary power.

4.3.2. Administrative or Executive Powers

Administrative power or function is the principal and inherent power of administrative agencies. Administrative agencies are mainly established for the purpose of carrying out administrative functions. It can be said that the other power of administrative agencies, such as the rule making and adjudication are incidental powers to their principal functions.

The executive role of administrative agencies is enforcing a policy which the legislature has already established.

Executive power is an authority assigned to agencies to give effect to laws.

- ✓ The executive function consists primarily of initiating, formulating and directing general policies. It also includes taking decisions within existing policy, inspection, inquiries, licensing, enforcement of standards and subordinate legislation.
- ✓ The responsibility for the enforcement of public policy is entrusted by the constitution to the executive branch of the government. In practice such responsibility is discharged by the large number of administrators under it.

Policy is a kind of planning directed towards the accomplishment of some goals or objectives. It is the output resulting from interactions of governmental & non-governmental bodies/groups. The legislature, the executive, the judiciary, top executives, political parties and pressure groups and finally the people participate in the process of policy formulation.

The 1st stage of policy formulation is to identify a problem followed by searching for alternatives to deal with it. After a policy is adopted, its success or failure must be evaluated. This is how the government fulfils the promises made to the people in its political manifesto. For their effective implementation, policies will be converted in to specific program of action by the proper administrative authorities.

The administrator has to classify the policies as ideological, macro-policies and sectoral policies.

- 1) **The ideological policies** flow from the very basic character of the government itself or from the constitution of the country.
- 2) **Macro-economic and development policies** are more technological in nature and include price policy, fiscal policy, banking policy etc.
- 3) **Sector policies** refer to the organizational sectors like the defense, foreign, agriculture policy, food policy etc.

Generally, **the execution of policy** demands at time greater imagination, resourcefulness, alertness, perseverance, diligence and sagacity/wisdom than its **formulation**. The administrator has to take in to consideration the objectives of his organization, its resources and the likely reactions of the public affected by it. He has to plan the implementation of the policy prescribed within the framework of the statute.

Administrative/ executive/ powers and functions that are exercised by administrative agencies vary from one agency to another depending on the kind of policy they execute. For instance, in our country the powers and functions vested up on **the environmental protection authority** is completely different from that of the **Ethiopian science and technology commission**. If we see the provisions of their enabling legislations, we can observe this fact clearly. The aim and objectives for their establishment is completely different.

Proclamation No. 295/2002 which establishes environmental protection organs states that environmental protection authority is established with the objective to formulate and implement policies, strategies, laws and standards, which foster social and economic development in a manner that enhance the welfare of the society and safety of the environment.

The **environmental protection authority** is vested with the following powers and duties:-

- 1) To coordinate measures in order to ensure that the environmental objectives provided under the constitution and the basic principles set out in the environmental policies of Ethiopia are realized;
- 2) To prepare, review, update and cause the preparation of environmental policies, strategies and laws, where necessary, in consultation with the competent agencies;
- 3) Carry out studies to combat desertification and mitigate the effects of drought and prepare corrective measures and create favorable conditions for their implementation;
- 4) Establish a system of environmental impact assessment of public and private projects, as well as social and economic development policies, strategies, laws and programs;
- 5) Coordinate, promote & as may be appropriate carryout research on environmental protection;
- 6) To enter any land, premise or any other place that fall under the federal jurisdiction, inspect anything and take samples as deemed necessary with the view to discharging its duty and ascertaining compliance with the environmental protection requirements;
- 7) To provide advice and support to regions regarding the management and protection of the environment.

On the other hand, **the Ethiopian science and technology commission** is established with the objective to encourage and enhance science and technology that enable the realization of the country's socio-economic development objectives.

Pursuant to Proclamation No. 7/1995, the administrative powers & functions of this commission include:-

- 1) To formulate the national science and technology policy and follow up its implementation;
- 2) To support and encourage research and development centers and institutions that have contribution in the promotion of science and technology;
- 3) To provide awards/ incentives/ to individuals and institutions that have contributed to the development of science and technology;
- 4) To establish a system for the collection of information on science and technological accomplishments, research work and results thereof;
- 5) To keep a list of professionals and institutions that engage in research and development activities.

The same holds true for the various other administrative authorities, i.e. Ministries, commissions, authorities and agencies of the country. All of them are endowed with several administrative powers and duties depending on the nature and objectives of their establishment.

In short, the various functions discharged by administrative agencies can be classified in to four broad categories. These are:-

A. Regulation of private conducts

This is a basic & expanding administrative function. Such regulation is often directed at **commercial enterprises**. It includes price, entry and service regulation of electric utilities, railroads, airlines and other carriers, environmental and consumer protection regulation, control of sale and prescription of drugs and regulation of terms and conditions of employment.

Among those agencies that carry out these functions, **the Telecommunications Agency** is one in our country. The agency is established with the objective to promote the development of high quality, efficient, reliable and affordable telecommunications services. For this purpose, it regulates tariffs relating to basic telecommunications service; regulates the type of telecommunications equipment which may be connected to a telecommunications system and performs other relevant activities that enable to achieve its objectives.

National Bank regulates the activities of banks and the value of foreign currency. **Environmental Authority**, on the other hand, regulates the environment and implements environmental policies and laws.

These and other kinds of regulations, most of the time, are exercised as per the enabling legislation of the agencies.

B. Government exactions

These are also traditional responsibilities of administrative officials. Taxation and military conscription are the two most prominent examples. Among such agencies, we have **the ministry of Inland Revenue and its departments**.

C. Disbursement of money or other commodities

There are certain categories of individuals who are entitled to some benefits because of their age, illness or unemployment conditions. Disbursing money for these eligible individuals is one function carried out by agencies under this category. They are common, especially in western countries.

Through the social security programs and other government system of insurance or compensation, agencies disburse public money as payment of pension for veterans. While these payments are often in cash, they may also take other forms such as food stamps. Subsidies to business enterprises through “tax- expenditure” and provisions in the tax laws are another important form of disbursement. Among such kinds of agencies we have **the Social Security Agency.**

The Social Security agency is established with the objective to strengthen and expand social security programs as stated under Social Security Re-establishment Proclamation No. 495/2006. To carry out this, it determines the adequacy of entitlement claims evidentiary documents, the types and amounts of social security benefits to which a beneficiary is entitled as well as it effects payment of benefits. Generally, it administers social security funds.

D. Direct Provisions of services

This is the fourth category of agencies’ administrative function. Traditional examples of this category include the maintenance, the post office; the construction of public works such as highways, dams and navigation improvements; the provision of police, fire and other protective services & funding of public education. Public hospitals & public housing are also included here.

There are also some kinds of agencies that are engaged in prevention activities other than the four broad categories of administrative function. **The Ethiopian Disaster Prevention and Preparation Commission,** for instance, is among such kinds of agencies.

The **Ethiopian Disaster Prevention and Preparation Commission,** as per its enabling **proclamation No. 10/1995,** is established, among other things, to prevent disasters by way of removing the causes and to prevent disasters, and to build in advance, the capacity necessary to alleviate the extent of damages that could be caused by disasters.

It has also the duty and responsibility to ensure the timely arrival of necessary assistance to the victims of disaster. For this purpose, it formulates strategies and policies for future disaster prevention whether natural or manmade, and follows up its implementation. It undertakes prior studies on the causes of disaster, set up systems for advance warning.

4.4. Administrative Agencies under the Ethiopian Law

Administrative agencies are creations of the law. In the Ethiopian context, there are three modes of creation of administrative agencies by law. These are:

- Administrative agencies established by the constitution,
- Administrative agencies established by House of Peoples Representatives, and
- Administrative Agencies established by the regulation of Council of Ministers.

4.4.1. Administrative Agencies Established by Constitution

There are **three** administrative agencies established by the Federal Democratic Republic of Ethiopia (FDRE) constitution. These administrative agencies are the;

- 1) Auditor General (Art. 101 of the constitution),
- 2) Election Board (Art. 102 of the constitution), and
- 3) Population Census Commission (Art. 103 of Constitution).

These administrative agencies are directly accountable to the House of Peoples' Representatives. These institutions are required to be independent of the executive branch of government. This is so because unless they are independent of government, they could not discharge their responsibilities effectively.

- ✓ The General Auditor's office could not audit administrative agencies effectively if it is subject to the control of the executive branch of government.
- ✓ The existence of an Electoral Board outside the influence of the executive is very crucial to conduct free and fair election.
- ✓ Population Census results are also decisive to plan socio-economic activities.

In this relation, elections are conducted based on population size that is received through population census. It is important to note that though these agencies are accountable to parliament and established by the FRDE constitution, their proposed function is like an administrative agency.

4.4.2. Administrative Agencies Established by the House of Peoples' Representatives

The House of Peoples' Representatives establishes most of the administrative agencies in the country through **proclamation**. One of the shortcomings of the FDRE constitution is that it has failed to devote a special provision that grants power to the House to enable it to establish administrative agencies. The House establishes administrative agencies through using its general power to issue a proclamation provided under **Art.55 (1) of the constitution**.

By using this power to issue proclamations, the House has established a number of administrative agencies. The most important proclamation in this regard is **proclamation NO. 256/2001** enacted for the reorganization of the executive organs of the Federal Government.

According to the **proclamation [No. 256/2001]**, the following ministries are established.

- 1) Ministry of Capacity Building
- 2) Ministry of Health
- 3) Ministry of Trade and Industry
- 4) Ministry of Rural Development
- 5) Ministry of Infrastructure Development
- 6) Ministry of Finance & Economic Development
- 7) Ministry of Federal Affairs
- 8) Ministry of Agriculture
- 9) Ministry of Mines
- 10) Ministry of social Affairs
- 11) Ministry of Justice
- 12) Ministry of Revenue
- 13) Ministry of National Defense
- 14) Ministry of Foreign Affairs

- 15) Ministry of Information
- 16) Ministry of Water Resources
- 17) Supervising Authority of Public Enterprises
- 18) Ethiopia Roads Authority

Authorities established by Proclamation No.256/2001 are;

- 1) Qualities and Standards Authority
- 2) Central Statistical Authority
- 3) Road Transport Authority
- 4) Ethiopian Mapping Authority
- 5) Ministry of Education
- 6) Civil Aviation Authority
- 7) Drug Administration Authority
- 8) Federal Inland Authority
- 9) Ministry of Youth, Sports and Culture

Agencies /Commissions established by Proclamation No. 256/2001 are:

- | | |
|---|--------------------------------------|
| 1) National Archives & Library Agency | 2) Federal Police Commission |
| 3) Ethiopian Broadcasting Agency | 4) Federal Prison Administration |
| 5) Agency for the Admin. of Rental Houses | 6) National Urban Planning Institute |
| 7) Ethiopian Electric Agency | 8) Addis Ababa City Government |
| 9) Ethiopian Telecommunication agency | 10) Dire Dawa City Administration |
| 11) National Seed Industry Agency | 12) Federal Police Commission |

Each administrative agency has its own powers and duties granted to it by the specific proclamations.

4.4.3. Administrative Agencies Established by Regulation of Council of Ministers

The other form of establishing administrative agencies is through regulations enacted by the Council of Ministers.

The Council of Ministers has a constitutional power to enact regulations (Art. 77 (3)).

By using such power of issuing regulations, it has established a number of administrative agencies or public enterprises such as:

- | | |
|--|---------------------------------------|
| 1. Justice & Legal System Research Institute | 5. Bahir Dar University |
| 2. Ethiopian Conference Center | 6. Gondar University, |
| 3. Mekele University | 7. Jimma University & other colleges. |
| 4. Debu University | |

Since Ethiopia has a Federal system of government, regional governments have the power to establish administrative agencies called 'Bureaus'.

Thus, many of the administrative agencies at the Federal levels have parallels with the regional government level. When we see the relationship between administrative agencies at the Federal and Regional level, the relationship is one of coordination and advisory rather than regulatory. The Federal administrative agencies have only the duty to assist the regional administrative agencies when the latter are in need of any technical or other assistance.

4.5. Purposes for Establishing Administrative Agencies in Ethiopia

The most important purposes for establishing administrative agencies are the following.

4.5.1. To carry out Policy Decisions

The major purpose of establishing administrative agencies is to implement executive policy decisions. That is;

- a) Every government has its own economic, political, and social policies used to strengthen the development of the socio-economic life of the people.
- b) Even though enacting effective social and economic policies by itself is an important task of government, how to put them into practice is a more challenging task.
- c) In order to achieve the desired objectives prescribed in policies, the government establishes a government department, agency, ministry or commission that would be responsible for the implementation of a specific policy.
- d) This agency would be provided with the necessary finance, staff and other facilities to implement the policies that the government has planned.
- e) Accordingly, administrative agencies are the major venue through which the public would benefit the fruits of economic and social policies.

4.5.2. To meet Contemporary needs of the Public

The reason why administrative agencies are established is to meet the contemporary needs of the public. That is;

- a) Every government could face different socio-economic crisis which needs urgent response.
- b) For example, let us take the case of Disaster Prevention and Preparedness Agency.
- c) This agency is established to address drought and food shortage crisis in the country.

4.5.3. To Meet Science and Technological Developments

The vital purpose for establishing administrative agencies is to meet scientific and technological developments. That is;

- a) We are in the 21st century where the development of science and technology in making the World borderless. Science and technology has contributed a lot in changing the socio-economic life of world people.
- b) Unless the government tries to use technology for the welfare of its people, the people could suffer from backwardness and poverty.
- c) In order to regulate different scientific and technological developments, the government would establish different agencies. For example, the FDRE government established the Ethiopian Science & Technology Commission- it is responsible for introducing and encouraging different scientific interventions in the country.
- d) In order to reduce the harmful impacts of science and technology the FDRE government has also established the Environmental Authority and Radiation Authority.
- e) Basically, the government of Ethiopia establishes administrative agencies for the achievement of one or more of the three purposes discussed in the preceding paragraphs.

4.6. Constitutional Standards for the Operation of Administrative Agencies

In the context of Ethiopia, administrative agencies can be established through the following;

1. Constitution,
2. Legislations enacted by the House of Peoples Representatives
3. Regulations enacted by the Council of Ministers.

Depending on the type of activity assigned to administrative agencies, they may have different forms like;

1. Ministry
2. Commission
3. Agency
4. Authority
5. Other forms

As related to the operation of administrative agencies, the powers and duties assumed and exercised by them vary from agency to agency.

For example, what is provided as an administrative power for Ministry of Justice is different from that of Education as provided in *proclamation No.256/2001*. This is because of the different nature of the two agencies. That is;

The administrative power or functions of the Ministry of Justice include:

- 1) To represent the Federal Government in criminal cases falling under the jurisdiction of the Federal courts;
- 2) To instruct for investigation where it believes that a crime, falling under the jurisdiction of the Federal Courts, has been committed; order the discontinuance of an investigation or instruct for further investigation on good cause;
- 3) To study the causes of and the methods for prevention of crimes;
- 4) To provide legal education through the use of various methods with a view to raising public legal consciousness in relation with protection of human rights, among others.

The administrative functions (powers and duties) of the Ministry of Education include:

- 1) To devise & facilitate implementation of ways & means for extending education throughout the country;
- 2) To determine and supervise the implementation of the country's educational standard;
- 3) To determine the educational curriculum offered at the level of senior secondary schools, higher education institutions and training institutions of similar status, and the type and standard of certificates to be awarded to students;
- 4) To determine the qualification required for reaching at each level of education;
- 5) To establish higher education institutions, determine their internal administrative organization; determine the criteria for admission to higher education institutions;
- 6) To classify degrees, Diplomas and certificates awarded by foreign higher education institutions, among others.

4.5. Good Governance in Administrative Agencies

What is good governance?

Good governance is the process of decision-making and the process by which decisions are implemented in acceptable way by the concerned body.

It has 8 major characteristics (features or principles). These are;

- 1) Participatory,
- 2) Consensus oriented,
- 3) Accountable,
- 4) Transparent,
- 5) Responsive,
- 6) Effective and efficient,
- 7) Equitable and inclusive and
- 8) Follows the rule of law.

It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making.

It is also responsive to the present and future needs of society.

It is important to note that Administrative Agencies must be committed to consolidate good governance and democratization in their operational means and ends.

4.5.1. Principles of Good Governance in Administrative Agencies

4.5.1.1. Rule of Law

Rule of law as a concept implies the observance of the law by all members of a state including government officials. That is, in rule of law; the law applies equally to all without any reference to the background or status of individuals. It also implies the absence of use of personal discretions or judgments in the working of government activities or administrative agencies. Government officials or administrative agencies in a rule of law are expected to act according to the law and the law only.

Good governance requires fair legal frameworks that are enforced impartially. It also requires full protection of human rights. Impartial enforcement of laws requires an independent judiciary and an impartial and incorruptible police force. Hence, administrative agencies, to consolidate good governance, need to follow strict observance of the law which we call it rule of law.

4.5.1.2. Participation

Participation by both men and women is a key cornerstone of good governance. It could be either direct or through legitimate intermediate institutions or representatives. It is important to point out that representative democracy does not necessarily mean that the concerns of the most vulnerable in society would be taken into consideration in decision making.

Participation needs to be informed and organized. This means that it should include freedom of association and expression on the one hand and an organized civil society on the other hand. Participation of citizens is a critical component of democracy and an effective function of a democratic political system.

It also to be noted that active participation of citizens in the daily activities of administrative agencies contribute much for the healthy operation of duties and powers delegated to those agencies. Thus, to make administrative agencies accountable and responsible to the wishes and interests of the governed, citizens' civic or political participation is essential.

4.5.1.3. Responsiveness

Good governance requires that institutions and processes try to serve all stakeholders within a reasonable timeframe. Administrative responsiveness implies that the administrative machinery or agency has to be strong and answerable enough at the contact points not only to deliver the goods to the citizens effectively, but also to act to the satisfaction of all concerned.

4.5.1.4. Effectiveness and efficiency

The concepts of effectiveness & efficiency in the context of good governance meant to be the following.

Effectiveness refers to processes & institutions that produce results (intended objectives) that meet the needs of society while making the best use of resources at their disposal.

Effectiveness refers to successful achievement of specific policy goals. Administrative agencies should be effective in their policy implementation. Otherwise, they will fail to meet public interest.

