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REVIEW OF CIVIL JUDGMENTS IN ETHIOPIA

"THE LAW AND THE PRACTICE"

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ADDIS ABABA, ETHIOPIA

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INTRODUCTION

Justice requires that every cause should be once freely tried and public policy demands that having been tried once, all litigations about that cause should be concluded forever between those parties. The maintenance of public order and the repose of society dicates that what has been definitely determined by competent courts shall be accepted as irrefragable legal truth. Had it not been for such holding, there would have been no end of litigation and the courts, most efficient powers would have become little more than advisory bodies. In the other hand, there may be situations where the application of this principle in its full force could result in gross injustice. As a middle ground therefore, certain rules have been formulated which are designed to prevent injustice to the party aggrieved by the former judgment, and at the same time to guard against giving him an unwarranted advantage. It is in view of striking this balance that the procedural mechanism "review" came into the scene.

Ordinarily, the term "review" denotes the re-examination of a judgment either in the trial court itself or in an appellate court. As far as our civil procedure code and this paper are concerned, however, this term is executively employed for re-examination of a case within the trial court (Art 6, Civ. Pro. C). This mechanism is recognized by different names in different jurisdictions: "New-trial" or "re-trial" in common law "reopening" in most civil law countries: "revision" in the European court of justice and "review" in the Indian code of civil procedure. The present writer would also use these terms inter changeably in the body of the paper and hence this fact should be clear from the out set.

As concerns the structural formulation of this paper, chapter one is devoted to a brief examination of the origin and historical background as well as the function of the concept and theoretical exposition of "review". The second chapter deals with the technical and substantial necessities for granting "review; with mode and hearing of proceeding in the application of review". The discussion will be would up by offering conclusions and recommendation that the writer deems pertinent.

CHAPTER ONE

1. GENERAL OVERVIEW OR REVIEW OF JUDGMENT

1.1. Definition of Procedure

The word "procedure" is defined as "a specific method or course of action the judicial rule or manner for carrying on civil law suit or criminal prosecutor". From this definition, it is clear that the fundamental element of procedure is the requirement of "method of course of action, rule or manner and carrying a law suit or prosecution.[1]"

According to this definition, procedure is a method of proceeding based in such rule which could guide any party how to take an action, when he will apply his claim or exercise his rights and it shows that there are rights in the realm of procedure just an in that of substantive law. This implies, a person who wants to claim his rights must follows this specific method or course of action. This will apply at the area of civil and criminal law.

The word "civil procedure" is defined as "the broody of law rules enacted by the legislature of courts-governing the methods and practices used in civil litigation a particular method or practice used in carrying in civil litigation[2]".

The word "criminal procedure" also defines "the rules governing the mechanisms under which claim are investigated prosecuted, adjucated, and punished. It includes the protection of accused persons constitutional rights[3]".

[1] Blacks Law Dictionary 18th edition west publishing company (2004) p. 1241
[2] Ibid p-263
[3] Ibid p-403

The other element used to define a procedure, it is "a judicial rule" which means it isn't only a method or mechanism it is a rule promulgated by a legislation of authorized body. So it is not assumes as a manual procedure that sounds as substantive law. Because procedural law deals with how to apply rights duties and privileges to the courts and the whole law of remedies which doesn't belong to procedural law and there are rights in the realm of procedure as in that of substantive law. The rule may enact by the judiciary according to the legal system of a country.

The other remedy of the procedure is the guidance of the judges when they are process the judgment writing [4].

This writing is concerned with "review of judgment" which is one out of many articles those are found in civil procedure code of Ethiopia, under Art-6.

1.2. Historical Background

It is usual to consider the history of a certain concept before plunging in to analyzing the very concept itself. This is mainly because the historical circumstances that gave rise of its emergence may be of much help in understanding its necessity and relevance. Nevertheless, as one attempts to trace back to far remote parts in view of investigating the origin, it is very unlikely that one would come up with homogeneous and coherent historical facts. Such out come may be attributed not only to the poor documentation system then existing but also owing to the absence of comprehensive and elaborate application of the concept at those times. It is asserted that this fact holds true to legal concepts, too.

[4] Civil Procedure Code of Ethiopia, (1965)

Against this background, the concept of "review", as a procedural mechanism enabling the court of rendition to reconsider its formal decision has its roots in roman times. In conformity with such assertion, that has been stated as:

> ---Roman law had worked-out four methods of ensuring right determination of facts, correct ascertainment of the law, and right application of the law to the facts found. Summarily stated they were: -
>
> 1) Inspection of the proceedings for errors is not conforming to law;
> 2) Rehearing of the cause in a higher tribunal;
> 3) Reference of the crucial question of law to the ultimate appellate tribunal for an authoritative answer, and
> 4) Rehearing of the cause in the same court upon petition therefore.[5] (Emphasis added)

Still "… when in what court in particular, and for what causes, new trials originated are subjects involved in impenetrable obscurity by the lapse of ages" [6]. Not much detailed and clear information is obtained about how this procedure was employed in remote times and as indicated here in above one reason why we do not find this procedure as elaborated, as it should have been may be that there are no old reports of the motion.[7] It is recognized; however, the aforementioned four procedural methods have been used universally in the legal word ever since the Roman times with many variations and amplification.[8]

[5] Roscoe Pound, Appellate Procedure in Civil Cases, (1941), P: 10
[6] Charles W. Joiner, Trials and Appeals, (1952), P: 427
[7] Ibid
[8] Pound, Cited at Note 1.

In the middle ages also the development of the Roman law of procedure went on in the courts of the church.[9] At those time review was resorted to in case of judgments based on false testimony or forged documents in case of default without the fault of the party against whom the judgment was rendered and in case of newly discovered facts or evidence such as to require a different decision.[10]

During the emergence of modern Roman law, with the complete establishment of central royal authority uniformity of appellate procedure in the different local jurisdictions developed.

Fundamentally, there came to be two types of review: -

1) The ordinary appeal, an appeal in Roman-canon-law sense, in which appellate tribunal reviews a judgment rendered by tribunal reviews a judgment reader by a tribunal of prior instance, and
2) What is called extra ordinary appeal, in which the court that has rendered a judgment is asked to review and reverse or modify it.[11]

While the Roman origin "review" has been in a wide spread practice in the continental legal system, parallel development of this procedural mechanism has been taking place more or less independently in England. Undeniably, there are historical indications to the effect that the Romano canonical system has influenced the English ecclesiastical courts. As confirmation to this it is said that the church courts followed the Romano canonical procedure of the Latin Church, even after reformation and some native English courts also applied the Romano canonical rules.[12] It is also admitted that in England where the common law had its own peculiar way, the influence of continental learnings

[9] Ibid
[10] Ibid
[11] Sited Supra at Note 5
[12] R.C. VAN CAENENGEM, Int'l Encyclopedia of Comparative Law, (1973).

based on Roman law was far from absent.[13] As soon, however, as the main frame work had been completed the Romano canonical influence ceased to separate in the common law and further growth was from within, unaided by imputes from without.[14] Thus according to Millar, English civil procedure become a sealed book to all but Englishmen a completely insulated system, which did not look beyond itself.[15] And since the development of the concept of "review" could not be imagined in isolation from the development of the civil procedure in general, this concept has indigenous development in England.

Once review ('new trial' as they termed it) as one of the non appellate challenge of judgments has been recognized and incorporated in the common law, it entered into a wide spread application. The usual grounds for application to new trials were:-

Want of due notice of trial, where the defendant had not appeared and made a defense misbehavior of the prevailing party towards the jury or witnesses, misbehavior of the jury un avoidable absence of attorneys or witnesses, newly discovered evidence, misdirection by the judge, error in admitting or rejecting evidence, a verdict without or contrary to the evidence, and excessive damages such as to indicate passion or partiality.[16]

Based on the maxim that "where justice is not done upon one trial, the injured party is entitled to another", the motion of new trial developed into a widely applicable institution in the common law. Practice as a means of challenging and remedying prejudicial error in the trial not appearing in the record itself.[17] With respect to time for application it

[13] Ibid; P: 32
[14] Robert Wyness Millar, Civil Procedure of the Trial in Historical Perspective (1952), P: 27
[15] Ibid: P. 336
[16] Pound, Cited Supra at Note 5. P: 42
[17] Millar, Citied Supra at Note 14 P: 335

was normally laid that "it had to be made with in four days from the verdict but where the ground was that of newly discovered evidence, the courts exercised discretion as to granting further time.[18] The time in the latter case is enlarged and the period is more usually fixed as one year; or before the expiration the time for appeal or within a reasonable time not more than one year from the date of judgment.[19] Even then the application was addressed to the discretion of the court and the decision on the application was, in principle, non-appeal able.[20]

The review mechanism was in a wider scope of application in Britain during the time when Great Britain had seized colonies in the overseas, It naturally follows, therefore, the then colonies of Great Britain would be heavily influenced, or even dominated, by the system of adjudication employed in England. Logic and practice of colonizers also affirm that, leave alone the legal rules of the colonizer, even other minor social behaviors of it were injected into the colonized and such measures were calculated ones in view of preserving the influence that, conquerors must passes to retain their power. Consequently, India an annex-colony of Great Britain could not be an exception to this. No doubt, therefore, the review mechanism which is in corporate in the Indian codes of civil procedures and widely practiced there in had common law origin.

Having discussed the development of the concept in the external world, let us now examine its introduction in to our legal system or else whether it has indigenous origin. Materials on Ethiopian old judgments were consulate on the assumption that they may throw some light on our old court practices. From the documents at his disposal, this writer has learned that review as a procedural mechanism was not in use at those times, and this fact tends to exclude the speculation that review may

[18] Ibid; P: 336
[19] Ibid; P: 337
[20] Ibid; P: 338

have indigenous origin in Ethiopia. More interestingly, in the record of our old judgments stipulations that seem to prohibit the employment of review were laid down. Accordingly, the following two stipulations from the Ethiopian old judgments Bulletin may be of interest.