Efficiency covers the sustainable use of natural resources and the protection of the environment.

Efficiency can be classified into three main categories. These are:

- a) **Administrative/Management Efficiency**: Administrative agencies have to be efficient in their management. This is to say, they need to *establish appropriate methods & procedures*, and *the use of management techniques* such as work study, network techniques, human resources turnover handling strategies, among others.
- b) **Policy Efficiency**: This has peculiar significance for administrative agencies. This kind of efficiency refers to *the making of right policy decisions and the choice of appropriate programs to achieve the defined objectives.*

For example, **Rural Roads Authority** (as an administrative agency) may spend huge sums of money on a new road construction project.

- ✓ But the cost will be irritable if the new road does not help achieve the planned objectives such as facilitation of regional development through free flow of commodities, services and people.
 - ✓ Many a time, government projects yield results after a fairly long period.
 - ✓ Still, in making public investment decisions, the achievement of larger policy objectives has to be kept in mind.
 - ✓ This is how policy efficiency can be ensured in government or administrative agencies.
- c) **Service Efficiency**: This is related to the satisfaction of the public. Administrative agency efficiency, especially where programs are directed toward specific target groups, has to be *measured in terms of accessibility to citizens and their overall satisfaction derived from the enjoyment of designated services and facilities.*

4.5.1.5. Transparency

Transparency is a principle that is related to *the public right to know the activities of government or administrative agencies*. In a democratic system of government, the relationship between government and people is a principal agent relationship whereby the government is an agent appointed by the people through election to administer state affairs. Since the government is an agent of the people, the public has the right to know the how government is exercising its powers.

There are many reasons suggesting the need to an open government. Participation by the people in government is regarded as an important aspect of democracy and *people cannot participate unless they have information as to what is going on in the country*. A modern democratic government should be answerable to the public and people are entitled to know what policies and programs are followed and why government is following them.

4.5.1.6. Accountability

The principle of accountability refers to an obligation to answer for the execution of one's assigned powers and responsibilities. Whenever there is delegation of power to another person or organ, the organ to which some power is delegated is accountable for its actions. In a democratic system of government, delegation of power is made to government through free and fair election. The people delegate their power to government.

In a parliamentary system of government, the people delegate power directly to the parliament.

The parliament is responsible for acts and decisions of government. In other words, members of parliament are accountable to the people who elected them. When the parliament fails to meet the expectations of the people, the electorate can make members of parliament accountable and can remove them from membership in parliament.

The parliament in turn delegates its power to the executive branch of government by electing and appointing the prime minister and other higher government officials. The prime minister and other government officials are accountable to parliament. The parliament should be able to effectively utilize its power to control the executive branch of government.

The prime minister in turn delegates his powers to ministers, commissioners or other higher government officials. These government officials are accountable to the prime minister.

Heads of different government officials also delegate their power to different department heads under the administrative agency.

Department heads also delegate their power to different professionals or other civil servants.

4.5.1.7. The Principle Due Process of Law

Although it is generally agreed that the principle of due process of law, the idea that no person shall be deprived of life, liberty and property by governmental action without notice and opportunity to be heard for such deprivation-is clearly and expressly contained for the first time in history in *chapter 39 of Magna Charta, there are opinions to the effect that the concept is older than and known long before the Magna Charta itself*.

In the first canon of the Edict of Corad II-the strongest of all the Holy Roman Emperors (1024-1039) it was stated that “no man shall be deprived of his life, whether held of the emperor or a demi-lord, but by law of the empire and the judgment of his peers.

Though the concept was known for a long period of time, the phrase “due process of law” was used for the first time in history in the statute of 28 Edward III also called the “Statute of Westminster of the Liberties of London” of the 14th century (1354).

Chapter three of this statute reaffirming Article 39 of the Magna Charta declares: “No man of what estate or condition that he be, shall be put out of land or tenement, nor imprisoned nor disinherited, nor put to death without being brought in answer by due process of law.”

Thus, it extends the scope of its protection from only the freeman to that of every human being by substituting the terms “every man of what estate or condition” for “free man” of Article 39 of Magna Charta.

4.6. Control of Administrative Agencies

The discussion on decision-making & communication issues fall into the larger question of control in administrative agencies. Administrative agencies try to maintain a position of equilibrium by using the various control devices properly. The problem of control is thus closely associated with the problem of organizational growth and survival.

In common parlance, control has a negative and restrictive meaning.

- ✓ But the organizational control system is a very important means for checking and verifying organizational goal achievement through production of intended results.
- ✓ We will first clarify the meaning and nature of control and then indicate some of the control devices that have been evolved in recent times.

4.6.1. Nature and Meaning of Control

Control is needed to watch progress of work and to guard against possible result failure. Information about system performance is essential to permit timely decisions that emanate as control measures.

There are two most important purposes of control:

- a) To make sure that actual operation conforms to established standards.
- b) To provide timely information about actual work performance so that corrective action could be taken in case of any difficulties reported in course of performance.

Control of Administrative agencies involves three basic elements of the control process:

- a) **Setting of Standards:** what results have been planned & should be explicitly stated and made known to all the organizational participants and to their subordinate branches of administrative agencies.
- b) **Comparison of Actual Performance against Standards:** As the work would be in progress, the results actually achieved should be ascertained for seeing whether actual performance is falling short of planned results or not.
 - ✓ This method of control is known as “**monitoring**” which stands for mid-course control.

- ✓ When an activity has run its full course and reached the stage of completion, the comparison of final result actually achieved against the planned result is generally known as “**evaluation**”.
 - ✓ Both monitoring & evaluation do involve comparison of actual performance against present standards.
- c) **Taking of Corrective Action**: Information or feedback about actual system performance acts as signals for corrective action. Decisions are called for, on the basis of performance reports, to ensure that appropriate action is taken to remedy the defects and correct mistakes. By taking appropriate action, the management of administrative agencies makes sure that actual performance conforms to the planned standards and produced desired results.

4.6.2. Control of Administrative Agencies in Ethiopia

Administrative agencies that are consciously result-oriented usually adopt a number of measures to see that performance takes place according to planned standards.

4.6.2.1. At the whole administrative agency level, corporate planning

- a) This has been in use in many large administrative agencies such as the Ministry of Finance and Economic Development has endorsed the Five Year Strategic Plan (2003-2007E.C.) of Ethiopia quite recently.
- b) Other ministries and subordinates (both federal and regional governments) have to align their yearly plan with the strategic plan of the country which is endorsed by Ministry of Finance and Economic Development. The main purpose of this strategic plan framework is to facilitate control of administrative agencies.
- c) **A corporate plan (strategic plan)** includes the following;
- ✓ A long term plan/vision spelling out the long term objectives of Administrative agencies is made.
 - ✓ Alternative courses of action for achieving objectives are worked out.
 - ✓ The choices of action programs are suggested.
 - ✓ Short-term programs for actual operations & budgets for the period (year) are formulated.
 - ✓ **At the top level of an administrative agency**, corporate planning provides a control mechanism by setting standards of short-term activities within a longer time frame. It should, however, be noted that corporate planning in public administration is fraught with many difficulties such problems of longer-term projection of activities.

4.6.2.2. At the macro level, planning-programming-budgeting-system [PPBS]

- a) This was developed in USA, and it has been advocated and actually used in many public organizations (administrative agencies).
- b) Under this system [PPBS],
 - 1) First, objectives & programs are clearly identified.
 - 2) Second, alternative courses of action in achieving a planned output are worked out-reduction in child mortality and traffic accidents.
 - 3) Cost-benefit analysis is applied at the stage of project formulation & choice of projects is made on the basis of this techniques.
 - 4) In PPBS, the results/outputs of the different programs are identified first; the budgetary process of allocating and controlling funds follows the initial exercise of determination of results.

4.6.2.3. Budgetary Control

- a) Budgetary control is conventionally exercised in most administrative agencies.
- b) In allocating funds for different activities (water supply, roads, education, health, food security, irrigation, energy supply, etc), results are anticipated in rather crude ways.
- c) The allocation process has to consider and accommodate competing demands coming from different departments. Thus, it assumes a political character.
- d) As the activities are carried on, expenditure reporting reflects the progress of funds actually used and the results achieved.
- e) Conventional budgeting practices do not always consciously spell out these different processes of identification of planned outputs, balancing of programs by coordinating the different departmental demands, & measurement of results through continuous reporting.
- f) PPBS provide a technical support system in aid of financial control specifically and input control generally.

4.6.2.4. Management by Objective [MBO]

- a) As a management technique, it is widely used in many private organizations and this has been applied to public sector organizations also.
- b) The originator of this technique is **Peter Drucker**. Originally, Drucker emphasized the need for spelling out clearly the objectives of every manager in an organization (administrative agency) to control his performance and direct his efforts toward achieving the objectives.
- c) As a control technique, MBO has the advantage of;
 - 1) **Clarifying objectives and tasks at different levels of administrative agency so that** the agency participants are able to discuss openly
 - ✓ What is to be done by whom and
 - ✓ What are the resources or support systems needed to perform the tasks
 - 2) Identifying the various problems and pitfalls in the process of work performance and what efforts are made to overcome these openly.
 - 3) The performance of each manager is evaluated against the standards set in course of the initial consultation process when the key tasks of a manager are agreed upon.
- d) Control is meaningful and purposive, since the objectively and openly defined tasks set the parameters of control.

- e) MBO can be successfully applied in a situation where the outputs are fairly precisely quantifiable.
- f) The organizational climate must be such that the superior and the subordinate officers interact freely and frankly, and there is a fair amount of openness and camaraderie in interpersonal relations.

4.6.2.5. The level of Performance Appraisal

- a) The level of Performance Appraisal, at the level of the individual employee is conventionally used in administrative agencies.
- b) As a control device, it seeks to periodically collect information on task performance by each employee.
- c) It enables the administrative agency to check whether the performance of each individual participant is going along a planned path & whether the total organization is thus moving toward the desired direction.
- d) Thus, Performance appraisal serves two important purposes. These are;
 - 1) Satisfactory “work” performance is organizationally necessary. This is the functional purpose of appraisal.
 - 2) A second objective is to ensure employee ‘health’ in terms of personal satisfaction and a sense of well-being. This is the personal aspect of appraisal.
 - 3) Performance appraisal is really a tool for the followings.
 - ✓ Obtaining certain information/facts about the employee to the higher management with a view to adopting corrective measures, when and where needed;
 - ✓ Promoting right personnel practices within the organization; and
 - ✓ Motivating the appraisee to give of his best for achieving organizational success as also his own.
- e) The fate of performance appraisal in Ethiopian Administrative Agencies is fairly known with its own limitations. The limitations are the following.
 - 1) Tasks are not clearly laid down; appraisal, in such circumstances, tends invariably to become too highly subjective.
 - 2) In a hierarchy oriented organization, the superior uses his positional advantage to the fullest extent and seeks to reduce the subordinate to a position of subservience and submission.
 - 3) Personal qualities are often rated higher than work performance.
 - 4) As in the case of MBO, performance appraisal, to be organizationally useful, has to have a congenial organizational climate.
 - 5) Without a degree of openness and actual (if not formal) de-emphasis of hierarchy, appraisal is apt to be a unilateral process and not an interactional one.
 - 6) It is hoped that the recent Civil Service Reform program (BPR) launched by the government of Ethiopia will change the hierarchical administrative agency career structure to flat career structure to avoid personal bias during the control of administrative agencies.

There are also other agencies of control. Performance of administrative agencies is controlled in a variety of ways.

Within a particular administrative agency, the devices mentioned above are employed to control performance. Yet, there are other mechanisms to control administrative agencies.

4.6.2.6. Other mechanisms to control administrative agencies

4.6.2.6.1. Press and Public Opinion

Government as a whole is constantly watched by the press and the public. That is;

- a) A bad performance by agencies directly attracts public attention & hits the headlines of the press.
- b) Complaints can be voiced by the members of the public against specific Administrative Agencies or activities.
- c) Noisy protests and timely complaints serve as useful sources of information for corrective action & control of administrative agencies.
- d) A vigilant press & public opinion can be a real controller of government activities, provided that the administrative agencies have the attitude to listen to public complaints and to act on them.

4.6.2.6.2. Legislative Control

Legislative control over the executive is the basic tenets of democratic government. That is;

- a) The legislature frames laws and rules, and makes amendments to legislations.
- b) The policy control is reflected in legislative changes.
- c) Legislative control takes the form of debates & discussions that often expose the malfunctioning of executive departments and lead to demands for corrective action.

4.6.2.6.3. Judicial Control

If there is an independent judiciary system, the control mechanism is too strong to control administrative agencies. However, it is very difficult to speak absolutely about the independence of the judiciary organ of government, even, in highly democratic countries like that of the UK, USA and India.

4.6.2.6.4. Treasury Control

The central financial agency of FDRE government-the Ministry of Finance & Economic Development plays a major role in government-wide financial control. That is;

- a) The budget estimates of different departments are processed, considered & formulated by the Ministry of Finance and Economic Development.
- b) General financial rules for the guidance of the departments emanate from this ministry.
- c) It keeps a constant watch over the departments to make sure that the rules are followed properly and to observe economy in expenditure and function within the framework of budget grants.
- d) Taxation, borrowings and other revenue raising proposals fall directly within the province of the finance ministry's functions.

4.6.2.6.5. Audit Control

This is the exclusive jurisdiction of an independent authority-the Auditor General. That is;

- a) His major responsibility is to see that the executive departments incur expenditure in accordance with the purposes laid down in the laws, rules, and regulations.
- b) Audit has to make sure that expenditure has been authorized by the competent authorities.

4.6.2.6.6. Personnel and Inventory Control

Other forms of input control are personnel and inventory control. In government, the public service commission and the ministry in charge of personnel frame rules and regulations for the common use of different departments, as they seek to recruit and manage their staff.

Materials management is a pretty sophisticated job now. This controls the administrative agencies' purchasing and procurement processes of inputs such as equipment, raw materials, etc.

4.6.2.6.7. Control Structure

Control philosophies of people holding managerial positions affect the way controls are actually expressed.

At the receiving end, the subordinates react to the controls by their varying involvement postures. The pattern of control which characterizes an agency can be called its control structure.

On the basis of predominant power base used in an administrative agency, some writers have classified control structures of administrative agencies into three basic types:

Types of control structures of administrative agencies

- A. Coercive:** if controls are exercised basically by using actual physical means.
- B. Utilitarian:** if the method of achieving control is basically the material means, goods and services.
- C. Normative:** if administrative agencies (organizations) make use of symbols of affection, prestige and esteem as the predominant means of achieving control.

4.7. Administrative Rule Making

4.7.1. Definition of Rule Making

In administrative law, rulemaking refers to the process that executive & independent agencies use to create, or promulgate regulations.

In general, first legislatures set broad policy mandates by passing statutes, and then administrative agencies create more detailed regulations through rulemaking.

By bringing detailed scientific and other types of expertise to bear on policy, the rulemaking process has been the means by which some of the most far-reaching government regulations of the 20th century have been created.

For example, science-based regulations are critical to modern programs for environmental protection, food safety, and workplace safety. However, explosive growth in regulations has fueled criticism that the rulemaking process reduces the transparency and accountability of democratic government.

Legislatures rely on rulemaking to add more detailed scientific, economic, or industry expertise to a policy fleshing out the broader mandates of authorizing legislation. For example, typically a legislature would pass a law mandating the establishment of safe drinking water standards, and then assign an agency to develop the list of contaminants and safe levels through rulemaking. The rise of the rulemaking process itself is a matter of political controversy. Many find that obscure and complex rulemaking tends to undercut the democratic ideal of a government that is closely watched by and accountable to its citizens.

Common purposes of rulemaking in the USA for example include:

1. **Adding scientific expertise.** For example, in the U.S., the [Federal Food, Drug, and Cosmetic Act](#) outlaw the sale of adulterated/contaminated/polluted or impure drugs. The act requires that the [Department of Health and Human Services](#) promulgate regulations establishing which laboratory tests to use to test the purity of each drug.
2. **Adding implementation detail.** Legislation on automobile fuel efficiency, for example, often delegates the development of the actual engine tests used to calculate 'city mileage' and 'highway mileage'.
3. **Adding industry expertise.** The [U.S. Clean Air Act](#) and [Clean Water Act](#) require the [United States Environmental Protection Agency](#) to determine the appropriate emissions control technologies on an industry-by-industry basis.
4. **Adding flexibility.** More detailed regulations allow for more nuanced approaches to various conditions than a single legislative standard could. Moreover, regulations tend to be more easily changed as new data or technologies emerge.
5. **Finding compromise.** In some cases, a divided legislature can reach an agreement on a compromise legislative standard, while each side holds out hope that the implementing regulations will be more favorable to its cause.

4.7.2. The Rule making process

Rulemaking processes are generally designed to ensure that:

- 1) **The public** is informed of proposed rules before they take effect;
- 2) The public can comment on the proposed rules and provide additional data to the agency;
- 3) The public can access the rulemaking record & analyze the data;
- 4) The public can analysis behind a proposed rule;
- 5) **The agency** analyzes and responds to the public's comments;
- 6) The agency creates a permanent record of its analysis and the process;
- 7) The agency's actions can be reviewed by a judge or others to ensure the correct process was followed.

4.8. Meaning and Definition of Delegation Doctrine

What is delegation doctrine?

The Delegation doctrine is a principle limiting parliament's ability to transfer its legislative power to another governmental branch, especially the executive branch. This is based on the **separation-of-powers concept**.

The following are vested by the constitution to the legislature & shall not be delegated. These are;

- 1) The power to declare whether or not there shall be a law,
- 2) The power to determine the general policy to be achieved by the law, and
- 3) The power to fix the limits within the limits within which the law shall operate.

Thus, any **statute**¹ conferring excessive legislative power is invalid for it is unconstitutional to delegate powers. Delegation is permitted only if parliament prescribes clear & adequate standards to guide an executive agency in making the policy.

¹ A written law passed by a legislative body, or a rule of organization or institution.

Example, in the USA, all states whose constitutions contain a separation of powers doctrine have adopted some version of the delegation doctrine, which permits the legislature to delegate the administration of the law, to non-legislative entities, such as administrative agencies.

Thus, the delegation doctrine allows the legislature to focus on the fundamentals of a law leaving to the agencies the task of filling in the gaps by promulgating rules to administer the law.

However, if legislation does not provide adequate standards for the agency charged with the task of filling in the legislative gaps, courts can invalidate the legislation.

4.8.1. Standards of Delegable Legislative Authority

4.8.1.1. Adequate standards

- A. If legislation does not provide adequate standards for the agency charged with the task of filling in the legislative gaps, a court will probably invalidate the legislation.
- B. For example, **the Wisconsin Court of Appeals** invalidated a statute that allowed **the Department of Transportation** complete discretion in determining the length of driving license suspensions.
- C. The court found the statute lacked any ascertainable standards to guide the department in determining the length of the suspensions, thereby impermissibly delegating the power to make law to the department.
- D. Other states with a similar "standards" requirement have invalidated statutes that allowed agencies to promulgate rules concerning such things as **liquor-licensing regulations** and electronic video systems without providing any standards for the content of those rules.

4.8.1.2. Delegation of Power to determine what is in the Public's Interest:

- A. A statute that delegates the power to determine what is in the public's interest is constitutionally vulnerable on delegation grounds, as evidenced by decisions of **the Wisconsin Supreme Court**.
 - ✓ In one decision, the court struck down a statute that delegated to circuit courts the authority to determine when it was in the interest of the public to establish a metropolitan sewerage district.
 - ✓ Similarly, the court invalidated a statute that delegated to the circuit courts the duty of determining if a particular annexation was in the public interest.
 - ✓ **In both cases, the court was troubled because the statutes gave a non-legislative entity the power to determine policy by deciding what constituted the public's interest.**
- B. Although there are no reported cases in Wisconsin concerning the delegation of the public interest determination to an administrative agency, other state courts have struck down such statutes on delegation grounds, regardless of whether the statute delegated the power to a court or an agency.
- C. **The common thread among all these cases is that the legislature may not abdicate its responsibility by allowing other entities to make public policy determinations.**

4.8.1.3. Delegation by Incorporation of External Material

- A. A statute that incorporates an existing federal statute/regulation by reference & that empowers an administrative agency to rely upon that federal law in making factual

determinations is permissible under the delegation doctrine for the legislature, by relying upon an existing, fixed law, has not abdicated its responsibility to make the law. Thus;

- ✓ **The Wisconsin Supreme Court** has upheld a statute that defined the term “**drug**” by reference to *the official United States Pharmacopoeia*, even though the statute empowered an administrative agency to make the actual determination as to which substance was a drug.

B. A problem may arise, however, if a statute incorporates, or is interpreted by a court to incorporate, future changes to that law.

- ✓ So, for example, a statute that requires drugs to be regulated by any future federal drug law would probably be invalidated because the legislature would effectively be delegating its law-making function to the federal government.

4.8.1.4. Delegation to Non-governmental Agencies

- A. A similar kind of delegation problem to the “incorporation” problem can arise if a statute delegates to private persons or trade or industry associations the power to promulgate substantive regulations or standards, such as *water quality standards* or *licensing standards*, which are properly the province of the legislature.
- B. Although **the Wisconsin Supreme Court** has not addressed the issue of delegation of legislative power to nongovernmental agencies, the supreme courts of other states have generally invalidated such delegations.
- C. *The crux of the problem lies in giving non-legislative persons the power to create new legal standards.*

4.8.1.5. Delegation of the Power to Define or Establish Punishment for Crimes

- A. *Courts almost invariably strike down statutes that delegate to a non-legislative entity or person the power to define or establish the punishment for a crime.*
- B. In some cases, the statute being challenged on delegation grounds does not contain an ascertainable standard of guilt, thereby effectively and impermissibly delegating to courts the legislative power to define statutory offenses.
- C. In other cases, the statute impermissibly delegates legislative power to prosecutors.
- D. For example, **the Wisconsin Supreme Court** reviewed a challenge to the enactment of two criminal statutes concerning felony abandonment that were identical except for the penalty.
- E. Although the statutes were upheld in a 4-3 decision, one of the judges, writing for the three dissenting justices, concluded that the enactment of the statutes violated the delegation doctrine:
- F. It is axiomatic that the state prosecutes people for crimes under statutes enacted by the legislature. By establishing more than one maximum penalty for the identical crime the legislature has effectively failed to fix a penalty for the crime. The legislature has abdicated its responsibility to set a penalty by allowing the prosecutor to determine the maximum penalty for the crime through selecting the statute under which to charge.

4.8.2. Strategies for Reconciling Legislation with the Delegation Doctrine

4.8.2.1. Provide Clear Standards

To avoid a delegation problem, it is best to provide clear and adequate standards for the agency that is charged with administering the legislation so that no major substantive gaps exist for the agency to “fill in.” In addition to avoiding the constitutional problem, this approach to crafting legislation has the practical effect of enabling the agency to carry out more effectively the requester’s/client’s intent.

4.8.2.2. Use Existing Standards for Incorporation

If a requester/client wishes to rely upon the federal government or a private association to fill in the gaps of the legislation, it is best to incorporate existing standards promulgated by the federal government/private association, and to refer to them by date and official name. Doing so implies that no question arises about whether the legislature intended to incorporate future changes to those standards.

4.8.2.3. Public Interest Determinations

It is generally best to avoid delegating to any entity the power to determine what constitutes the public interest because courts uniformly hold that only the legislature may make this kind of policy determination by enacting legislation.

4.8.3. Enforcement of the Delegation Doctrine

The major criterion of the delegation doctrine is that the agency’s enforcement of the law must be accomplished fairly and openly.

If the enabling act and subsequent statutes enacted by parliament do not give some guidance to the president or prime minister for instance and the subordinate administrative agencies in the manner of enforcing the law, then the delegation doctrine has been violated. For example, see the following two cases;

A. The FDRE constitution Case

- 1) The people are entitled to know what the law is and how it will be enforced against persons who do not obey it.
- 2) Because, laws created by Ethiopian parliament must meet this standard; obviously, any agency to which parliament gives the power to enforce the laws must also meet it.
- 3) Here, it is vital to remind that agency officers are appointed by the prime minister or president.
- 4) With respect to agencies, officers are persons who will be responsible for the enforcement of the law.
- 5) The laws are to be enforced by government and not by private sector.

B. The case of USA

- 1) The passage of an enabling (enforcement) act and the creation of an agency must be done in a manner that the very least meets the following criteria.
 - a) The goals of the statutes must be clear, and the statutes must have definable limits.
 - b) The methods the agency uses to enforce the statutes must be fair and open to all members of the public, and

- c) The enforcement of the statutes must be accomplished by officers of the government, not by persons with private interests.

4.8.4. Administrative Justice

4.8.4.1. Defining Administrative Justice

Administrative Justice/administrative adjudication, is the exercise by an administrative agency of judicial powers delegated to the agency by a legislative body.

Agencies typically possess both legislative and judicial powers in their area of authority. i.e.

- 1) The legislative power gives the agency the authority to issue regulations.
- 2) The judicial power gives the agency the authority to adjudicate contested cases within its area of jurisdiction.

It can also be defined as the process by which an administrative agency issues an order, such order being affirmative, negative, injunctive, or declaratory in form.

Most formal proceedings before an administrative agency follow the process of either rule making or adjudication. That is;

- 1) Rulemaking formulates policy by setting rules for the future conduct of persons governed by that agency.
- 2) Adjudication applies the agency's policy to the past actions of a particular party, and it results in an order for or against that party. Both methods are strictly regulated by the law of administrative procedure.

4.8.4.2. Ethical Framework for Administrative Justice

1. Quite recently, the major ethical framework for administrative justice can be derived from “The Theory of Justice” as propounded by the philosopher, John Rawls.
2. Rawls’s principles are essentially an elaboration of the Anglo-Saxon concept of fairness and these come close to what is called in economics “Pareto Optimality”.
3. Rawls suggests two basic principles of justice to test public interest. These are;
 - a) One of these is that “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others”.
 - b) The other principle postulates that “social and economic inequalities are to be arranged so that they are both: Reasonably expected to be to everyone’s advantage, and Attached to positions and offices open to all.”
4. In case of conflict between these two principles, the second principle [b] is expected to prevail and give way to the first. It is suggested that rational- decision -making in administrative agencies has to have an ethical framework.
5. The principles of John Rawls provide an operating logic for the determination of public interest by the decision-makers (administrative agencies) which are claimed to be good principles to ensure administrative justice.

4.8.4.3. Liabilities (Legal Accountability) of Public Authorities

1. Legal accountability is the responsibility taken by government authorities for all actions done by them, i.e. whether the action is wrong or right.

2. **The government of Ethiopia** has endorsed lots of rules and regulations to facilitate legal accountabilities of public authorities.
3. The government of Ethiopia has institutionalized different public institutions to promote legal accountability of government officials. Among the rules formulated by the government are:
 - a) Civil service ethics and code of conduct rules,
 - b) Code of conduct for members of the legislature,
 - c) Code of conduct for government appointees, among others
 - d) From public institutions established by the government to facilitate liability of public authorities are:
 - e) Human Rights commission,
 - f) The Ombudsman,
 - g) Federal, Regional, Zonal, and Woreda Level Public Grievances Hearing institutions are typical examples.
 - h) Federal and regional Ethics and anti-corruption institutions.

Chapter Five: Criminal Law

As an aspect of public law, criminal law both sets standards of conduct and provide list of penalties if someone disrespect such standards. As the case is for all other laws criminal law has varied purposes depending on the nature of the socio-political system of a state. Hence, the concern of this chapter is to introduce students with the basic concepts, principles and theoretical foundations of criminal law.

5.1. Meaning, Definition and Scope of Criminal Law

Criminal law is that part of law which addresses ‘public offences. Overtime, especially during the Middle Ages; a growing list of harmful acts came to be identified as crimes against the peace and security of the state and were ultimately prosecuted in the name of the state. The state administers any punishment imposed up on the wrong doer and the state collects and fine in the execution of the criminal law. Since there is hardly any sphere of human activity with which criminal law is not directly or indirectly connected. The branch of law and justice most visible to the general public is pertaining to crime. The body of law that defines criminal offenses, regulates the apprehension, charging, and trial of suspected persons, and fixes penalties and modes of treatment applicable to convicted offenders.

Criminal law is only one of the devices by which organized societies protect the security of individual interests and assure the survival of the group. There are, in addition, the standards of conduct instilled by family, school, and religion; the rules of the office and factory; the regulations of civil life enforced by ordinary police powers; and the sanctions available through tort actions. The distinction between criminal law and tort law is difficult to draw with real precision, but in general one may say that a tort is a private injury while a crime is conceived as an offense against the public, although the actual victim may be an individual.

As a discipline criminal law is a study of crimes, moral principles and limits of prohibited criminal behavior. As such criminal law has two philosophical foundations: society’s need to maintain security in the community by regulating and controlling governmental and individual activity as well as the need to provide for and allow changes in the law response to changes in the society.

As can be made clear in the subsequent discussion criminal law wants to accomplish two things. On the one hand, achieving criminal control is the primary objective of criminal law.

On the other hand in a democratic system concern for the due process of the criminal justice system is also its concern.

Generally criminal law has two aspects. One part of the criminal law prohibits certain behavior and identifies the penalties for engaging in such activity. This is the substantive aspect of criminal law. In this aspect of criminal law, criminal acts are identified and those convicted of such crimes will be liable for several penalties. The other aspect is procedural law which refers to that part of criminal law that governs procedures once an individual (or group) is suspected of crime, apprehended, indicted, tried or convicted. In a simplified way the substantive law is intended to protect citizens from those who would do harm and the procedural law is intended to protect suspected, accused and convicted persons from illegal and unfair prosecution by the state.

5.1.1. Defining Crime

Crime is a violation of an existing social rule of behavior as expressed in a criminal statute, for which criminal punishment may be imposed. It is a conduct and an act that is prohibited by the criminal law and that brings penalty as a consequence of the breach of the criminal law.

The 2005 Penal Code of Ethiopia under Article 23 defines crime as follows:

*“A crime is an **act** which is **prohibited** and made **punishable** by law. In this code, an act consists of the **commission** of what is prohibited or **omission** of what is prescribed by law.”*

In the definition three points need to be underlined. Crime is an act (commission or omission) and not all acts are a crime but the act must be prohibited by law and made punishable by law.

This definition calls for discerning the elements of a crime.

Criminal liability is imposed on conduct felt to be against the general interests of society. Obviously, if millions of people have to live together their lives will be more pleasant and peaceful if some measures are taken to prevent people from killing or physically attacking others, walking in to the houses of others and take their property without the consent of the owners of the property. Most of us would agree that these types of behavior are anti-social, and we want them to be controlled. But there is not agreement on what kinds of conduct should be considered criminal. The types of conduct which are criminal vary from society to society, As general attitudes change overtime, so do attitude to the kinds of behavior we label as criminal.

In popular discourse, a crime is a behavior that violates fundamental precepts and deserves to be denounced and punished. This commonsense definition implies that certain behaviors are inherently criminal and necessarily invite sanctions. Because moral precepts as well as responses to their violation vary substantially overtime and place, commonsense definitions of crime cannot denote a fixed, certain, consistent and natural category of behavior.

In legal discourse, crime is a behavior which leads to particular legal procedures and for which the law permits imposition of criminal penalties. Hence, crime is constituted by legal reactions, not by

characteristics inherent in behaviors. Legal definitions of crime appear to be both precise and more objective than commonsense definitions. Thus crime is what the law defines and treats as such.

A person cannot usually be found guilty of criminal offence unless two elements are present: *actus reus* and *mens rea*. These are the two requisites of a crime and thereby legal penalty. A defendant is not guilty of an offence unless he/she committed wrongful act with the required mental element: *mens rea* which literally mean guilty mind. Accordingly, before a defendant may be found guilty in a criminal trial, the prosecution must establish beyond a reasonable doubt the required *actus* and the required *mens rea* exists in one's act or omission.

For a criminal *offence* to occur there must be two main elements - the prohibited conduct and the mental element of a guilty mind or intention. Unless an offence falls into the unusual category of a strict *liability* offence, the *prosecution* must, in order to prove that a person has committed an offence, show that both these elements were present.

For example, if a person intentionally and without lawful excuse (such as self defense) strikes another without that person's *consent*, an assault has been committed. The prohibited conduct is the striking and the mental element, or guilty mind, is the intention to strike/hurt/injure.

On the other hand, if a person accidentally strikes another, no criminal offence occurs because the mental element, or guilty mind, is absent. However, sometimes a person may commit an offence by acting recklessly, that is, without a specific intent but disregarding or not caring about the consequences of their actions.

It is a general principle of criminal law that there must be an essential element in criminal offence some blameworthiness of mind. Sometimes it is negligence or sometimes malice or intention with full knowledge of the consequence of one's act. Thus what do we mean by *actus reus* and *mens rea*?

5.1.1.1. Actus reus

Actus reus is a Latin word which refers to a positive act, for example taking something or hitting someone. Occasionally, however, the *actus reus* may take the form of a failure or omission, to do something, such as failing to stop a car after an accident has occurred, or failing to pay tax. Such an omission led to a conviction of penalty.

It can consist of more than just an act; it comprises all the elements of the offence other than the state of the mind of the defendant. Depending on the offence, this may include circumstances in which it was committed and/or the consequences of what was done. For example the crime of rape requires unlawful sexual intercourse by a man with a woman without her consent. The lack of consent is the surrounding circumstance which determines whether the act is rape or not.

Similarly, the same act may be part of the *actus reus* of different crimes, depending on its consequences. For example stabbing someone may become the *Actus reus* of murder if the victim dies or it could be the *actus reus* of causing serious bodily harm if the victim survives. In both offences the act of the defendant is the same.

For an act or omission to be considered as an offence, it needs to have three ingredients:

- ✓ It has to a voluntary act or failure to perform a voluntary act that one has a legal duty to perform;
- ✓ The act causes-damage, harm, etc and
- ✓ Social harm as specified by the law

The justification for requiring actus reus is to prevent punishing a person merely for his/her thoughts. An old legal maxim says that you cannot be punished for your evil thought but you may be punished for and actions associated with your evil thought. An additional justification is based on the concept that criminal law should not be so broad as to reach those people who entertain criminal schemes(ideas) in their minds only, but never allow their thought to govern their conduct.

The conduct must be voluntary. If the accused is to be found guilty of a crime, his/her behavior must have been voluntary. Behavior usually be considered involuntary where the accused was not in control of his/her own body or where there is extremely strong pressure from someone else such as threat that caused the accused will be killed if he/she does not commit a particular offence.

Crimes can be divided into four types depending on the nature of their actus reus.

- a) **Action crimes:** The actus reus here is simply an act, the consequence of that act being immaterial. For example perjury is committed whenever someone makes a statement which they do not believe to be true while on oath. Whether or not that statement makes a difference to the trial is not important, to whether the offence of perjury has been committed.
- b) **State of Affairs crimes:** Here the actus reus consists of circumstances and sometime consequences but not acts –they are ‘being’ rather than ‘doing’ offences. Example could be membership to illegal and terrorist groups.
- c) **Result crimes:** The actus reus of this crime is distinguished by the fact that the accused person’s behavior must produce a particular result. Example for a person to be accused of murder his act must cause the death of the victim.
- d) **Omission:** Criminal liability is rarely imposed for true omission, in cases like when the accused has a duty to act. In one particular court case a man and a woman were accused of murder by omission because they failed to give the child food and she died. They are found guilty because they intentionally withhold providing food to the child and their failure has caused the death of the child.

5.1.1.2. Mens rea

Mens rea is a Latin term meaning ‘guilty mind’ and traditionally it refers to the state of mind of the person committing a crime. The required mens rea varies depending on the offence, but there are two states of mind which separately or together can constitute the necessary mental state of a criminal offence. These are intention and negligence.

As a general rule, by requiring intent as part of the offensive act or omission, the law seeks to avoid making criminals out of people who are in no way morally at fault. A person should not be criminally convicted and punished unless it can be shown that he/she had a guilty mind. For example, before any one may be convicted of theft, the prosecutor must prove beyond any reasonable doubt not only that the defendant took something(actus reus) but that he was acting dishonestly and that he intended to keep the goods(mens rea).