> *After a decision has been given on a case, neither plaintiff nor defendant may go back to the original court and restart litigation,*[21] *where a person has sued another over a dispute concerning "risk", tax or cattle and has last as in result if the testimony of witnesses, he may appeal but may not start his case and bring witnesses at the same court.*[22]

By virtue of these citations in earlier times the practices of our court was that a person who was affected by a court judgment has no remedy in the court of rendition except by the way of appeal.

In the 1943 court procedure rules, also, since these rules, on the whole, were not very detailed, a number of areas of procedural law were not covered.[23] Among other procedural devices the concept of review was not incorporated in those rules. Under this legal notice too appeal was the only available remedy at the disposal of a party aggrieved by a decision of a lower court except where the decision was rendered ex-party in which case the defendant may apply for the setting aside of the decision to the trial court.[24]

Under Ethiopian procedural law, therefore, the concept review of judgment, which is exclusive concern of this paper, is embodied for the 1st time in Art. 6 of the civil procedure code of 1965. Thus, it legitimate to

[21] Ethiopian Old Judgment Bulletine 88th No.135, P: 316
[22] Ethiopian Old Judgment Bulletine 28th No.2, P: 45
[23] Rober Allen Sedler, Ethiopian Civil Procedure, (1968), P: 3
[24] Only, Under Art. 47(1) of the Court Procedure Rules is the Possibility of Reproaching the Trial Court Envisaged

inquire as to form where the legislature of the procedure code borrowed this concept.

As stated here in above, it is not with in Ethiopian law or court practice that one must look for the root from which the concept of "review" stems. Logically, therefore, its origin must be attributed to foreign legal system.

In his material on Ethiopia civil procedure, Sedler affirmed that ''British'' judges assisted in the drafting of the 1943 Rules.[25] It is also admitted that some of the court procedure Rules of 1943 were based on the Indian code of civil procedure for this code was used as a model for the procedural codes of some of British colonies in Africa such as the Sudan, and was of widespread application.[26] At this point, it is interesting to recall that these Rules were the predecessors of the present procedure code in procedural matters. Further more, it is asserted that many of the new provisions (Among which Art. 6 is one) were based on provisions contained in other codes such as the India code of civil procedure.[27]
To sum up, therefore, it is highly probable that the Indian code civil procedure is the root of civil procedure of Ethiopia in general and the very provision under consideration in particular. Such assertion can be reinforced by comparing the reviews provisions in each code. (i.e. Art. 6 from our code and order-47 from the Indian code of civil procedure). However it is interesting to underline the fact that one shouldn't expect a mere duplication of the Indian code since "the borrowing was highly selective"[28] and hence there is no wonder if minor devastations exist.

To summarize the concept "review of Judgment" which has been widely practiced in the continental legal system has its root in the Roman law, whereas in the common law it has developed more or less independently

[25] Sedler, Supra at Note 23.
[26] Ibid
[27] Ibid
[28] Ibid

from that of the Roman law. It was from the common law that the Indian code of civil procedure ''borrowed'' this concept, while the Ethiopian civil procedure code in its turn imported it from the latter. This is in brief, the historical development of the concept of review when examined and put in an oversimplified fashion.

In the next chapter, the technical and substantial requirement warranting review as laid down under Art. 6 of the Ethiopian civil procedure code together with the practice of our courts in this regard will be discussed.

1.3. General Consideration of Procedure

Procedure refer to the two subject matter, which is called civil and criminal procedure. These distinctions between them are the following: the word civil procedure means simply the procedure that is going to be followed in civil case. A civil case is one that is instituted by a person it may be an individual or a legal person or even the government, against another for the purpose of obtaining redress for a wrong allegedly committed against him. The person who initiates a civil case is called the plaintiff; the person who is sued in civil case is called the defendant. The opposite of civil case is a penal prosecution. It is instituted by the government the procedural law governs by separate body of laws to be followed in such cases. Thus, whether a case is civil or criminal depends upon: -

1. Who is instituting the action
2. The purpose or which the action is instituted and
3. The relief that will be given[29].

[29] Material for Basic Course in Civil Procedure, 1953 P.

Note that the same act may constitute both a criminal offence and a civil wrong. For example if Ato "A" attacks Ato "B" he has committed a criminal offence he has also committed a civil wrong against the person of Ato "B", for which Ato B may claim redress to repeat, a civil case is one instituted by an individual for the purpose of securing redress for a wrong which has been committed against him if he is successful he will be awarded many or other personal relief. The typical criminal case is one, which the state initiates for the purpose of securing obedience to its law by the punishment or correction of a lawbreaker. In civil case, on the other hand, the state is not ordinarily seeking a sanction against a lawbreaker, not it is directly concerned as a party in the proceeding. The typical civil cases is initiated and carried on by a person who seekers redress for some wrong alleged to have been committed against him by another. The redress he seeks is commonly, although by no means always, the payment of money to him by the wrong does although some times he may be seeking specific relief. The establish and maintains a system of court to which a person may resort if he chooses to do so, to obtain such redress.

Civil procedure is the procedure that is employed in such cases, and it is that kind of procedure with which this paper will be concerned. Especially on review of judgment that declared under Art. 6 of the civil procedure code which gives rise to the parties to claim revision of judgment with were given by the appropriate court previously.