The penal law is not to punish acts but guilty persons. A person may inflict harm but he may not be guilty if he/she does not act with intention or negligence. Hence, the existence of dangerous disposition is a prerequisite to criminal liability. In this regard it suffices to look at the pertinent provision of the penal code of Ethiopia as indicated below.

Article 57. -Principle; Criminal Fault and Accident.

No one can be punished for a crime unless he has been found guilty thereof under the law.

A person is guilty if, being responsible for his acts; he commits a crime either **intentionally or by negligence**. No one can be convicted under criminal law for an act penalized by the law if it was performed or occurred without there being any guilt on his part, or was caused by force majeure, or occurred by accident.

1. A person is deemed to have committed a crime intentionally where:

- ✓ He performs an unlawful and punishable act with full knowledge and intent in order to achieve a given result; or
- ✓ He being aware that his act may cause illegal and punishable consequences commits the act regardless that such consequences may follow.
- ✓ An intentional crime is always punishable save in cases of justification or excuse expressly provided by law (Arts. 68-81).
- ✓ No person shall be convicted for what he neither knew of nor intended, nor for what goes beyond what he intended either directly or as a possibility, subject to the provisions governing negligence.

Article 59. - Criminal Negligence.

(1) A person is deemed to have committed a criminal act negligently where he acts:

- ✓ By imprudence or in disregard of the possible consequences of his act while he was aware that his act may cause illegal and punishable consequences; or
- ✓ By a criminal lack of foresight or without consideration while he should or could have been aware that his act may cause illegal and punishable consequences.
- ✓ A person is guilty of criminal negligence when, having regard to his personal circumstances, particularly to his age, experience, education, occupation and rank, he fails to take such precautions as might reasonably be expected in the circumstances of the case.

2. Crimes committed by negligence are liable to punishment only if the law so expressly provides by reason of their nature, gravity or the danger they constitute to society. The Court shall assess sentence according to the degree of guilt and the dangerous character of the criminal, and according to his realization of the possible consequences of his act or his failure to appreciate such consequences as he ought to have done.

Article 71. - Absolute Coercion.

Whoever, without causing greater harm than he could have suffered, commits a crime under an absolute coercion which he could not possibly resist is not liable to punishment. The person who exercised the coercion shall answer for the crime (Art. 32(1)(c)).

The Court shall determine the existence of absolute coercion, taking into account the circumstances of the case, in particular the degree and nature of the coercion as well as the personal circumstances and the relationship of strength, age or dependency existing between the person who was subjected to coercion and the person who exercised it.

Article 72. - Resistible Coercion. If the coercion was not irresistible and the person concerned was in a position to resist it or avoid committing the act, the court shall pass sentence on the criminal (Art. 180).

5.1.2. Purpose and Principles of Criminal Law

Depending on the nature of the political and legal system the purpose of the criminal law could be used for different purposes. It could be used to eliminate adversaries or to protect the interest of a specific group. Besides, it's well intended objectives could also be competing and contradictory.

Generally speaking, achieving criminal control is considered as the primary objective of a criminal law though there could be differences on defining which acts are criminal. On the other hand, in a democratic system, there is also a concern for ensuring due process or extending constitutional rights to those suspected, accused and convicted of crime. This latter objective has been properly recognized by the FDRE Constitution. Such constitutional provisions Art 17-23 are meant for providing procedural and substantive protection for persons who are suspected, accused or convicted of a criminal offence.

Of course the criminal justice system may also have such objectives as avenging, imposing just penalties, rehabilitating and reintegrating offenders and victims, while overseeing appropriate restitution (compensation). Nevertheless crime control and due process are commonly regarded as the principal objectives. This can be made clear if one looks to the following provision of the penal code of FDRE.

Article 1- Object and Purpose of the penal code of FDRE

*The purpose of the Criminal Code of the Federal Democratic Republic of Ethiopia is to **ensure order, peace and the security of the State, its peoples, and inhabitants for the public good.***

*It aims at **the prevention of crimes** by giving due notice of the crimes and penalties prescribed by law and should this be ineffective by providing for the punishment of criminals in order to deter them from committing another crime and make them a lesson to others, or by providing for their reform and measures to prevent the commission of further crimes. (Emphasis added).*

This being the case we need to recognize that these objectives are also inherently contradictory of each other. If one's only objective is crime control, one empowers the criminal justice system to move quickly and ruthlessly against any and all suspected offenders. Such an approach, however, will inevitably sweep up many innocent parties and will violate the privacy and rights of any number of ordinary citizens. If one insists on adhering fully to all the due process guidelines, a

certain proportion of guilty offenders will escape processing or punishment- although this approach is far less likely to compromise the rights of innocent parties. The challenge has always been to achieve the right balance between these objectives.

A basic tension exists between these objectives. Some tension also exists between other objectives as well. But the general purpose of the criminal law is to preserve public order and decency, to protect citizens from what is offensive or injurious and to provide sufficient safeguards against the exploitation and corruption of others, particularly those who are young, weak in body or mind, inexperienced or in a state of special physical, official or economic dependence. It is the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior.

Philip Graven (1965) in the analysis of the 1965 penal code of Ethiopia has stated that the purpose of criminal law is to ensure order, peace and the security of the state and its inhabitants for the public good. It aims at the prevention of offences by giving due notice of the offences and penalties prescribed by law should this be ineffective by providing for punishment and reform of offenders and measures to prevent the commission of further offences.

He underlined that some incoherence in the treatment of offenders will inevitably arise if there does not exist a minimum of consistency in the ‘criminal policy’ of a state and if the police and the courts are to be guided solely by their conception of what ought to be done to fulfill the aims of the law.

Given two identical cases tried, one by a court which would think more in terms of punishment, and the other by a court which would think more in terms of protection or correction; the decisions in each case are likely to be quite different. The difference is ultimately attributable to the absence of directive principles in the criminal law regarding what steps best can serve its purpose.

5.1.3. General Principles of Criminal Law

There are some important principles of the criminal law. In this discussion you need to closely study the pertinent provisions of the FDRE Constitution and the Penal Code provided above.

5.1.3.1. Legality

The principle of legality is recognized in almost all civilized countries as the keystone of the criminal law. **It is employed in four senses.**

The first is that there can be no crime without a rule of law; thus immoral or anti-social conduct not forbidden and punished by law is not criminal. The law may be customary, as in common-law countries; in most countries, however, the only source of criminal law is a statute (*nullum crimen sine lege*, “no crime without a law”).

Second, the principle of legality directs that criminal statutes be interpreted strictly and that they not be applied by analogical extension. If a criminal statute is ambiguous in its meaning or application, it is often given a narrow interpretation favorable to the accused. This does not mean that the law must be interpreted literally, if to do so would defeat the clear purpose of the statute.

5.1.3.2. Innocent until proven guilty

The basis of our system of criminal justice is that a person, although charged with an *offence*, is considered innocent until proved guilty of the offence. The magistrate, judge or *jury*, as the case may be, must be satisfied beyond a reasonable doubt that the person is guilty. Where there is a reasonable doubt, the person must be *acquitted* (that is, found to be not guilty of the offence).

Unfortunately, people sometimes think that a person who has been simply charged with an offence must therefore have committed the offence. The fact that a person has been charged does not mean that she or he is guilty, and any discussion of the charge should make it clear that at this stage the offence is only *alleged*.

5.1.3.3. Burden of proof

The task of proving the guilt of a *defendant* falls on the *prosecution* - it is not up to the defendant to establish her or his innocence. This rule applies in all criminal trials, although sometimes is up to the defendant to give evidence of a certain point in the defense case. For example, in those offences which prohibit a certain act 'without reasonable excuse', the defendant must explain her or his excuse; although it is up to the *prosecution* to prove that the excuse is not reasonable.

In some cases the *burden of proof* of a particular defense (such as insanity) may be on the defendant, but then the defense need only be proved *on the balance of probabilities*, not *beyond a reasonable doubt*, as the prosecution must do.

5.1.3.4. Right to remain silent

While it is not entirely accurate to say that a person has a legal right to remain silent when questioned by the police, it is true to say that generally a person is not required to answer their questions.

Legislation has created some exceptions to this rule. The main exception is that a police officer can request the name and address of a person found committing an offence, or who the police officer has reasonable cause to suspect has committed, or is about to commit, an offence or of a person who may be able to assist in the investigation of an offence or suspected offence.

In these circumstances a person who refuses to give her or his name and address, or who gives a false name and address, commits an offence. Drivers of motor vehicles are also required to give their name and address, and that of the owner of the car,

5.1.3.5. Prohibition of Double jeopardy

The principle of criminal law called the *double jeopardy* rule is that no person should be punished more than once for the same offence and that no person ought to be placed twice in jeopardy (at risk) of being convicted.

This means that a person who has been charged, tried and acquitted cannot be charged again for the same matter. However, often a new trial is ordered where for example, an *appeal* court overturns a conviction or where the first trial resulted in a hung jury or a mistrial.

5.2. Theories of Criminal Law

Philosophical ‘theories of criminal law’ may be analytical/normative. Once we have identified the salient features that distinguish criminal law from other kinds of law, we ask whether & why we should maintain such an institution. **Instrumentalist** answers to this question portray criminal law as an efficient technique that helps us achieve worthwhile ends; **non-instrumentalist** answers portray it as an intrinsically appropriate response to certain kinds of wrongful conduct.

By considering the question of how the criminal law should address citizens, we can discern the truth in the non-instrumentalist perspective. The next question concerns the proper scope of the criminal law: what kinds of conduct should be criminalized? Several candidate principles of criminalization are critically discussed, including the Harm Principle, and the claim that the criminal law should be concerned with ‘public’, rather than merely ‘private’, wrongs. Further questions are raised, however, by the increasingly important phenomenon of international criminal law.

5.2.1. Different Kinds of Theory

‘Theories of criminal law’ could just be general theories of law applied to the particular case of criminal law: proponents of **legal positivism**, of natural law, of economic analysis of law, of Critical Legal Studies and other schools of legal theory will expect to be able to say about the criminal law what they say about law in general.

Questions raised by theories of this kind will figure in what follows for instance;

- ✓ Whether it is part of the essence of criminal law that it must satisfy, or make, certain kinds of moral demand;
- ✓ Whether criminal law can be adequately understood in purely instrumental terms;
- ✓ Whether we should take the criminal law's apparent pretensions to rationality and principle seriously,
- ✓ Whether we should see criminal law as an oppressive exercise of political/economic power,
- ✓ Whether we should see criminal law as the site of conflicts which produce an irredeemably contradictory, unprincipled set of doctrines and norms.

Such questions are important, but we will not begin with them. We should, instead, begin by asking what is distinctive about *criminal* law. What marks it out from other kinds or aspects of law? What are its distinctive institutional structures, purposes, or content?

Philosophical theories of criminal law can be analytical, or normative.

Analytical theorists seek to explain the concept of criminal law, and related concepts such as most obviously that of crime (metaphysically more ambitious theorists might seek an account not merely of the concept of criminal law, but of its real, metaphysical nature).

They need not look for a strict, a historical definition an account of the necessary and sufficient conditions given, and only given, which a human practice counts as a system of criminal law; we have no reason to think that any such definition will be available. But they can hope to identify and explain the central or salient features of systems of criminal law features at least some of which will be exhibited by anything we can count as a system of criminal law; and to develop an account of a paradigm of criminal law, on the basis of which we can recognize as systems of criminal law

other practices that resemble that paradigm sufficiently closely, even though they do not quite fit it.

Normative theorists seek an account not just of what criminal law is, but of what it ought to be (and whether it ought to be at all). Should we maintain a system of criminal law? If so, what goals should it serve, what values should inform it, what should its scope and structure be? Any such normative theory must presuppose some analytical account of that whose goals, values, scope and structure are being discussed.

Whether analytical and normative theorizing are related more closely than this will depend on what kind of analytical theory we develop:

- 1) **a legal positivist** will insist that, here as elsewhere, the question of what law ought to be is quite separate from, and left open by answers to, the question of what law is;
- 2) **a Natural law theorist** will argue that an adequate analysis of the concept or the metaphysical nature of criminal law will reveal the moral purposes or values that a practice must serve (or at least claim to serve) if it is to count as a system of criminal law at all.

Philosophical theories of criminal law, whether analytical or normative, cannot subsist in isolation. They must have some regard to the empirical actualities of that which they theorize: to the histories of the different systems of criminal law, and to sociological inquiries into their actual operations. **Some critical theorists** believe that such historical or sociological inquiries will undercut the pretensions of philosophical theorizing: that what needs analyzing is not the superstructure or superficial self-presentation of the criminal law, on which philosophers tend to concentrate, but the social, political and economic realities lying beneath that surface; and that given the oppressive or conflictual nature of those realities, philosophical theories cannot amount to anything more than doomed attempts to rationalize what is inherently irrational or a-rational.

The only adequate reply to these critiques of philosophical theorizing is to show how such theorizing can assist both an understanding of what criminal law is, and the discussion of what it ought to be, by taking seriously the concepts in terms of which it presents itself: that is the task on which we embark in what follows.

Another way in which philosophical theories of criminal law cannot subsist in isolation is that they cannot be wholly separate from other branches of philosophy. That is;

- 1) They must draw on **political philosophy**, since they must depend on some conception of the proper aims of the state & of the proper relationship between a state and its citizens.
- 2) They must draw on **moral philosophy**, insofar as the criminal law properly aims to define types of moral wrong and to punish those who culpably commit them.
- 3) They must draw on **philosophy of action & on philosophy of mind**, if they are to explicate ideas of wrongdoing & of fault that are appropriate to law's wrong-defining role.

5.2.2. Should We Abolish the Criminal Law?

Although the criminal law is a pervasive, and might seem to be an inescapable, feature of all societies in which we live, there are those who argue that, precisely in virtue of the paradigmatic features identified in the previous section, it is an institution that we should seek to abolish.

This is a central strand of the ‘abolitionist’ movement which, whilst often focusing most directly on the abolition of criminal punishment, also incorporates a critique of criminal law.

Abolitionist critics focus on three aspects of criminal law which, they argue, make it an utterly unsuitable institution for the kinds of social life and the kinds of relationship that we should seek.

First, the criminal law purports to declare and enforce authoritative standards of value, in particular of moral value: it claims the authority to tell us how we should live, and to enforce its demands on us if we disagree or disobey. But this, critics argue, amounts to an illegitimate attempt to impose a moral consensus inevitably- the consensus of those with political power on societies which are rather characterized by radical moral disagreement. It denies to those who do not share that consensus the freedom to think and live as they see fit.

Second, the criminal law ‘steals conflicts’ from those to whom they properly belong. Of course citizens often find themselves in conflict with one another; their relationships are often impaired by various ‘troubles’. Such conflicts and troubles must be resolved; any harm that has been done must be repaired. But that is a task for those most directly involved for the ‘victim’ and the ‘offender’ (though we should be cautious about such notions), with the help of their local community.

The criminal law, however, in defining such conflicts or troubles as criminal wrongs to be dealt with by a public criminal process, steals them: it transfers them to the professionalized context of a criminal justice system in which neither victims nor offenders are allowed really to participate; it thus denies those to whom the conflict belongs the chance to work it out for themselves.

Third, the criminal law deals in punishment in ‘pain delivery’ when what is needed is instead a process that will repair whatever harm was caused, reconcile the people involved in the conflict, and thus restore the relationships that the conflict damaged.

Criminal punishment cannot contribute to those appropriate ends: it reflects a primitive, backward-looking concern with retributive justice, whereas we should rather be seeking a forward-looking restorative or reparative justice.

5.2.3. Instrumental and Moralistic Conceptions of Criminal Law

We can begin to tackle these two questions by distinguishing two radically different ways of conceptualizing criminal law. We might decide, in the end, that a plausible account will have to draw on both kinds of conception; but we can usefully begin by contrasting simple, pure versions of each.

One conception is instrumental. The criminal law is a technique or instrument that can be used to serve various possible ends. We are justified in maintaining a system of criminal law if it is an efficient technique for achieving worthwhile ends; its structure and content should then be determined by asking how it can serve those ends most efficiently.

What worthwhile ends could a system of criminal law serve? We cannot simply say that it should prevent/reduce crime, since without the criminal law there would be no crimes no conduct would

count as criminal. However, a number of plausible goals could be posited, reflecting a range of views both about human goods and about the proper roles and functions of the state.

We begin with a set of individual & public interests that merit protection, given their role in human welfare: they can be protected by various methods, including various state activities; a system of criminal law makes its distinctive contribution to their protection by forbidding & thus preventing conduct that threatens substantial harm to them.

German criminal law theory posits a similar starting point: a set of individual and collective **Rechtsgüter** (a Rechtsgut is a good which the law properly recognizes as being necessary for social peace or for individual well-being, and as therefore meriting legal protection) which the criminal law protects against conduct that seriously threatens them.

As we will see it is not yet clear whether or how individual as distinct from public or collective interests should figure in an account of the protective aims of the criminal law, & some accounts certainly emphasize the collective dimension. Thus on **Walker's 'pragmatic' account**, the criminal law should aim to further the “smooth functioning of society & the preservation of order” collective/shared goods which provide essential preconditions for individual flourishing.

Two aspects of such instrumentalist accounts are worth noting here.

First, they typically limit the criminal law's concern to serious harms to the specified kinds of interest, which cannot be otherwise prevented. Thus the **Model Penal Code** refers to “substantial harm”, and German theorists argue that criminal law should be used only as a last resort against seriously harmful conduct. This kind of limitation can itself be rationalized in instrumental terms. The criminal law is a blunt and oppressive technique, which impinges seriously on the interests of those who are subjected to its coercive attention: not just those who are convicted and punished, but also those who are caught up in police investigations, or who are tried and acquitted, a consequentialist calculus of costs and benefits is therefore unlikely to favor its use unless it is the only feasible method of preventing quite serious harm.

But, **second**, the Model Penal Code also limits the criminal law's concern to conduct that “unjustifiably and inexcusably inflicts or threatens substantial harm”; and most criminal codes include similar limitations.

The ‘unjustifiably’ limit might still be justified instrumentally; we should not want to prevent conduct that justifiably causes harm.

Some theorists argue that we can also justify the ‘inexcusably’ limit in instrumental terms: that the criminal law's goals are not efficiently served by criminalizing faultless or excusable conduct. Others, however, ground this limit in a non-instrumental side-constraint on the aim of harm-prevention: a purely instrumentalist theory cannot justify criminalizing only culpable conduct; we must instead appeal to a non-instrumentalist demand of justice, that those who lack fault should not be liable to criminal punishment.