1.4. Function of Review of Judgment

As I tried to explain what review of judgment is, it has its own function of which to protect injustice of the parties to exercise their rights and privileges freely that are recognized by substantive laws of a country, Ethiopia.

Unless, cases are handled in a fair and orderly ways, it may aggrieve parties' rights of citizens through judgments.

Judgments may render by way of producing evidence which are relevant to a case that are produced by both side of he parties.

Either of the parties may not produce evidence due to different causes, which may lead a court to render judgment in favor of the other party.

Any party who aggrieved by a judgment may have a right to produce appeal to a higher court, through the most common method of obtaining review of judgment, to set aside or reverse a decision of the subordinate court.[30]

The appellate court may reverse, affirm or vary the judgment that was rendered by a trial court.

As an appellate court can revise, vary or affirm the judgment of the subordinate court, Similarly, review of judgment is a procedural mechanism that the unsuccessful party entitled him to producing review in the court that rendered the judgment while he has discovered new matter, as provided in Art. 6 of the civil procedure code.[31]

Even if, both an appeal and review of judgment are having the effect of reversing judgments, both are produced at different jurisdiction of courts.

A party who aggrieved by a judgment may claim review at the court of rendition with no need of producing appeal for an appellate court.

As appeal is a right of reversing a judgment that was rendered by a trial court review of judgment is similarity another way of revising a judgment

[30] Civil Procedure Code 321(1)
[31] Civil Procedure Code 6

at the court of rendition with no need of preferring appeal for the higher appellate court.

In most court cases we can learn the fact that uniform interpretation and application of review of judgment is not yet achieved by courts, due to misinterpretation of he law far from the intention of legislature, that may result in creating unreliability on the judicial system a tendency which in itself is a hast for disorder.

The judgment appealed from is presumed to be correct, like wise producing review of judgment is having similar effect.

Even if both are having similar effect, they are their own function and purpose that may make them different.

To conclude, the function of review of judgment is a procedural mechanism that may help in party who aggrieved by a judgment rendered, to being able to revise with no need of producing appeal, that yields or having a function of protecting a right and privilege of parties aggrieved to gain justice as suitable as a principle of “justice delayed, justice denied;” as a means of short cut.

2. Theoretical Exposition of Review of Judgment

An examination of the provision on review reveals that the person entitled to apply for review is "… any party considering himself aggrieved …"[32]. Logically this automatically flashed to one's mind the question who is a party. No doubt, the plaintiff and the defendant are parties to a lawsuit; still it seems pertinent to inquire whether there are the only parties possible in any suit.

[32] Ibid

Some argued that the term "parties" as a word designating the opposing litigants in a judicial proceeding the person seeking to establish a right and these up on whom it is sought to impose corresponding duty or liability; it include all the persons by whom or against whom a suit at law is brought.[33]

Our procedures code nowhere defines the word "party". By examining various provisions of the code; however, it seems to have been intended to designate persons who are named in the record.[34] It is, therefore, pertinent to look into the circumstances when persons may be brought into a suit and thereby named in the record including voluntary and involuntary intervening parties.

In summing up, the term party under Art. 6 should be construed to mean not only the original plaintiff(s) and defendant(s) but also those who intervened voluntarily or involuntary and others who are brought in through different devices.

But theoretically only the plaintiff(s) and defendant(s) are a one who can apply review of judgment. That is contrary with the intended goal of Art. 6 of the Civil Procedure.

For the purpose of this chapter, I tried to explain the theoretical exposition of review in general, particularly who can apply review. The other chapter will clear to the readers detail about how, who and when can be able to producing review of judgment in cases proceeding.

[33] Ibid
[34] Ibid

CHAPTER TWO

2. TECHNICAL AND SUBSTANTIAL REQUIREMENTS AND THE MODE OF PROCEEDING, APPLICATION AND DETERMINATION ON APPLICATION

2.1. Capability to Apply for Review

An examination of the provision on review reveals that the person entitled to apply for review is "...any party considering himself aggrieved...[1]"Logically this automatically flashes to one's mind the question who is a party no doubt, the plaintiff and the defendant are parties to a law suit and still it seems pertinent to inquire whether there are the only parties possible in any suit.

Some jurisdictions define the form "parties" as a word designating the opposing litigants in a judicial preceding the person seeking to establish a right and these upon whom it is sought to impose corresponding duty or liability; it includes all the persons by whom or against whom a suit at law is brought. Some also assert that the word party applies not only to those named in the record but to every person whose property rights are affected by the judgment.[2] As a middle ground between these two extremes, bower, on his part defines it as not only a person named as such but also one who intervenes and takes part in the proceedings, after lawful citation, in whatever character he is cited to appear or who, though not named as a part, insists on being made so, and obtains the leave of the court for that purposes.[3] Our procedure code no where defines the word "party" By examining the various provisions of the code; however, it seems to have been intended to designate persons who are

[1] Civil Procedure Code of the EMPIRE of ETHIOPIA, *1965), Art. 6-6(1)
[2] AMERICAN JURISPRUDENCE (2nd ed. 1962), Vol. 39 P: 851.
[3] Ibid

named in the record.[4] It is, therefore, pertinent to look into the circumstances when persons may be brought into a suit and thereby named in the record.