What emerges here is a familiar difference between two types of instrumentalist theory.

A pure instrumentalist seeks to explain every aspect of a justified system of criminal law in consequentialist terms; in designing a system, we need only ask which doctrines, practices and rules will efficiently serve the goals we have posited.

A side-constrained instrumentalist, by contrast, argues that our pursuit of those goals is also constrained by non-consequentialist values for instance by requirements of justice which might preclude some practices for instance the criminalization of faultless conduct even if those practices would efficiently serve the system's goals.

5.2.4. The Law's Voice

On some accounts, the law is not addressed to the citizens at all: it is, rather, addressed to the courts, laying down what actions they should take (what punishments they should impose, for instance) when certain conditions are satisfied.

Perhaps the law should also be made known to or easily knowable by, the citizens on whom it is liable to impinge, as a matter of fairness to them: but they are not its direct addressees. Such a view is no doubt true for some aspects of law, including some aspects of criminal law: laws that deal, for instance, with sentencing, or that define various legal excuses, seem to be addressed to courts rather than to the citizens. But it is not a plausible view of law as a whole or of the central, offence-defining aspects of criminal law in particular: the law speaks to all of us, as citizens.

We may hear its voice most loudly, most dramatically, if we find ourselves as defendants in a criminal court, when we are called to answer a charge of criminal wrongdoing, and to hear the law's condemnation of our conduct if we are convicted: but in defining which kinds of conduct are criminal, and which are legally permissible, the law speaks to all of us, about what we may or may not do. (Some aspects of the substantive offence-defining criminal law are not addressed to all citizens, but only to those engaged in particular activities: only drivers are addressed by most of the road traffic laws, for instance, and only those who deal in shares are directly addressed by the laws concerning insider trading).

In what tones and terms, then, does or should the criminal law address the citizens?

One view, familiar from the classical positivist theories of Austin and Bentham, tells us that the law, as addressed to the citizens, consists in a set of commands or orders backed by threats to secure obedience from those who might otherwise disobey. The law says to us “Don't do this!” (or, less frequently, “Do this!”); and if we ask why we should obey that command, the answer will refer either to the law's authority (“Because it is the law and you ought to obey the law”) or to its power (“Because the law will make you suffer if you do not”) though for classical positivists like Austin and Bentham the law's authority seems to reduce to its power.

That simple positivist view of law is no longer widely held, but we can see a vestige of it in the very widespread view that the substantive, offence-defining criminal law consists essentially in a set of ‘prohibitions’ (rules that ‘forbid’ certain kinds of conduct), which citizens are supposed to ‘obey’ which, indeed, they supposedly have an obligation to obey.

Now this might indeed be how the law's voice sounds to those who feel no allegiance to the polity whose law it is, and it is how the law's voice should sound to those whose relationship to it and to the polity is that of oppressed subject to alien sovereign: the law does speak to them in the threatening coercive tones of one who demands, and claims to have the power to exact, their obedience.

But it is not how the law should speak to the citizens of a **liberal polity**. As citizens, we are members of the normative community whose values the law purports to express: if it is to address us as citizens, and as responsible agents, it must speak to us not in the peremptory, coercive voice of a sovereign who commands our obedience, but in the rational, normative voice of values which demand our allegiance as the values of our polity. The law of a liberal polity, that is to say, must aim to be a common law: a law which belongs to the citizens, as a reflection of the values they share, rather than a law which is imposed on them by an alien sovereign.

The law, or the legislators who create and declare the law, must claim that there are good reasons to criminalize the kinds of conduct it defines as crimes. Since to criminalize conduct is to declare that it should not be done, that claim must be that there are good reasons why the citizens should not engage in such conduct.

Reasons reflecting the polity's values.

If the law is to address us as responsible members of the normative political community, it must address us in terms appropriate to those reasons. In the example offered in § 4, I treat my friend as a responsible agent only if the reasons I offer her for going to visit her aunt are of the right kind the very reasons that, as I see it, make it right for her to do this.

Similarly, I am now suggesting, if the law is to address us as responsible citizens, it must address us in terms that appeal to the right kind of reason for refraining from the conduct that it defines as criminal: in terms that appeal, that is, to the reasons which justified criminalizing such conduct in the first place.

What kinds of reason could those be?

We will return to this question in the following two sections, but should note here that it will be hard to resist the initial conclusion that they must be moral reasons, to do with the moral wrongfulness of the conduct that is criminalized.

For, **first**, the law's voice is an insistent one. It declares that these things must not be done, even if (it implies) it might suit our individual interests to do them; it attaches significant penalties to the conduct it criminalizes: how could such a voice be justified other than by claiming that it is speaking to us of moral duties that we owe to each other and to the polity?

Second, the law speaks in terms that appear closely related to the extra-legal languages of morals. It speaks of guilt, of fault, of culpability and wrongdoing; it speaks of murder, rape, dishonesty, theft and the like: unless we are to say that these terms are systematically ambiguous as between their legal and their extra-legal uses (in which case the law would not be making itself accessible or readily intelligible to its citizens), we must conclude that the law's definitions of offences are meant to be legal definitions of moral wrongs of kinds of conduct that are wrong either pre-legally, as ***mala in se*** are; or as ***breaches of legal regulations*** which, once they are created, citizens have a moral obligation to obey.

The criminal law's definitions of offences will not always aspire to match precisely our extra-legal understanding of the relevant moral wrongs. There will often be good reasons, to do with the practical and moral constraints of law enforcement and the criminal process, for the law's

definitions to diverge from extra-legal moral understandings. But the law's definitions must be grounded in those extra-legal moral understandings. What the criminal law must say to the citizens is therefore not that they must refrain from such conduct because the law forbids it and can demand their obedience, but that they should refrain from such conduct because it is wrong.

Why should we maintain an institution that speaks to its citizens in such terms of wrongs that should not be committed?

Part of the reason is obviously to dissuade the citizens (if they need dissuading) from committing such wrongs that is the truth in the instrumentalist view. Indeed, nothing said so far rules out the familiar suggestion that a central purpose of a system of criminal law is to reduce the incidence of the relevant kinds of wrongdoing by threatening those who might commit them with punishments that will deter them whether punishment should be justified as a deterrent is a further issue.

But this is not to say that instrumentalists are wholly right, or that Moore is wholly wrong to think that the sole purpose of criminal law is to provide for the retributive punishment of those who culpably commit such wrongs. For, first, even if we are in the end justified in using punishment as a deterrent for those who will not otherwise be dissuaded from crime, the law's initial appeal to the citizens must be in the moral language of wrongdoing, not simply in the coercive language of deterrence: not because such a moral appeal is likely to be instrumentally effective, but because it is intrinsically appropriate to the law's dealings with the citizens of a liberal polity. Second, we can now plausibly suggest that another purpose of the criminal law is to provide a suitable response to criminal wrongs that are committed. It publicly recognizes and condemns them as wrongs by defining them as crimes; it calls those who are alleged to have committed them to account, to answer for that alleged wrongdoing, through a process of criminal trials; it condemns those who are proved to have committed such wrongs by convicting them and by punishing them, if we understand punishment as involving the communication of censure. The truth in Moore's view is that such responses to crime are justified not merely as instrumentally efficient means to the reduction of harmful conduct, or to other further ends, but as intrinsically appropriate responses to the kinds of wrongdoing that properly concern the criminal law. We must take such wrongdoing seriously, if we take seriously the values against which it offends, the victim's standing as one who has suffered such a wrong, and the wrongdoer's standing as a responsible agent who has done wrong: but to take it seriously is to be prepared to declare it to be wrong it, and to call to account and to condemn those who engage in it.

The central purpose of *criminal* law, as a distinctive kind of law marked out from the other kinds and aspects of law by its features, is to define, and to declare the wrongfulness of, certain kinds of wrongdoing, in order not only to dissuade citizens from committing such wrongs, but also to provide appropriate responses to those who commit, or are alleged to have committed, such wrongs. In defining conduct as criminal, the law identifies it as conduct from which we have good reason to refrain, and thus also as conduct for which we will be called to public account, and condemned and punished, if we engage in it. To ask whether we should have a system of criminal law is therefore to ask whether there are kinds of wrongdoing that the state should identify and respond to in such a way kinds of wrongdoing that the state should take seriously as wrongdoing, and expect its citizens to take similarly seriously.

But what kinds of wrongdoing could these be? We noted that the simple Legal Moralists' claim, the claim that we have good reason to criminalize any kind of immoral conduct simply in virtue of its immorality, seems implausible. My betrayal of my friend, wrong though it is, does not seem like the kind of wrong that merits public denunciation by the criminal law, or for which I should be called to account by the whole polity through its criminal process; it is, surely, a private matter between me and my friend and perhaps the circle of friends to which we both belong), not a public matter that concerns the state, or my fellow citizens as such.

This natural response to this example points us towards one common way of identifying the kinds of wrong that do properly concern the criminal law the idea that conduct which is to be criminalized ought to constitute a 'public', rather than a merely 'private', wrong.

5.2.5. Crimes as Public Wrongs

What makes simple Legal Moralism seem implausible is not just the thought that some moral wrongs are not serious enough to attract the attention of the criminal law: though that is true, the wrong I do my friend is not a trivial one it might destroy our friendship. Nor is it simply the thought that there are very good reasons against criminalizing such wrongdoing reasons that will forcibly strike us as soon as we begin to think how a law criminalizing such conduct could be drafted and enforced: Legal Moralists themselves will, as we have seen, argue that such countervailing reasons can often outweigh the reasons in favor of criminalization; but my example was supposed to make us doubt whether the moral wrongfulness of this kind of conduct constituted any reason at all for criminalizing it. The objection to Legal Moralism is naturally expressed by saying that this kind of wrongdoing is a 'private' matter that is simply 'not the law's business'.

Must we then reject every species of positive Legal Moralism outright, and insist that the immorality of a kind of conduct is never in itself a good reason for criminalizing it? If so, we might still be able to preserve some form of negative Legal Moralism, and hold that conduct that is not immoral cannot properly be criminalized; but we would need to look elsewhere for positive reasons for criminalization. This, however, seems equally implausible especially if the argument of the previous section was sound. For I argued there that the criminal law must aim to identify and condemn kinds of morally wrongful conduct, which implies that it is the very immorality of the conduct that gives us reason to criminalize it; and it would anyway be very strange if the reasons for counting such central mala in se crimes as murder and rape as criminal had nothing to do with the moral wrongfulness of such actions. There is, however, a third way between the two extremes of holding that any kind of immorality provides a good reason for criminalization, and holding that immorality itself never provides a good reason in for criminalization: we can hold that immorality of the right kind provides a good reason for criminalizing conduct that involves it. Moral wrongdoing that could in principle be justifiably criminalized would thus form a subcategory of the larger category of moral wrongdoing.

But how could we identify that subcategory? One familiar slogan is that the criminal law is properly concerned only with 'public' wrongs, whereas merely 'private' wrongs are either not matters for the law at all, or matters for a civil rather than a criminal legal process. To gain any help from this slogan, however, we need to know what 'public' means in this context and how to distinguish 'public' from 'private' wrongs; in the rest of this section, I will explore some suggestions.

A pure instrumentalist will of course argue that this is a pragmatic issue: supposing that we do have good reason to criminalize only conduct that is in some way immoral, we decide which kinds of immorality to criminalize, and which to deal with in other ways (or to ignore) by asking which techniques are likely to constitute efficient means to our preferred ends. The range of possible techniques is very wide, even if our only aim was to reduce the incidence of such conduct (which it would not be): extra-legal techniques, such as education, advertising, and situational crime prevention; the taxation system (we might as efficiently reduce the incidence of a certain kind of conduct by taxing it as by criminalizing it); and the threat of civil liability to pay damages for any harm that was caused. But an implication of the argument of the previous section is that the choice between these techniques should not be a purely pragmatic one: although issues of efficiency are clearly relevant and important, we must first ask which kinds of measure are intrinsically appropriate to the kind of conduct, to the kind of wrong, we are dealing with. We have to ask, that is, whether the conduct in question involves a kind of wrongdoing that merits the public calling to account and condemnation of those who engage in it that the criminal law involves: if it does, we then have at least a good reason to criminalize it; if it does not, we do not. This might be only the first stage in a long and complex deliberation about whether a given type of wrongful conduct should be criminalized, and pragmatic issues would certainly need to loom large in later stages of that process: but my suggestion here is that it is an essential first stage.

So what should count as a ‘public’ wrong? A first and familiar suggestion, implicit in the way I have talked throughout of criminalizing ‘conduct’, is that ‘mere thought’ should not be criminalized: for thought is private; only action or conduct is public. This suggestion captures at least one central aspect of the slogan that criminal liability requires an act (or a ‘voluntary act’, as it is sometimes put), and it does seem to have some force: although mere thoughts can be morally improper (entertaining sadistic fantasies about my opponents, for instance), surely only what actually impinges on our shared social or material world can properly be of interest to the state or its criminal law; but mere thought which is not expressed or acted upon has no such impact. We must note, however, first, that this sets only extremely modest limits on the scope of the criminal law: it does not even protect speech from criminalization, since speech certainly has an impact on the world. Second, if the ‘act requirement’ is to do any substantive work, we need an account of the concept of ‘action’ or ‘conduct’ an account which will also need to deal with such questions as that of criminal liability for omissions, or for statuses such as being drunk or an addict: such an account is notoriously difficult to provide.

Within the realm of ‘conduct’ as distinct from thought, and leaving aside the question of omissions, how might we try to identify the subcategory of ‘public’ wrongs? Another familiar suggestion is suggested by Mill's Harm Principle “the only purpose for which power can be rightfully exercised over any member of a civilized community against his will is to prevent harm to others”: could we not say that only conduct that wrongfully harms or threatens to harm others is a suitable candidate for criminalization; that the criminal law is properly concerned only with harmful immorality? This leads us into some notoriously difficult questions: for instance, about whether the paternalist criminalization of conduct that harms only the agent can ever be justified; about whether we might also have reason to criminalize conduct that, though it does not cause harm, is seriously offensive to others; about whether there are kinds of immorality so gross that, even if they cause no harm, we have reason to criminalize them. We also need an account of the concept of harm itself, which

raises further problems. For instance, can we plausibly so define ‘harm’ as to rule out the argument that any immoral conduct is itself harmful, either to those whom it wrongs (since I am harmed by being wronged), if it does wrong anyone, or by doing moral harm to the society or culture in which it is done? Can we so define ‘harm’ as to exclude purely trivial wrongdoings from the scope of the criminal law, for instance by focusing on setbacks to ‘welfare interests’? We cannot pursue these issues here, but we should note two ways in which the Harm Principle fails to set any very tight constraints on the scope of the criminal law.

First, it allows the criminalization of conduct that threatens, as well as conduct that actually causes harm. Even the more limited category of conduct that causes harm becomes problematic when we ask what counts as causing harm: our existing laws criminalize not only conduct that immediately causes harm, but also kinds of conduct whose causal relationship to the harm is more remote for instance conduct that enables or assists another's commission of a crime; so we need to ask how far we should extend the law's reach in this direction. The problems multiply when we turn to conduct that, whilst it does not actually cause harm, is criminalized because it threatens harm, or creates a danger of harm: to the broad category of ‘nonconsummate’ offenses.

This category includes conduct that is intended to cause harm (attempts to commit crimes, for one obvious instance); conduct that, though not intended to cause harm, recklessly or negligently endangers others (dangerous driving, for instance, or breaches of health and safety rules); and conduct that, although it might not itself be dangerous, is of a kind that is usually dangerous (speeding, for instance). Again, we need to ask how far the criminal law should reach in this direction.

Second, even if we limit our attention to conduct that obviously and directly causes what must surely count as non-trivial harm, not all such conduct seems even in principle to be apt for criminalization. The friend whom I betray would surely count herself as seriously harmed by my betrayal; someone whose spouse betrays their marriage by committing adultery might reasonably claim to be seriously harmed by that betrayal. But we should not therefore see any good reason to criminalize betrayals of friendship; and although adultery is indeed a crime in some states, arguments about whether it is in principle apt for criminalization do not typically depend on claims that it is, or is not, harmful to the betrayed spouse the reality of that harm is taken for granted. Nor will it help to suggest, for instance, that the kinds of wrongful harm that are apt for criminalization are those and only those that set back ‘welfare interests’; if our welfare interests concern those goods that constitute the ‘basic requisites of [our] well-being’, they surely include such goods as friendship and other loving relationships.

So even if the Harm Principle can do some substantial work in limiting the proper scope of the criminal law, it does not take us far enough, since there are kinds of seriously harmful conduct that we do not think should, even in principle, be criminalized. Perhaps, if crimes are ‘public’ wrongs, we should now distinguish within the category of wrongfully harmful conduct between public and private harms: the betrayal of a friendship or a marriage is not apt for criminalization if and because it causes only private harm. But what is to count as a public harm, or public wrong?

On one familiar reading, a wrong or harm is ‘public’ if and because it affects, i.e. wrongs or harms, ‘the public’, rather than only an individual victim; wrongs or harms that affect only individual

victims are if they are matters for the law at all appropriately pursued by those individual victims through the civil courts. We can understand some crimes as harming or wronging ‘the public’ ‘the public’ being understood either a set of individuals among whom we cannot identify determinate individual victims, or as a collectivity with shared goods that crime impairs. Three examples will serve to illustrate this point.

First, ‘public order’ offences involving violent, riotous conduct are injurious to the public in that they pose a threat of serious harm to any of the indeterminate number of individuals in the area, and might threaten to undermine that shared sense of assured security on which our civic life depends. Similarly, offences of endangerment that involve no ‘disorder’ (driving offences which endanger other road users generally, for instance, and offences involving public health and safety) often threaten the public, rather than determinate individuals.

Second, some crimes attack or threaten the polity's own institutions, and thus threaten or harm ‘the public’ as a collectivity. This category includes such crimes as perjury, attempts to pervert the course of justice, the offering of bribes to, or their acceptance by, public officials, and various kinds of electoral malpractice. In some such cases a determinate individual might be wrongfully harmed an innocent person might be wrongly convicted, or might lose a civil case, because a witness commits perjury: but whether or not we can identify any such individual victim, the crime attacks a public institution which is crucial to the public interest.