All legal systems enable third party, under certain circumstances, to intervene on his own initiative in proceedings in which a third party, until then was not concerned, including real party in interest who is entitled by law to enforce a substantive right should be the one whose name the action is prosecuted.[5] Under our procedure law too, by virtue of Art. 41 of the civil procedure code, a third party may voluntarily intervene provided that the requirements stated therein are met, and once he is allowed to intervene, he becomes a party in the full sense of the word. It is worth mentioning, however, that the time when a 3rd party may be allowed to intervene differs from jurisdiction to jurisdiction under Italian law, for instance, voluntary intervention is not permitted after the conclusion of the evidence[6] while in our case it may be allowed "at any time" before judgment.[7]

Another procedural device to bring an outsider to a suit is the so-called "involuntary interventions". This may be effective by an order made by the court the initiative of one of the parties to the pending proceeding. The most important case in which all systems permit a notice to be issued to the 3rd party arises, where the defendant to a pending action asserts that the 3rd party is liable to indemnify him partially or fully in respect of the plaintiffs' claim.[8] Our code has also adopted two procedural mechanisms by laying down a similar possibility under Art. 43. Pursuant to this device, once the third party is compelled to

[4] GEORGE Spancer Bower, The Doctrine of Res Judicata (2nd ed. 1969)
[5] Robert Allen Sedler, Ethiopian Civil Procedure (1968), P: 323
[6] ERNST J. COHN, Iatil Encyclopedia of Comparative Law (1976)
[7] Ibid
[8] Cited Supra at Note 1, Art. 41

intervene "he shall be deemed to be in the same position as a defendant".[9]

It is also possible that persons may be brought into a suit by an interpleder mechanism, a situation where a defendant finding himself exposed to rival claims all of which he can't meet because they contradict themselves or which expose him to the danger of having to perform his obligation twice. By virtue of Art. 293-297 of our civil procedure code, he may either dropout of the proceeding while the two claimants continue against each other, or to secure that one law suit settles the issue between the claimants as well as the issue between him and the claimants. And as soon as the claimants are brought into the suit, they will for all parties thereto as per the application of Art.297 of the procedure code.[10]

Last but not least, persons represented under 34 or 38 of the civil procedure code and persons such as heirs executors, administers legally termed as "privies" who claim under the title of their authors are considered as parties for all practical considerations.

In summing up, the term "party" under Art.6 should be construed to mean not only the original plaintiff(s) and defendant(s), but also persons who intervened voluntarily or involuntarily and others who are brought in through different devices, as indicated above.

In the preceding discussion an attempt, has been made to show the possible persons to be contained in the term "party". Nevertheless, being a party in the former suit though a necessary condition is not sufficient by itself to obtain review. It is essential that the party should "consider

[9] J. Cohn, cited Supra at Note 6, O: 59
[10] Cited Supra at Note 1, Art. 43

himself aggrieved by the decree or order thereof ... ."[11] Since stipulation indicates that review is not allowed for the sole purpose of settling abstract questions or no matter whatever interesting or important to the public but only aimed to correct errors injuriously affecting the party. In some jurisdictions it is contended that before review is granted the record should show that the party complaining was aggrieved by the judgment against which review is sought.[12] Under our civil procedure code however, the phrase "considering himself aggrieved" seems to imply that the subjective thinking of the applicant to the effect that he is aggrieved by the decision suffices to apply for review. Thus, the fact that the decree, judgment or order complained of may, in a seas, have been in favour of the party seeking review doesn't necessarily require the conclusion that he is not a party "aggrieved" thereby, any prevailing party may demand review if the former decision (in his opinion) was prejudicial to him.[13]

At this juncture, it appears that if the applicants' subjective thinking is sufficient to establish his grievance parties may initiate review even though he is not objectively aggrieved. In reality, however, the trouble and expenses that may be incurred in retrial would dissuade a party who has nothing to gain from attacking a judicial decision. Thus, though it may theoretically be possible to assume that a party who subjectively thinking the facts of the case from the pleadings and the evidence submitted he is not from external sources or from his personal acquaintance with the facts,[14] and hence, if neither of the parties demand for it, may not come back to the case. Last but not least, where the legislature intended to grant such right to a court, it employed the

[11] However, it is interesting to underline the fact that such device is applicable only in cases, where the Party Deonanding Interpleader is in Possession of Properly or owing money which is or may be Claimed Adversely by two or more Persons.
[12] Cited Supra at Note 1, Art. 6(1)
[13] American Jurisprudence Cited Supra at Note 2, P. 52
[14] PETER e-Herzog and Delamar Karlen, Int'l Encyclopedia of Compara. L. (1982), Vol. 16 Chap. 8 P: 53

phrase"... the court of its own motion..." as for instance under arts. 11(1), 40(2), 145(1); but under art. 6, such phrase does not appear thus, as opposed to some jurisdictions our courts are not empowered to initiate review of judgment by themselves.

So far this paper has attempted to answer the question as to who is entitled by law, to apply for review. It is answered in such away that, on the one hand, it is not only plaintiff or defendant that is entitled to apply for review, on the other hand, it is not every person whose interest is affected by the decision who has the right to apply of review. But, persons whose name appears on the record of the suit concerned.