Third, other kinds of wrongful conduct are apt for criminalization because they involve serious unfairness towards one's fellow citizens. Someone who evades their taxes might cause no identifiable consequential harm, either to any individual or to the social institutions which are funded by taxation; if asked to explain the wrong she commits, we would appeal to some version of ‘What if everyone did that?’, rather than trying to identify any consequential harm that she causes. We would appeal, that is, to the unfair advantage that she takes over all those who pay their taxes: she gains the benefits that accrue to all citizens from the taxation system, but refuses to make her appropriate contribution to that system.

So we can explain why some kinds of conduct are properly criminalized by showing how they wrong or harm ‘the public’, or ‘the public interest’: but can we explain all crimes in this way? Can we sustain the general claim that conduct should, in principle, be criminalized only if and because it wrongs or harms ‘the public’ in this sense? There are two ways in which we might try to do this by appealing either to the idea of public order and stability, or to that of unfairness.

Consider, first, the idea of public order, and the suggestion that the criminal law's proper purpose is to protect the “smooth functioning of society and the preservation of order”. We find relatives of this suggestion in Becker's argument (1974) that the criminal wrongfulness of crimes consists in their tendency to cause ‘social volatility’, and in Dimock's argument (1997) that it lies in their tendency to undermine the kinds of trust upon which civic life depends. What makes crimes including such crimes as murder and rape wrongful in a way that properly concerns the criminal law is, on such accounts, not the wrongful harm that they do to their immediate individual victims, but their wider effects on social stability or trust. Consider second the idea of unfairness.

According to one well-known theory of punishment, crimes deserve punishment because the offender takes an unfair advantage over all his law-abiding fellow citizens: he accepts the benefits of their law-abiding self-restraint (the mutual security provided by an effective system of law) but refuses to make his proper contribution to that system by exercising such self-restraint himself. Might we ground a theory of criminalization on such a theory of punishment?

We should criminalize murder, rape and other central mala in se because, apart from the wrongful harm that they do to their individual victims, they wrong ‘the public’ (the generality of law-abiding citizens) by taking unfair advantage of them.

The obvious objection to such ways of explaining the idea of crimes as public wrongs or harms is that, precisely by portraying crimes as wrongs done to ‘the public’, they distort their character as wrongs that merit criminalization. We are now to criminalize murder or rape, not because of the wrongs that they do to their individual victims, but because of their effects on social stability or trust, or the unfair advantage they take over the law-abiding; from which it follows, if the criminal law should address the citizens in terms of the reasons and values that inform its definitions of crimes, that a murderer or rapist is to be condemned and punished not for what he did to his individual victim, but for acting in a way that created social volatility, or undermined trust, or took unfair advantage over his law-abiding fellows. This is surely not how we should understand the criminal wrongfulness of such crimes.

To illustrate this point, consider the example of domestic violence and abuse. In English law intra-marital rape was recognized as a crime only in 1991 (4 All ER 1981); until then, a husband who forced sexual intercourse on his wife without her consent was not guilty of rape. Similarly, although domestic violence (typically husbands violently beating up their wives) was formally speaking a crime, it was often not taken seriously as a crime by the criminal justice system: the police were often unwilling to intervene in ‘domestic disputes’ or to prosecute domestically violent men, seeing it rather as an issue for the couple to work out for themselves. No doubt part of what lay behind these practices was a view that the wrongs being done were, if wrongs at all, not that serious; but we can also discern the view that these were ‘private’ rather than ‘public’ wrongs. If we then ask what justified the change towards recognizing intra-marital rape as genuine, criminal rape, and domestic violence as a genuine crime that should be prosecuted, it is not plausible to answer in terms of either of the accounts noted above. It would not be plausible to argue that domestic violence or intra-marital rape is liable to create social volatility (indeed, such crimes are often committed by men who in their lives outside the home are models of peaceful conformity); or that it undermines the kinds of trust on which social life depends (such crimes, if confined to the home, do not undermine the trust that we can have in our dealings with strangers, which is the kind of trust that is relevant here); or that it takes unfair advantage over all those law-abiding people (or men) who refrain from these or other kinds of crime as if the law-abiding would love to commit such wrongs if only they were not restrained by the demands of fairness.

To explain why such domestic abuse should be criminal and taken seriously as criminal, we must look not for some ‘public’ harm or wrong that it involves distinct from the wrongful harm it does to its individual victims, but at that wrongful harm itself. What matters is that we come to see the wrongs suffered by abused wives not just as their private business, but as our collective business as citizens of a polity to which we belong with them; we come to recognize that they have as strong a claim to the protection and support of their fellow citizens as do the victims of attacks by

strangers a claim grounded simply in their fellow membership of the polity, as our fellow citizens. The wrongs done to them are ‘public’ wrongs not because they wrong the ‘public’, but because they are wrongs that properly concern the public their fellow citizens; even when they are committed in what might count, empirically, as ‘the privacy of the home’, they belong in what should count, normatively, as the ‘public’ realm. We could then also say, if we wish, that such wrongs are wrongs against, or injurious to, the public the polity and its members: they implicitly deny the core values by which the polity defines itself, and the basic normative bonds by which we define our civic relationships with each other; they are wrongs not just against their individual victims, but against all of us insofar as we identify with those victims as our fellow citizens they are wrongs in which we collectively share, and which we make ‘ours’. But to talk in this way of ‘public’ wrongs or injuries is not to try to ground the claim that such wrongs should be criminal: the appeal to the idea of a ‘public’ wrong now expresses, rather than trying to ground, the claim that it is a wrong that concerns us all, and that is therefore apt for criminalization.

If that is right, however, we cannot look to the idea of public wrongs or harms to provide criteria or principles of criminalization. We can say that the criminal law should be concerned with ‘public’, rather than ‘private’, wrongs, but that is because to call a wrong ‘public’ in this sense is already to class it as a kind of wrong that is apt for criminalization a kind of wrong which should be publicly denounced and whose perpetrators should be publicly investigated, prosecuted, condemned and punished; a kind of wrong whose perpetrators should be called to account by the polity as a whole, not just by the individual victim.

The upshot of this section is that we still lack any clear criteria or principles by appeal to which we can try to determine which kinds of conduct should be criminal. However, though this might be frustrating, we should at least by now be clearer about what kinds of claim we must be able to make about kinds of conduct that we want to show are apt for criminalization. First, we must be able to show that and how they involve wrongdoing: for as we saw, the criminal law focuses on wrongs that should be condemned, rather than just on harms that need to be repaired or compensated; and as we saw, the criminal law must speak to us of wrongs that we should not commit. Second, we must be able to claim that the wrong is of such a kind that it should concern us all as citizens we should not leave it to the individual victim to pursue, or not to pursue, a civil case against the wrongdoer. I have not suggested determinate criteria by which we can identify such wrongs, nor do I think that any determinate criteria can be provided; although theorists might yearn to find a single principle, or a single set of principles, by reference to which we could determine the (in principle) proper scope of the criminal law, such yearnings are doomed to be frustrated. We can, however, identify the main kinds of consideration that should be relevant. Is the wrong one that injures ‘the public’ rather than any individual victim? Is it one that flouts or implicitly denies the core values by which we define ourselves as a polity and which supposedly underpin our civic relationships? Is it one from which we should be able to expect the protection of our fellow citizens (which is to ask whether it is a wrong from which we should be able to expect to be categorically safe as we go about our normal lives, rather than a kind of wrong that we can be expected to risk on condition that we can seek compensation if we suffer it)? Answers to these questions will be contestable, and will properly emerge only from a collaborative attempt to understand what joins us as citizens and what we owe to each other as citizens an attempt which will lead to different results in different political communities: but we have made progress if we have at least identified more clearly the questions that we must ask.

5.3. Theories of Punishment

Punishment involves the deliberate infliction of suffering on a supposed or actual offender for an offense such as a moral or legal transgression. Since punishment involves inflicting a pain or deprivation similar to that which the perpetrator of a crime inflicts on his victim, it has generally been agreed that punishment requires moral as well as legal and political justification. While philosophers almost all agree that punishment is at least sometimes justifiable, they offer various accounts of how it is to be justified as well as what the infliction of punishment is designed to protect rights, personal autonomy and private property, a political constitution, or the democratic process, for instance. Utilitarians attempt to justify punishment in terms of the balance of good over evil produced and thus focus our attention on extrinsic or consequentialist considerations. Retributivists attempt a justification that links punishment to moral wrongdoing, generally justifying the practice on the grounds that it gives to wrongdoers what they deserve; their focus is thus on the intrinsic wrongness of crime that thereby merits punishment. “Compromise” theorists attempt to combine these two types of theories in a way that retains their perceived strengths while overcoming their perceived weaknesses. After discussing the various attempts at justification, utilitarian and retributive approaches to determining the amount of punishment will be examined. Finally, the controversial issue of capital punishment will be briefly discussed.

5.3.1. Utilitarianism

5.3.1.1. Utilitarian Justification

Utilitarianism is the moral theory that holds that the rightness or wrongness of an action is determined by the balance of good over evil that is produced by that action. Philosophers have argued over exactly how the resulting good and evil may be identified and to whom the greatest good should belong. Jeremy Bentham identified good with pleasure and evil with pain and held that the greatest pleasure should belong to the greatest number of people. John Stuart Mill, perhaps the most notable utilitarian, identified good with happiness and evil with unhappiness and also held that the greatest happiness should belong to the greatest number. This is how utilitarianism is most often discussed in the literature, so we will follow Mill in our discussion.

When attempting to determine whether a punishment is justifiable, utilitarians will attempt to anticipate the likely consequences of carrying out the punishment. If punishing an offender would most likely produce the greatest balance of happiness over unhappiness compared with the other available options (not taking any action, publicly denouncing the offender, etc.), then the punishment is justified. If another available option would produce a greater balance of happiness over unhappiness, then that option should be chosen and punishment is unjustified.

Clearly, crimes tend to produce unhappiness, so in seeking to promote a state of affairs in which the balance of happiness over unhappiness is maximized, a utilitarian will be highly concerned with reducing crime.

Traditionally, utilitarians have focused on three ways in which punishment can reduce crime.

- 1) First, the threat of punishment can deter potential offenders. If an individual is tempted to commit a certain crime, but he knows that it is against the law and a punishment is attached

to a conviction for breaking that law, then, generally speaking, that potential offender will be less likely to commit the crime.

- 2) Second, punishment can incapacitate offenders. If an offender is confined for a certain period of time, then that offender will be less able to harm others during that period of time.
- 3) Third, punishment can rehabilitate offenders. Rehabilitation involves making strides to improve an offender's character so that he will be less likely to re-offend.

Although utilitarians have traditionally focused on these three ways in which punishment can reduce crime, there are other ways in which a punishment can affect the balance of happiness over unhappiness. For example, whether or not a given offender is punished will affect how the society views the governmental institution that is charged with responding to violations of the law. The degree to which they believe this institution is functioning justly will clearly affect their happiness. Utilitarians are committed to taking into account every consequence of a given punishment insofar as it affects the balance of happiness over unhappiness.

5.3.1.2. Objection and Response

Perhaps the most common objection to the utilitarian justification of punishment is that its proponent is committed to punishing individuals in situations in which punishment would clearly be morally wrong. H.J. McCloskey offers the following example:

Suppose a utilitarian were visiting an area in which there was racial strife, and that, during his visit, a Black man rapes a white woman, and that race riots occur as a result of the crime, white mobs, with the connivance of the police, bashing and killing Blacks, etc. Suppose too that our utilitarian is in the area of the crime when it is committed such that his testimony would bring about the conviction of a particular Black man. If he knows that a quick arrest will stop the riots and lynching, surely, as a utilitarian, he must conclude that he has a duty to bear false witness in order to bring about the punishment of an innocent person. In other words the utilitarian argument tends to accept the happiness of a greater number of the people than the suffering of an individual or a minority.

A utilitarian is committed to endorsing the act that would be most likely to produce the greatest balance of happiness over unhappiness, and, in this situation, it appears that the act that meets this criterion is bearing false witness against an innocent person. But, so the argument goes, it cannot be morally permissible, let alone morally mandatory, to perform an act that leads directly to the punishment of an innocent person. Therefore, since the utilitarian is committed to performing this clearly wrong act, the utilitarian justification must be incorrect. The standard utilitarian response to this argument demands that we look more closely at the example. Once we do this, it supposedly becomes clear that the utilitarian is not committed to performing this clearly wrong act. In his reply to McCloskey's argument, T.L.S. Sprigge states that if faced with the decision presented in the example, a "sensible utilitarian" will attach a great deal of weight to the near-certain fact that framing an innocent man would produce a great deal of misery for that man and his family. This consideration would receive such weight because "the prediction of misery... rests on well confirmed generalizations". Furthermore, the sensible utilitarian will not attach much weight to the possibility that framing the man would stop the riots. This is because this prediction "will be based on a hunch about the character of the riots". Since well confirmed generalizations are more reliable than hunches, happiness is most likely to be maximized when individuals give the vast majority of the weight to such well confirmed generalizations when making moral decisions.

Therefore, since the relevant well confirmed generalization tells us that at least a few people (the innocent man and his family) would be made miserable by the false testimony, the utilitarian would give much weight to this consideration and choose not to bear false witness against an innocent man.

This type of response can in turn be challenged in various ways, but perhaps the best way to challenge it is to point out that even if it is true that the greatest balance of good over evil would not be promoted by punishing an innocent person in this situation, that is not the reason why punishing an innocent person would be wrong. It would be wrong because it would be unjust. The innocent man did not rape the woman, so he does not deserve to be punished for that crime.

Because utilitarianism focuses solely on the balance of happiness over unhappiness that is produced by various actions, it is unable to take into account important factors such as justice and desert. If justice and desert cannot be incorporated into the theory, then the punishment of innocents cannot be ruled out as unjust, so a prohibition against it will have to be dependent upon the likelihood of various consequences. This strikes many theorists as problematic.

5.3.2. Retributivism

5.3.2.1. Justification for Retributive

Regarding retributive theories, C.L. Ten states that, “There is no complete agreement about what sorts of theories are retributive except that all such theories try to establish an essential link between punishment and moral wrongdoing”. He is surely right about this, so, therefore, it is difficult to give a general account of retributive justification. However, it is possible to state certain features that characterize retributive theories generally. Concepts of desert and justice occupy a central place in most retributive theories: in accordance with the demands of justice, wrongdoers are thought to deserve to suffer, so punishment is justified on the grounds that it gives to wrongdoers what they deserve. It is instructive to look at the form that a particular retributive theory can take, so we will examine the views of Immanuel Kant. Kant invokes what he refers to as the “principle of equality” in his discussion of punishment. If this principle is obeyed, then “the pointer of the scale of justice is made to incline no more to the one side than the other”. If a wrongful act is committed, then the person who has committed it has upset the balance of the scale of justice. He has inflicted suffering on another, and therefore rendered himself deserving of suffering. So in order to balance the scale of justice, it is necessary to inflict the deserved suffering on him. But it is not permissible to just inflict any type of suffering. Kant states that the act that the person has performed “is to be regarded as perpetrated on him”. This he refers to as the “principle of retaliation”. Perhaps the most straightforward application of this principle demands that murderers receive the penalty of death. So, for Kant, the justification of punishment is derived from the principle of retaliation, which is grounded in the principle of equality.

The concepts of desert and justice play a central role in Kant’s theory, and they are applied in a way that rules out the possibility of justifying the punishment of innocents. Since an innocent person does not deserve to be punished, a Kantian is not committed to punishing an innocent person, and since it seems to some that utilitarians are committed to punishing innocents (or participating in the punishment of innocents) in certain circumstances, Kant’s theory may seem

to be superior in this respect. Recall that the failure to take desert and justice into consideration is thought by many to be a major problem with utilitarian theory. However, while Kantian theory may seem superior because it takes desert and justice into account, an influential criticism of the theory challenges the idea that punishment can be justified on the grounds of justice and desert without requiring that the balance of happiness over unhappiness be taken into account.

5.3.2.2. Objection and Response

Gertrude Ezorsky argues that we should test the Kantian position and other retributive positions that resemble it “by imagining a world in which punishing criminals has no further effects worth achieving”. In this world, punishment does not deter or rehabilitate. For whatever reason, incapacitation is impossible. In addition, victims receive no satisfaction from the punishment of those who have harmed them. In this world, a Kantian would be committed to the position that punishments still ought to be inflicted upon wrongdoers. Furthermore, the individuals that populated this world would be morally obligated to punish wrongdoers. If they failed to punish wrongdoers, they would be failing to abide by the dictates of justice. But surely it is quite odd to hold that these individuals would be morally obligated to punish when doing so would not produce any positive effects for anyone. According to Ezorsky, this terribly odd consequence suggests that the Kantian theory is problematic.

Kant would not agree that this consequence of his theory is odd. According to Kant, “if justice and righteousness perish, human life would no longer have any value in the world”. So, even the inhabitants of our imaginary world are obliged to ensure that “every one may realize the desert of his deeds”. If they do not live up to this obligation, then they will be failing to abide by the dictates of justice, and their lives will be of lesser value. Of course, critics of the Kantian theory are unlikely to be persuaded by this response. Indeed, it is appropriate to be highly skeptical of a conception of justice that holds that justice can be promoted without anyone’s welfare being promoted. As stated earlier, many of the theories that are referred to as “retributive” vary significantly from one another. However, as the Kantian theory possesses many central features that other retributive theories pose; criticisms similar to Ezorsky’s have been leveled against many of them. Predictably, the responses to these criticisms vary depending on the particular theory.

5.3.3. Compromise Theories

Many theorists have attempted to take features of utilitarianism and retributivism and combine them into a theory that retains the strengths of both while overcoming their weaknesses. The impetus for attempting to develop this sort of theory is clear: the idea that punishment should promote good consequences, such as the reduction of crime, surely seems attractive. However, the idea that it would be justified to punish an innocent in any circumstance where such punishment would be likely to promote the greatest balance of happiness over unhappiness surely seems wrong. Likewise, the idea that justice and the desert of the offender should play a central role in a justification of punishment is attractive, while being committed to punishing an offender even when nobody’s welfare would be promoted as a result seems to be problematic. So, each type of theory seems to have positive and negative aspects. But how to combine these seemingly opposed theories and produce a better one? Is a compromise between them really possible? In an attempt to explore this possibility, we will examine the theory of H.L.A. Hart.

Chapter Six: Administrative Remedies

Introduction

Until the nineteenth century the responsibilities of the state were few and classical the maintenance of public order, the conduct of foreign affairs and the disposition of the armed forces. It is far different now a day. In the interests of protecting the public and regulating the economy, the state intervenes in a very considerable degree in to the lives of its citizens. Certain types of businesses such as banking, employment agencies and livestock markets may not be carried out without a licence; and that licence may be subject to such conditions as the licensing authority sees fit to impose. A variety of discretionary grants, most notably in the area of industrial development, is available, as is a wide range of benefits in the spheres of health, social welfare, education and unemployment. The administration of these controls and services brings many people and institutions into contact with administrative agencies and naturally provides a fertile source of grievances. It is the task of courts to ensure that administrative actions and decisions are taken in accordance with law, once a case is brought before them.

Usually individuals whose rights are substantially affected by the acts of administrative agencies resort to court proceedings or to superior administrative organ to obtain remedies. It is obvious that cases are brought and litigated before these organs in order to get a remedy which will have the effect of protecting from and redressing for wrongful acts pending or purported by public authorities.

Remedies are practical methods of enforcing rights. Unless they are enforced and protected, they are meaningless. Effective remedies are of the utmost importance. Hence, courts and other institutions must employ effective remedies in enforcing individual rights.

6.1. The Nature and Role of Remedies

“Administrative and judicial remedy” is a legal concept with immense practical importance in administrative disputes. The existence of effective legal remedies in every country is the primary means by which parties obtain certainty about their rights, and know how they will be protected. It is the duty of the government to adopt legislative, administrative and judicial measures to recognize and protect individual rights and freedoms. Legal remedies are the tools for ensuring the protection of individual prosperities, securities and rights. An important question is what these remedies are. Remedies are of different kind. The most important of these rights are administrative and judicial remedies.

6.1.1. What are “Administrative and Judicial Remedies”?

When used in law, the word “remedy” has a meaning that is very different from its normal dictionary definition. In normal usage, ‘remedy’ means a cure or action by which problems and illnesses are addressed. In legal language, the term “remedy” refers to the use of laws, courts and administrative agencies to “cure” a legal problem. Legal “cures” generally occur in several ways:

- By bringing a non-complying situation into compliance;
- By compensating (with money or other benefits) losses suffered, including the failure to receive a legally vested payment or other expectation;
- By issuing an order mandating required actions, or prohibiting those that are illegal or do not comply with legal requirements, and
- Other legal prescriptions.

Remedies are created and applied by law. In some situations, primary legislations or subordinate laws on a particular topic may specify the remedy, by stating a precise amount that must be paid, or action that must be taken in a particular situation. Often, however, the law cannot specify all of the variables in the situation. In that case, a law will authorize particular courts, agencies or other officials to declare and enforce a remedy – providing specific guidance (called a “legal standard for decision-making”) to ensure that those decisions are legal and fair. In these remedy decisions, agencies and judges sometimes have wide discretion, but are still held to legal standards of fairness, equity and due process of law. In nearly all countries, remedy decisions are subject to oversight or appeal rights, which ensure that other agencies or higher levels of government will challenge against improper decisions and secure the rights of all parties and the “rule of law.”

The following sections explain three critical points: (i) the difference between “remedies” and “penalties”; (ii) the kinds of ‘remedy’ that can be obtained in law; and the legal conditions (pre-requisites) that must be met by a party seeking a remedy.

6.1.2. Remedies vs. Penalties

The most important point about remedies is that they are different from penalties in the objectives they aim to achieve. The purpose of a penalty is to identify the violator and punish him in some way; whereas the purpose of a remedy is to “fix” or “cure” the person/entity/etc. who has, as a consequence of the violation, been injured or suffered a financial loss.

The second difference between a remedy and a penalty relates to who collects any funds that are awarded. In a penalty, any financial amounts assessed (fines) are paid to the government of the country (or sub-national jurisdiction) in which the action is brought. A financial remedy, by contrast, produces an amount that is paid to the person or persons who have suffered a loss caused by the violation. Similarly, a penalty may result in imprisonment, a term of “public service,” loss of permits, or other means of punishing violators. By contrast, a non-financial remedy may include an order requiring the defendant to comply with terms of a contract (e.g., to provide reports, give access to records, etc.), sharing non-financial benefits (e.g., data, contacts, etc.) and other actions that directly “cure” the situation for the complaining party.

The third important difference is the fact that, in the context of remedies, the claimant controls the claim. He brings the action, and he determines whether to continue or drop it. The only way that his claim will be dismissed is by his decision, or by the court’s conclusion that the claim may not be prosecuted. By contrast, penalties are assessed and prosecuted by decision of the government and its prosecuting officers. This control has a downside, however. In most cases, the party who controls the legal action is also the party that pays for it. Governments do not normally take action to provide remedies to injured parties – they create legal systems and institutions that enable the injured party to seek a remedy.

In some cases, the remedy-penalty distinction is blurred. For example, in some countries, it may be possible to increase the amount of a remedy, as a way to punish the violator. This practice is often called “exemplary damages” or “punitive damages.” Their purpose is basically to protect against repetition by the defendant. In the absence of possibility of “punitive damages,” very wealthy defendants might feel that they can commit the same actions tomorrow, so long as they are willing to pay the remedy. The claimant (not to the government) receives the added funds, as a sort of “bonus.” Do you think that “punitive damage” is available in our legal system? This kind of remedy is prevalent in the common law legal system particularly in USA. But, in our legal system, as a principle, what is awarded as a compensation that is equivalent to the harm the compliant has sustained.

More rarely, in some penalty laws, the court may require the defendant to recompense the victim, as one part of the final judgment. In many countries, however, the rights of the victim to receive a remedy are tried in a separate process (civil court), usually after the penal claims have been adjudicated. And it is the later trend that exists in Ethiopian legal system.

6.1.3. Available remedies

Another important characteristic of remedies is that they must be created in law. Over the 3000 years, since King Solomon’s decision to cut a baby in half as a means of resolving a dispute over parental rights, the concept of governance has become more rigorous, and the list of remedies that may be awarded has been very clearly defined. Even with this limitation, there are many different types of remedies that may be awarded. It is important to remember that all remedies are not available in all situations. Whether a particular remedy is authorized in a particular case will depend on the nature of the basic legal right involved, and the legal and institutional source of the remedy.

Some of the kinds of remedies that exist in different legal systems, and may be relevant to claims based on administrative wrong doings and discriminations include the following:

- a) *Compliance orders*, (legal writs mandating or prohibiting certain actions);
- b) *Compensation* for harms caused (payment of ‘damages’ or ‘restitution’ calculated based on the value of the injury, damage or financial loss suffered by the claimant), including ;
- c) “Compensatory” remedies (*i.e.*, the direct value of the harm suffered), and
- d) “Punitive” remedies (discussed above);
- e) *Rescission, cancellation, revision or termination* of permits, licenses or other government instruments;
- f) *Reformation or invalidation* of a contract or other agreement;
- g) *Declaratory decisions* (the court’s binding determination of questions regarding rights under certain kinds of relationships. In some countries, the rights to obtain declaratory remedies is only available in a limited number of situations);
- h) contractual remedies, including, among others:
 - i) ‘*Specific performance*’ – *i.e.*, ordering a party to perform his responsibility under a contract;
 - j) *Accounting* (calling on a party to provide a record of relevant matters within his sole knowledge);
 - k) *Lien* rights (in cases where the law enables the creation of a lien against certain properties for certain purposes – especially where the claimant gave property or services that are incorporated into a valuable property) ;
 - l) *Other special rights* (sometimes called ‘constructive trusts’) in property, where the property of the claimant is later legally exchanged for other property.
 - m) *Estoppels* (an order which prevents a party from taking certain actions in the future.)

6.2. Sources of Remedies

The existence of a particular remedy or group of remedies in the laws of certain country does not necessarily enable individuals or complaints to utilize those remedies to obtain redress. Thus, after determining the existence of a legal remedy, the second step in determining the availability of remedies is to consider the path by which the remedy is obtained – to ask ‘*Where (from what law or legal category) is the remedy obtained?*’ ‘*Through what institution or system can I seek the remedy?*’ and ‘*What limits or restrictions apply when seeking remedies through this path?*’ The nature of the remedies available, the processes of seeking them and many other factors depend on the source of the remedy. Under this chapter we will consider four basic sources of remedy-judicial institutions, administrative bodies, direct contract mechanism and arbitration/mediation panels. Despite their various names, each of these sources represents a component of “administrative and judicial remedies”.

6.2.1. Remedies available through administrative agencies

The first general category of remedy is “administrative” remedies that are available through government ministries, agencies and other bodies that are not formal courts. Most countries authorize administrative bodies to undertake some “administrative” decision processes in response to claims.

The most common remedy for a person affected some way by administrative action is appeal to the superior administrative authority or administrative tribunals. For example, in our country a tax payer who thinks that the tax authority imposed up on him excess amount of tax can appeal to the tax appeal commission which is structurally found under the administration. Again disciplinary committees established under different agencies can hear complaints against public officials. These can be good example for a kind of remedy acquired from administrative agencies themselves.

In some countries the justification for administrative remedial processes is that they might reduce demands and caseloads on the formal court system. These countries might call on a claimant to “exhaust his administrative remedies” (i.e., to attempt to resolve his problems through administrative processes), before bringing an action in the courts. As we have discussed under the previous chapter this kind of prerequisite also exists in our legal system. In other countries, the opposite justification applies citizens do not normally want to go through the cumbersome procedure of bringing an action to courts. Instead, they prefer to the informally process by speaking directly to an agency official.

It is important to note that in both of these situations, government agencies and officials need to have clear administrative regulatory standards to guide their judgment. These tools enable the agency to control and manage claims, and to ensure that fair decision will be taken. National administrative processes are designed to help, regulate and control both the process and the impact of personal contacts, while providing a comfortable avenue for legitimate claims.

An administrative body’s powers to hear and resolve claims are limited in several ways. First, only specific types of claims can be brought before an administrative agency, and only within the specific substantive area of the agency’s mandate. For example, conservation agencies may act only in conservation-related matters, pollution control agencies to pollution-related matters, etc.

More importantly, direct administrative remedies are usually tied to very particular decisions or authorization of the agency. For example, an agency that has the power to grant a concession will often have the right to adjudicate matters brought by applicants who have been denied of his right. They may also have the right to review claims that the permit-holder is violating the permit. But they may not have the power to award a remedy to neighboring landowners who are injured by the concession-holder's actions. Similarly, an agency that has the power to conduct inspections and issue compound penalties will often have the administrative authority to hear appeals related to these actions.

6.2.2. Remedies available from judicial institutions

The term “judicial remedies” refers to the range of actions that may be taken by a court, judge, appellate panel, magistrate or other judicial official, (or in some cases the legal bodies of traditional communities where authorized by national laws) when acting formally in that capacity. In most countries, these officials may act in a variety of specified ways to suit the needs of the situation. For example, in very urgent cases, a judge may often issue an emergency writ or some other order such as “*ex parte*” process (that is, a hearing where the defendant does not appear). The fairness of these procedures is ensured by requiring that they be reviewed in a formal legal process at a later date. Most judicial decisions, however are given through a more complete judicial process, where both parties are present and able to argue in their own behalf.

The powers of the judiciary are not unlimited. Each court may only act within its “jurisdiction” that is, it may only decide cases that (i) occur within geographical boundaries and involve specified financial levels, (ii) are assigned to the court's judicial level and division, and (iii) (sometimes) that addresses the particular kinds of law or subject matter of the particular court's portfolio. Most importantly, courts are authorized to act only as regard to matters governed by law. This last category of authority may include concepts such as negligence, endangerment, breach of contract and other matters.

There are various kind remedies available for courts which they grant when ultra vires or improper act or decision are made by administrative agencies. Currently, however, many countries courts face the problem of multiplicity of remedies available. Since there are overlaps between these remedies, it becomes difficult to choose the appropriate remedy in a given case. In such circumstances it is advisable for an aggrieved party to come up with alternative remedies.

Generally, the remedies available before the courts can be classified in to two categories; Ordinary remedies of Private law and Prerogative remedies of Public law. Private law remedies are those remedies which are available in suits between private individuals. Private individuals can invoke any of the private law remedies against public authorities in the same way as they could have done against private individuals. There are three kinds of Private law remedies. These are Injunction, Declaration and Action for Damage. All these remedies are available in our legal system.

The Public law remedies, on the other hand, are remedies that not only enforce private rights but also keep the administrative and quasi- administrative machinery within proper control. They are effective in the areas where private law remedies do not reach or proven ineffective. A person would be given a private law remedy only if he could show that the challenged act has directly and

substantially affected him. The main types of public law remedies are certiorari, prohibition, and mandamus.

6.3. Public and Private Remedies

6.3.1. Private Law Remedies

6.3.1.1. Injunction

Injunction is one of the standard remedies of private law. It may be defined as an ordinary judicial process that operate in *personum* by which any person or authority is ordered to do or refrain from doing a particular act which such person or authority is obliged to do or refrain from doing under any law. The remedy is coercive but not rigid and can be tailored to suit the circumstances of each individual case. It can be negative or affirmative, absolute or conditional, temporary or perpetual or it can operate immediately or at a future date. The court in its proceedings for injunction can review all actions: judicial, quasi-judicial, administrative, ministerial or discretionary.

Private person who is threatened by some decision of the administration can apply for injunction; if granted the injunction would incapacitate the administrator from acting and thereby it will wash out the fear that administrative decision will be executed in the future.

Injunctive relief is not only negative but also positive and can compel an authority to do something which under law he is obliged to do and may, therefore, be very effective as a control mechanism of administrative action.

Courts grant temporary injunction as an interim measure on an application by the plaintiff to preserve the status quo until the case is heard and decided. In granting temporary injunction, the court takes in to consideration the *prima fascia* case of the plaintiff, nature and extent of his injury (he must show that if he is not granted the injunction, he would suffer irreparable injury), balance of convenience and the existence or otherwise of the alternative remedy.

A perpetual injunction is only granted at the conclusion of the proceedings. It is issued after determination of the rights of the parties to the proceedings and it may be granted for a fixed period or for a period which can be extended through application, or for indefinite period terminable when conditions imposed on the defendant have been complied with.

Nonetheless, injunction may not be granted under the following circumstances;

- To restrain agencies or authorities from instituting or prosecuting any judicial proceeding, civil or criminal;
- To restrain agencies from petitioning to any legislative body;
- To prevent the breach of contract which cannot be specifically enforced

Generally, injunction is an effective method of judicial control of administrative action where the authority has acted without jurisdiction or has abused its jurisdiction or has violated the principles of natural justice. It is also an effective instrument in controlling the exercise of administrative discretion. Therefore, if the administrative authority has either not exercised its discretion at all, or it is arbitrary, or has been exercised on extraneous considerations or for an improper purpose, injunction would be ordered.

6.3.1.2. Declaration

A declaratory order or judgment is simply a court's declaration or statement resolving a dispute as to the meaning or application of the law to a situation in which the applicant has a sufficient interest. As its name implies, declaration only declares what the legal position of the parties is; it does not change the legal positions or rights of the parties. That means, in a strictly technical sense, the order or judgment has almost no mandatory or restraining effect at all. The orthodox view is that whilst declarations are often accompanied by consequential relief ordering or restraining certain conduct, a mere declaration cannot be executed or enforced. Theoretically, a declaration neither commands nor restrains action.

But, it may provide a non-coercive alternative to one of the other judicial review remedies. By granting a declaration that a decision is invalid a court may give guidance to future decision-makers or help individuals in order to avoid some negative consequences of the decision. Injunction has the effect of putting forward the law based on facts before the court. By doing so it merely declares its true legal position.

The main characteristic of declaration is it is not targeted to anyone. Rather it reminds the parties not to violate the right of the other part by declaring or stating their respective rights. For example, in case of individual possession right to property and interpretation of will, the court investigates and declares the right of individuals before they file any suit to the court. Hence, by making a declaratory order of the rights of the parties the court will be able to settle the issue at a stage before the status quo is disturbed.

According to Jennings this kind of remedy is the result of the 20th century democratic right. It is during this period that declaration began to be used in the field of judicial review of administrative action. Where the life of the individual is highly interlinked with the administration, this kind of remedy helps to solve public problems easily. He asks, lastly to stress on the benefit of declaration that if it is possible to delimit administrative power within their boundary without taking coercive measures, then why do we need to stick to the later?

In fact if the other party or the administrative agency continued to do the action contrary to the declaration and if it infringes the right of the claimant, she/he has the right to apply before the court of law for another remedy. In many legal systems, for a party to have sufficient standing to seek and obtain the grant of declaratory relief, he must satisfy a number of tests which have been formulated by the courts; some of these requirements are alternative while others are cumulative.

For example in Australia, the following prerequisite must be full filled. The proceeding must involve the determination of a question that is not abstract or hypothetical. There must be a real question involved, and the declaratory relief must be directed to the determination of legal controversies. The answer to the question must produce some real consequences for the parties. The applicant for declaratory relief will not have sufficient status if relief is claimed in relation to circumstances that have not occurred and might never happen'; or if the Court's declaration will produce no foreseeable consequences for the parties. The party seeking declaratory relief must have a real interest to raise it. Generally there must be a proper contradictory right. These rules should in general be satisfied before the Court's discretion is exercised in favour of granting declaratory relief.

Under the law of England more or less similar kind of requirement exists for the court to render declaration remedy. First of all the claimant must be entitled to a legal character or a right to any property. Secondly, there must be some danger or detriment to such right or character. And lastly, plaintiff must seek further relief if he is entitled to it. This places a restriction on the power of the courts to grant a mere declaration.

In situations where the plaintiff is entitled to consequential relief and does not claim it, the court will not grant declaratory relief. Consequential relief is the relief which directly flow from the declaration. For instance, in a suit for declaration in a case of wrongful dismissal, the consequential relief would be reinstatement and arrears of salary. Injunction may be a consequential relief in certain situations. However, in England and USA courts are entitled to grant 'mere declaration', and the plaintiff may reserve further relief for a separate action.