Subsequently, an examination will be made as to the types of decisions or orders, which are susceptible to review.

2.2. Reviewable Decision

2.3. Appealable Decision Until and Unless Appeal is Preferred

In different jurisdiction appeal is normally available as a matter of right from all final decisions. This right is also incorporated both in our constitution as well as "our civil procedure code by virtue of art. 320(1). But the code nowhere defines what final decision mean. Therefore, the only way seems to resort to legal literature.

Different literatures defined what final decision is, in similar sense. According to the meaning of final decisions given in different literatures, a decision is final and hence appelable if the trial court has disposed of the case for good and it is no longer within its power to re-examine it. I think that a similar meaning should be given to the word under our law.

In some jurisdictions, though decisions are final, a monetary limitation is fixed in view of determining whether they are appelable or not. They provide that where the amount in controversy is below a specified figure the decision of the 1st instant court is final and non-appelable.[15]

Under our procedure code, finality (regardless of the amount controversy) is, in general, the only requirement to determine appelability.[16]

On the basis of determining whether a decision is final or non-final, different jurisdictions adopt different positions and hence there is no hard and fast rule in this regard. Our law tends to tackle this issue cautiously by adopting a middle course approach. This may be witnessed from the cumulative reading of art 320(3) and (4). Under these sub articles, it is generally stated that, there is no appeal on interlocutory orders (decisions that do not fully dispose of the case) but sub (4) of the same article specifies that some kinds of interlocutory orders (as enumerated therein) be subject to appeal. Under the Ethiopian Civil Procedure Code, therefore, final decisions in general and interlocutory decisions which are setout under Art. 320(4) of the code are appellable.

For the purpose of review, appeallability is not enough but when the applicant files the application for review must have not preferred.[17] Appeal hence, it is necessary that at the time when the applicant files the application for review appeal must have not been preferred. Admittedly, an application for appeal is a process having its own stages like to ask a copy of judgment, intention to appeal, delivery of a copy of judgment, to file memorandum of appeal and so on. Though, the appellant may withdraw the appeal and apply for review.[18]

[15] Civil Pro. C. Art. 248
[16] Peter and Delmar, cited supra at note 14, p.27
[17] Civil Pro. Art 320(1)
[18] Ibid, Art 6(1)

In this writer's opinion, as a general rule preference of an appeal should be understood to mean the filling of the memorandum in the appellate court's registrar. Moreover, even if an appeal has been filed but was dismissed for the decision was non-appealable, the party may apply for review.[19] Since it falls within the category of non-appeabable decision on the contrary, application for review could not be filed if the appeal was filed to late and where thus dismiss. This is because the party has the option of raising the question before the trial court or before the appellate court.

In case between Almay Yigletu Vs Taye Worklemma the high court did that, instead of calling upon the opposite party by the mere fact that the other party has demanded review, should have examined the application in light of the dictates of the law. In the case under discussion, we have seen that federal Supreme Court confirmed the appeal.[20]

From the above cited court cases one may learn the fact that uniform interpretation and application of our law is not yet achieved by the courts, this may result in creating unreability on the judicial system a tendency, which in itself is a hast for disorder. Hence, there is a need to promptly rectify such diversified implementation of one and the same provision as it was handed down by the legislature to be applied uniformly.

Another issue that may be raised in connection with art.6 would be, a situation where by a new and important evidence is obtained after an appeal has been preferred on other grounds and appeal is pending. In this case the only possible solution could be to ask the appellate court to allow the introduction of the new and important matter by invoking art.

[19] Mulla, the Code of Civil Proc, Vol. II. P. 1263
[20] Sedler, cited supra at note s, p. 218

345(1) (b) of the code, which may not be admitted by the court because of it, is the requirement of the court but not party.

But one if it is permitted, an appellate court, as laid under art. 341(1) of the procedure code, is to be ordered where the lower court has disposed of the suit upon preliminary point and the decree is reversed in appeal.

Under our procedure code also such mechanism seems an advisable one undeniably, an appellate court has no power to direct the trial court to re-examine its former judgment as to grant or deny in application for review rests within the exclusive discretion of the trial court itself.

Nevertheless, by virtue of art.346 (a), where the appellate court is convinced to the effect that allowing the introduction of additional evidence is justified, it is empowered "to direct the court from whose decree or order the appeal is preferred to take the additional evidence". Therefore, as is practiced in other jurisdictions, it should be construed leniently so long as the construction serves the ends of justice. Thus, this writer holds that remand may be justified in such exceptional circumstances. Such mechanism, for one thing may restrict the appellate court to its function of revision and secondly, it may lighten the caseload of the higher courts so as to achieve speedy trial.

Another possible solution could be that the appellant can demand to withdraw his appeal in view of instituting an application for review at the trial court. If the leave were duly granted, it would be considered as though an appeal had not been preferred and the review application could sustain provided, however, that the one-month period from the discovery of the ground of application has not yet elapsed.[21] Therefore, the present writer asserts that where an evidence pertaining to Art. 6 is obtained at the time when an appeal is pending, either the appellant can

[21] Ibid

withdraw the appeal with permission of the appellate court should remand the case to the lower court in view of re-examining it.