6.3.1.3. Action for Damage

Public authorities are repository of powers which might pose potential danger up on property and personal dignity of citizens. They can, for instance, order the demolition of houses, the revocation of licences, the detention of persons and other similar acts which can affect individual rights and interests. These kinds of harms to individual interests can give rise to legally sustainable claim for damage unless the damage is inflicted pursuant to a clear statutory power.

Whenever any person sustains damage/ harm as a consequence of contractual breach or tortuous/, she/he has the right to file suit before court of law against such authority for compensation of damage. In this regard the action brought against the administrative organ is similar to the one brought against ordinary individuals. And it will be governed by ordinary civil procedure and the relevant substantive laws of the country. This remedy of damage, in addition to its contribution for enhancement and protection of individual rights against public officials, it also creates desirable incentive for avoiding mistakes and reckless exercise of power by the government authorities. In other words, it serves as a means of ensuring that powers are exercised responsibly, in good faith and with due diligence. The remedy can also be equally used by the public authority against individuals who sustain damage against the property or officials of the authority.

6.3.2. Public Law Remedies

6.3.2.1. Certiorari

The Certiorari is a word with a Latin origin and denotes the term 'inform'. It was essentially a royal demand for information. Using his prerogative the King used to order that the necessary information be provided for him. Initially, certiorari was never used to call for record of proceedings of an Act or decisions for quashing. But gradually, the scope of certiorari has gone under change and currently pursuant to this remedy high or supreme courts can order lower courts and also administrative agencies to submit records of proceedings to them for review, and may quash them if found to be unreasonable.

Hence, certiorari is a remedy issued to call up the records of subordinate tribunals or authorities for examination if there was an excess of jurisdiction or some other similar vices.

It is in essence a two part remedy.

- 1) The first part is an order removing the official record of the impugned decision-maker into the superior court issuing the certiorari order.
- 2) The second part is an order quashing the impugned decision, and the record thereof. That is, certiorari is used to wipe the slate clean.

The writ of certiorari proceeds from an understanding that all subordinate courts and authorities have limited jurisdiction and power and must be kept within the legal boundary. Based on this understanding, certiorari can be issued to rectify faults such as:

- 1) Excess of jurisdiction, i.e. when an authority acts beyond its legal authority
- 2) Denial of natural justice, i.e. where the decision of an authority is found out plagued with bias or/ and it has rendered decision without giving opportunity to be heard for the parties.
- 3) Abuse of jurisdiction, i.e. when the authority has jurisdiction but abuse it
- 4) Lack of jurisdiction, i.e. when the authority has no jurisdiction at all
- 5) Fraud, if the decision of the agency has been obtained through fraud

Hence, certiorari is one of the various methods by which an **ultra vires** and other illegal act of an administrative agency can be challenged before a judicial institution. *However, the court, by granting the writ of certiorari, it will not impose its own decision.* It simply quashes the original decision, thereby conferring implicit authority to the original body for a fresh reconsideration of the matter. It is important to note that certiorari does not compel the decision-maker to start again. Nor can a certiorari application be regarded as analogous to an appeal. It is merely an application for judicial review of the decision, so that the superior court cannot substitute its own decision for that which is quashed.

A certiorari order operates retrospectively, in the sense that once the order is made the quashed decision is treated as null from the moment it was first pronounced. Sometimes, this may give rise to great inconvenience and injustice. In such a situation, the court might be reluctant to grant certiorari and resort to declaration.

6.3.2.2. Prohibition

Prohibition is an order made by a high court or Supreme Court to prevent subordinate court or tribunal from exceeding or continuing to exceed the jurisdiction or infringing the rule of natural justice. Prohibition is simply a negative or restraining order (a little bit like an injunction). It does not quash anything. In other words, it is prohibitive in its nature, that it is fashioned to prevent the commission of errors. Hence, its purpose is to prevent rather than cure. The court can grant a partial prohibition where the applicant asked for an unlimited prohibition.

The remedy of prohibition is very similar to the order of certiorari in the sense that both can be resorted to in seeking to prevent ultra vires action or action in breach of natural justice pending a final decision by a statutory agency exercising public functions. Both certiorari and prohibition had their origins in supervision by superior courts of the actions of subordinate courts, and later tribunals exercising judicial or quasi-judicial functions. The main difference between certiorari and prohibition is in the timing of the application to the court. Certiorari cannot be resorted to until there is something to quash e.g. a decision, or warrant. Prohibition can be granted before a time when the decision-maker has not reached a final decision. Indeed, prohibition can only be used

where there is still something remaining to be prohibited. The remedies therefore largely overlap, and are commonly sought cumulatively or in the alternative. The usual practice is to pray for prohibition and alternatively certiorari because it may happen that pending proceedings for prohibition the agency may hand over its decision. Certiorari and prohibition would both be sought, for example, whenever a final decision requires the taking of further steps to enforce it. Both remedies would also be sought where, although the final decision needs no further enforcement, it is still operating to the applicant's disadvantage.

The grounds on which prohibition will be issued is similar to that of certiorari, and includes jurisdictional defects on natural justice, and excess, abuse, or failure to exercise a discretionary power except in case of error of law on the face of the record. Specifically, prohibition lies only for actual or threatened excess of power, but is not available in respect of non-jurisdictional error of law on the face of the record. Prohibition can be granted to prevent further action from being taken. It can also be granted to prevent the decision-maker from committing that act in the first place. It can be even issued before the decision-maker has actually asserted jurisdiction over the merits of the subject matter. It is even possible, in principle, to issue prohibition at any time after a matter has been entrusted to a decision-maker for consideration or after the agency made order to stop the authority from enforcing its decision. However, it is very rare for prohibition to be issued at such early stage. Generally, prohibition is an effective and fast remedy if a person does not desire any other relief except to stop the administrative agency.

6.3.2.3. Mandamus

Mandamus is an order which commands a public body to perform a public duty and is usually employed to compel public authorities to exercise their jurisdiction. It is designed to enforce performance by government bodies of their duties. In most cases mandamus is employed, at the request of a person intended to benefit from it, to ensure the performance of a clear statutory duty at any occasion when the administrative agency has plainly and unlawfully refused to undertake.

In order to grant the writ of mandamus against administrative agencies the following conditions must be fulfilled.

The ***existence of legally enforceable duty***. Mandamus lies to compel public official to perform a public duty which is created either by a statute, the constitution or by some rule of common law but unperformed.

The public duty enforceable through mandamus must also be an absolute duty. Absolute is one which is mandatory and not discretionary. A discretionary power is not a duty, and a statute which says "may" usually grants only discretion. Nevertheless, mandamus is frequently issued in a context where the statute used "may", but the repository of the discretionary power is usually under a duty at least to exercise his discretion where an appropriate request is made if there is no alternative reason indicating why he should not do so.

Another condition is specific demand and refusal. Before mandamus is ordered the administrative agency must be demanded by the applicant to perform the specific duty and the agency must be unwilling to perform the duty. This means, it is required that the mandamus applicant must prove that he/she demanded the respondent to perform the relevant duty, and the respondent had actually or impliedly refused. This is partly because it was felt that the respondent should not be sued without first being clearly warned. It seems that proof of a distinct demand is a

matter of evidence as whether the respondent actually or impliedly refused to perform the relevant duty. In some cases, however, specific demand for the performance of duty may not be necessary. This comes to the picture where it appears that the demand is unavailing, or where the respondent, by his own conduct, has made the demand impossible, or where a person has by inadvertence omitted to do some act which he was under a duty to do, and the time within which he can do it has expired.

There must be a clear right to enforce the duty. Mandamus will not be issued unless there is a right to compel the performance of some duty. The right to enforce the duty must subsist till the date of the petition. If the right has been lawfully terminated before filing the petition, mandamus cannot be issued.

Generally speaking, mandamus consists of an order to do a positive act, rather than to desist from doing something. In relation to mandamus the relevant duty should not be of a continuing nature. Mandamus has no quashing effect -- if one needs to quash a decision she should seek certiorari, or exercise a statutory appeal right.

Dear learner, which of these remedies are available in our legal system? As we have discussed earlier, the private law remedies are available in our legal system, both in the civil code and the civil procedure code. As regard to the public law remedies, their origin and development is closely linked to the common law legal system. As a result, we could not find the terms in our legal system. But in practice, such kinds of remedies may be available in our courts.

6.4. Prerequisites for claiming remedies

One of the steps in determining whether a particular remedy will be effective to address a particular legal issue is to consider the primary conditions that must be met, in order for the remedies to be sought. Since remedies are created and applied through national laws, any person seeking for it within a country must research and comply with the prerequisites established under that national law.

There are several essential prerequisites that must be met in order to obtain a legal remedy on any claim. We have discussed the necessary requirements that should be fulfilled to claim each specific remedy in our previous discussion. But we can still pin point three prerequisites that seem to be applicable to any application of remedy. There are

- A law which forms the basis of the claim;
- “Standing” of the claimant to bring the claim under that law; and
- Jurisdiction over the defendant, his actions, or some of his property.

6.4.1. Legal basis for claiming a remedy

In order for a person to seek redress for harm, damage or financial loss to a particular right, interest or property, the law must:

- Recognize the right, interest or property as worthy of remedy, and
- Have a basis for determining that the actions that caused the harm, damage or loss was wrongful or inequitable.

If these necessary preconditions are not satisfied, courts cannot award remedy. Where the requirements fulfilled, but are unclear at law, many courts will not award a remedy due to

ambiguity. Many kinds of right or interest have been clear in law from time immemorial. For example, the legal rights of individuals to own land, plants and animals and to seek redress when they are taken or used without permission or payment has been recognized for nearly 4000 years. Hence, the courts are generally comfortable in making decisions in such cases.

By contrast, the law has only recently recognized the distinction between the rights to own a computer program, and the right to reproduce that program and sell it commercially. These rights must generally be spelled out carefully in national laws, and contracts often include special provisions and clarifications, if the parties feel that the law is not clear enough on a particular point, or if they want to apply it in a different way.

6.4.2. Standing to seek redress

A second element in determining whether a particular claimant may seek a remedy is whether he has “standing” before the court—that is, whether the court or agency will allow a particular person to bring a particular type of claim. For example, if one party to a contract brings an action based on his fear that the other party will violate the contract in the future, the question of standing arises, because there has not been any violation of the contract yet. In most countries, a claimant may not bring an action for violation until that violation has occurred, except in very special circumstances. Similarly, in administrative cases, one is not entitled to litigate his claim unless he sustained an actual damage by the act of the administrative organ.

Another aspect of standing is the nature of the party bringing the action. Normally, in an action for redress of an injury or wrong, the injured or wronged person must bring the action, or it must be brought on his behalf. Often, it is necessary to describe the nature of the injury or wrong, and demonstrate that a legal remedy exists that is capable of redressing the injury.

6.4.3. Jurisdiction over the defendant or his property

The other important element in determining the effectiveness of a remedy is whether it is possible to obtain legal jurisdiction over the defendant, over the actions that form the basis of the lawsuit or over some of his property. Hence in relation to claims related to administrative agencies, it is important to know where to bring the legal action and how to enforce it.

6.5. Alternative Dispute Resolution Mechanisms

In different countries, agencies now decide hundreds of thousands of cases annually—far more than courts do. The formality, delays and costs incurred in administrative proceedings have steadily increased, and in some cases the inefficiency becomes similar to courts’. Many agencies, even though they are better than courts, act pursuant to procedures that waste litigants’ time and society’s resources; and the formality can reduce chances for amicable and successful resolution of cases. Writers argue that the recent trend towards elaborated procedures in many cases pose transaction costs to agencies and the public in general which substantially outweigh their benefits.

A comprehensive solution to reducing these burdens is to identify instances where simplification is appropriate. This in fact will require a careful review of individual agency programs and the disputes they involve. A more immediate step for agencies is to adopt alternative means of dispute resolution, or to encourage regulated parties to develop their own mechanisms to resolve disputes that would otherwise be handled by agencies themselves. The term “alternative dispute resolution”

(ADR) encompasses several different techniques for resolving disputes, all of which share the characteristic of being “alternative” to a judicial trial or administrative agency contested case proceeding. ADR includes mediation, arbitration, negotiation, mini-trial, early case evaluation, and negotiated rule-making.

ADR methods have been employed with success in the private sector for many years, and when used in appropriate circumstances, have yielded decisions that are faster, cheaper, more accurate or more acceptable, and less contentious. Although they are not limited to commercial issues and contracts, arbitration processes are usually applied to contract dispute, especially where the contracts or commercial relationships are ‘international.’ Arbitration and mediation may be used by governments, agencies, private persons, corporations, NGOs and other types of entities. The same forces that make ADR methods attractive to private disputants can render them useful in cases which administrative agency decides, or to which the government is a party. For these methods to be effective, however, some aspects of current administrative procedure may require modification.

The primary alternative mechanism is arbitration, which can be defined as a form of ADR, governed by an agreement between the parties or special rules or statutes providing for the process, in which a neutral third-party issues a decision after a streamlined and simplified hearing. Arbitrations may be binding or non-binding. In binding arbitration, the arbitrator’s decision is enforceable in the courts and can be challenged on limited bases, generally not related to the merits of the arbitrator’s decision. In non-binding arbitration, the ruling by the arbitrator is only advisory. It is intended to provide the parties with a realistic assessment of the strengths and weaknesses of their respective positions so that the parties may be able to reach an agreed settlement.

It is a set of formalised rules (less strict and detailed than most national judicial requirements, but still formal procedures) for obtaining binding resolution of a claim or problem. The use of arbitration enables all sides of a claim to be resolved less formally, but still result in a final decision that is binding as between the parties. The decision rendered by arbitrators (award) will be enforced at court of law like any court decision. Typically arbitration is used where all of the persons involved in the legal claim specifically consent to be bound by the decision.

An even less formal process, mediation, is also used with increasing frequency. Ideally, mediation operates in a non-adversarial manner. Mediation processes are generally defined as “an attempt to reach a common middle ground through an independent mediator as a basis for a binding settlement.” Mediation is thus different from arbitration, which operates like a court, where the parties are adversaries, each seeking to be declared the “winner” in relation to the claim. Mediation emphasizes the use of dialogue among the parties in order to find a solution, which might be described as “the best compromise.” Mediation is often conducted in a non-binding format – that is, the parties do not begin by agreeing to be bound to the results. Rather, they may wait until the final compromise is achieved, if it is, and have the option then to agree to be bound. The success of mediation usually depends on the quality, abilities, and impartiality of the mediator, and the good faith of the parties in desiring a mutually acceptable solution.

Mediation is particularly appropriate when: the parties have an ongoing relationship; the consequences of not resolving the dispute are bad -- expensive, time consuming, risky, or otherwise unsatisfactory; or there is a wide range of potential resolutions to the dispute. On the

contrary, mediation is not appropriate probably when an agency needs a legal interpretation by a judicial body to guide future actions; an agency is seeking to establish an important precedent; or an Agency is litigating the case for a policy reason.

ADR process may allow Parties to ‘sculpt’ their arbitration in whatever way they can agree on. Arbitration panels and processes are usually based on particular pre-existing rules and principles, such as the UNCITRAL Model Law on Commercial Arbitration, and the International Chamber of Commerce’s Rules and Guidelines on arbitration. While some of these systems provide a platform of actual arbitrating services, it is not necessary to use that platform in order for an arbitration to be conducted under those rules. There are many other sets of primary rules on arbitration, and the first task in any arbitration (often decided in the contract or elsewhere, before the claim arises) is to determine which rules and guidelines apply. Beyond this, however, most arbitrations begin by setting any special “ground-rules” that the Parties might choose. For example, the parties may agree that the financial award may not be less than a specified minimum, or more than a specified maximum.

There are primary limitations to arbitration and other ADR, however. These mechanisms can only be used where both parties agree to their use in most cases. In some cases, this consent may be given long before any claim has arisen. For example, a contract may include an ‘arbitration clause’ in which the parties agree to use arbitration rather than the courts, in the event of a future claim or controversy, relating to the contract. If a disagreement is not contractual, the parties may agree to submit their dispute to binding arbitration. If they do not agree, however, then independent arbitration or mediation will normally not be possible.

As a result of various advantages of ADR methods, nowadays countries have integrated the mechanisms in the executive branch of the government. In U.S.A., for instance, administrative agencies use ADR mechanisms to resolve disputes in the following areas;

- Contract disputes;
- Employee grievance disputes;
- Disciplinary actions against licensees;
- Permitting requests that are protested;
- Enforcement actions; and
- Rule-making and/or policy-making involving many different interests

And the mechanisms have legislative bases or grounds such as the Administrative Dispute Resolution Act of 1996 and TEXAS GOVERNMENT CODE, Chapter 2009. Particularly, Administrative Dispute Resolution Act (“ADRA”) of 1996 set out a vision of an Executive Branch that used ADR to: improve the decision making process that leads to “more creative, efficient and sensible outcomes;” and save resources.

Apart from this ADRA required federal government entities to consider alternative means of resolving conflicts in hopes of realizing some of the same benefits as private companies. Agencies are required to appoint a specific person for training personnel in the use of ADR techniques and assessing all programs with ADR potential. This served the dual purpose of both normalizing ADR within the agencies, as well as establishing specific contexts in which the new tools could be used effectively.

The ADRA provided that voluntary, [binding arbitration](#) would be authorized when all parties consented, subject to the safeguards of judicial and agency review. Perhaps most importantly, the act established a framework of [confidentiality](#) in ADR proceedings. Since the federal government is subject to the Freedom of Information Act (FOIA), it was important that the ADR strike the right to balance between maintaining an open and transparent process with protecting the parties' confidentiality.

Generally, ADR methods can also be one means of resolving disputes arising from the administration and redressing remedies for individuals whose right is affected by administrative bodies. In Ethiopia, it is possible to say that these methods are not practically employed in public sectors. Their role even in private disputes is also limited though some of them have cultural bases in different ethnic groups of the state. The reason behind this requires a more detail investigation and it is beyond the scope of this course, administrative law, at this level. Hence, it is sufficient for the student at this point to be acquainted with the fact that ADR mechanisms also have application in resolving administrative disputes in recent years.