2.4. Non-Appeeallable Decisions

In earliest times, review was employed in cases were the appellate remedy is exhausted or where the decision is not appeallable. Restricting the review procedure to decisions of courts of last resort and to non-appellable decisions might have been justified by the fact that in such type of decisions the only available remedy at the disposal of the aggrieved party is to attack the decision by way of review whereas in appellable decision he may petition for appeal, too.

Now a days, though the general rule is that judicial decisions are appeallable, there are certain exceptions to this rule practically, under our law, the legislature has granted the court an exclusive jurisdiction and discretionary power which is non-appellability, on certain decisions.

The provision on review is intended, at least us one main objective, to prevent gross injustice in non-appellable cases which cant be remedied otherwise and hence our code has subjected these types of decision to review. Art. 6 applicable only to those that are expressly designated as such within the code here and these types while the later ones are outside the purview of Art. 6 for in the later not only appeal is preferred but also has been exhausted. For example, if a certain decision has reached at Supreme Court and decided there, it is not subjected to review on the contention that it is not appellable beyond that level, because such decision is not appellable in the context of Art. 6 but a decision that has exhausted its appellate floors.

On the other hand, some proclamations contained a "finality clause" which are very much prevalent in administrative decisions. For example,

as of proc. No. 38/96 which is a social security authority establishment proclamation under Art. 11 that provides a finality clause and the decision of this administrative body, especially on question of facts is said to final and conclusive which is also unappealable.

2.5. Place of Application

Courts are not empowered to hear and decide any case that is submitted before them. To avoid these, a court should consider before entering into the merit of the case to determine whether it has jurisdiction over the case with no need to be presented as a preliminary objection by the opposite party, as of art. 9(2) of the civil procedure code. On the applicants side also, a one who opted to submit his application should take cognisance where he should apply on the basis of geographical and monetary value, to different hierarchy of courts are allocated (empowered) that the possible disputes that may be brought before them. Art. 6 clearly stated that were an application for review of judgment is to be submitted by way of expressing as "at the court, which rendered the judgment." One reason for referring re-examination of cases to the court of rendition could be since the court is familiar with the case as well as a principle of "speedy trial".

But, in some reasons, a judge who rendered a judgment may not present at the time of examination of an application of review of judgment due to so many reasons. Here, in case between w/o Almaz Yigeltu Vs Tayework Lemma the application of review of judgment was decided by another judge who weren't rendering a previous judgment, which may be contrary to the principle that I locate it above, "speedy trial." Therefore, it is proposed that to the extent, a judge who decide the case to be found without such inconvenience the application should be presented before him because referring the case to another court is unfamiliar with the

case that may needs time to study, as well as it may prolong the litigation.

It is also possible that an application for review may be submitted to a court other than the trial court and hence it is crucial to determine what measure the court should take in such circumstances.

Art 6(1) except stating the place where the application should be filed and this in effect determines the court has jurisdiction to entertain the application, it doesn't specify measures to be taken when it is filed in wrong jurisdiction of judgments were rendered in both a trial and appellate courts, similarly.

Practically, except stating as "review of judgment can apply to the court which gives it..." it doesn't clearly state that where it present if a case was decided by both a trial and an appellate court, clearly.

In case between w/ro Almaz Vs Tayework Lemma review of judgment were presented at the high court by the appellant, w/o Almaz Yigeltu while the court rendered decision with no giving notice to the opposite party (Tayework Lemma), that helps W/ro Almaz can present a review of judgment at trial court, twice due to defect of practical application of the court.

Therefore, it is sound to maintain and lack of interpretation and application of the code, the code should indicate and applicable where an application for review of judgment wrongly filed or if both a trail and an appellate courts rendered judgments, similarly.

2.6. Mode of Application

2.7. Format

After identifying where the application is to be filed, the format to be complied with on is initiated to apply for review seems to need brief elaboration. As regards form art. 6(2) tend to oversimplify matters by employing the “mutatis mutandis” approach with memorandum of appeal. Thus, the particulars under art. 327 of the civil procedure code are to be followed to the extent they are applicable and with necessary modification. For instance, art. 327(1) requires "the name and the place of the court in which the appeal is filed" but, to make this sub-article meaningful in review cases, it should be modified to read the name and place of the trial court and the word "appellant" is to be replaced by the word "applicant" wherever it appears.

In case of w/o Almaz Yigeltu Vs w/o Tayework Lema, the later when presenting an application for review to the appellate court, employed the term "appellant-respondent" instead of the word "applicant". The court were not concerned about the format but, directly inter into examination of the case without calling the other party.

This paper concerns to the extent that, the applicant should correctly employed the phrase "applicant - respondent" to indicate his status in the application for review. It is submitted, however, the applicant is using the exact wordings of art. 6(2) which states that "...the same particulars as a memorandum of appeal...". But in case of trial court, applicant apply review of judgment within the same wording as plaintiff - defendant, which is contrary of art. 6(2)... The same particulars as a memorandum of appeal.

Hence, to avoid such possible confusion, it is advisable that future legislation pertaining to review mechanism should come up with a format exclusively suitable for it instead of cross-referring to memorandum of appeal. Until then, however, meaningful construction of the memorandum of appeal so that it could be practicable to an application for review is the only, way out and thus, the screen different terms should be substituted by the term "applicant".

2.8. Affidavity

Art. 6(2) dictates that the memorandum be supported by an affidavity. Affidavity as defined by the code itself is "a statement of facts in writing lawfully sworn or affirmed". As one may witness from the different parts of the code, an affidavity may be administered at least on three situations: -

a) When the law requires such as art. 6(2)
b) When the court orders to that effect art. 203(1)
c) When the court permits upon the application, therefore art. 204(1)

In all these cases it is necessary that the affidant have an actual knowledge of the facts alleged therein.

An issue which may be raised in relation with the present discussion would be whether an affidavity could be made on behalf of a party by his pleader. As we have seen above, it is necessary that the affiant should have an actual knowledge of the facts but a pleader usually derives the facts of the case from his client and it is to be held that the pleader has no actual knowledge of the facts alleged therein. Moreover, had the legislature intended to allow such delegation, it would have expressly spelt it out as it did in some instances. For example, in appeal cases the

memorandum of appeal can be signed by the appellant or his pleader, last but not least, even in case of verification the pleader is not entitled to verify a pleading. Thus, it is tenable to hold that affidavity may not be made by a pleader on behalf of a party because it is too personal to be made by proxy. Consistent with the foregoing some foreign jurisdictions state that "if a statute requires an affidavit to be made by a party to an action or proceeding, the general holding is that it can not be made by an agent or attorney where the statute does not so provide.

In a case of w/ro Almaz Yigeltu Vs Tayework Lemma, however the affidavity supporting the application for review was made and signed by an agent of the applicant. All the same, the application was granted irrespective of the fact that the affidavit was not made by the applicant himself.

Under Art 6(2) the facts to which the affidavit much relate are: - The fact that either of the improper conducts has tainted the former judgments, the applicant has exercised due diligence during the trial but matter was not within his knowledge until the judgment was rendered. The Amharic version of this sub-article only requires the affidavit to show the commission of the criminal conducts in the former judgment. This divergency might have resulted from the in advertent way of translation and hence it is recommended that future amendment of the procedure code should take note of this fact and thereby attach conformity between the two versions.

It seems that, the affidavit required under this article seemed to involve serious commitment, for one thing it is administered in view of nullifying the former judgment together with the time and energy of the court expended therein. Secondly, it attributes a criminal conduct to certain individual such as the opposing party or his witnesses. Therefore, before one is destined to make the affidavit required by this provision, he

should be aware of the fact that incase where his allegation proved, to be false, his application for review will be denied. Furthermore, it is also possible that an independent criminal charge can be instituted against him. The respondent under Art. 452(1) our revised penal code provided that the statement is willfully and deliberately, given with the intent that it be taken as true and with knowledge that it is false. This precaution may make people to think twice prior to making an affidavit based on unfounded allegations. Hence, some states provide that: -

> *A part from the specific it is designed to serve or effectuate, the true general test of the sufficient of an affidavit is whether it has been drawn in such a manner that it might be the basis of a charge of pejury if any material allegation contained therein is false.*

But, mostly the observance of the mandatory required affidavit has not been strictly examined in some our courts.

2.9. Time Limit for Application

As long as a judicial decision is subject to attack, parties remain uncertain as to their rights though judgment might have been rendered in their favour. Thus, there is a need to stipulate a fixed period of time beyond which the decision shall be non-assailable.[22]

In determining the length of the time, however, different consideration should be taken into account; it is undesirable by allowing too much time for initiating an attack. It is equally undesirable to shorten the period unduly for the parties' need time to consider whether further litigation is justified.[23] In view of maintaining the balance of the two

[22] Almaz Yigletu Vs Taye Worklemma (supreme at. A.A, 2000 E.C Civil case No. 31563

[23] By virtue of art 278(2) of the code the appellate shall be bound by the law of limitation in the sense that the appeal doesn't interrupt the time limit and it would be considered a thought the 1st suiut had not been instituted.

interests and in order to encourage promptness in bunging actions, statutes restrict to fixed, arbitrary periods the time within which rights otherwise unlimited, may be asserted.[24]

If the attack is based upon facts not known at the time entry of the judicial decision, such as newly discovered evidence, fraud or misconduct by a party or a member of the court, a considerably longer period of time is ordinarily allowed.[25] This may be justified by the fact that a relatively longer time may be needed to discover the evidence or to disclose the improper conduct. In some jurisdictions, even no time limit is provided in such cases, and the aggrieved party may apply for review even years after the rendition of the judgment.[26]

Another approach which our code also favors consists in foxing relatively short period of time but providing that it begins to run only from the discovery of the fraud, misconduct or the like.[27] Time periods vary from jurisdiction to jurisdiction. Under our law, it is within one month from the discovery of the relevant facts.[28]

Time limit begins from the discovery of the fact on which the application is based.

Contrary to the express stipulations of this sub-article, some argued that (reason out) as follows "as regards the prescribed one-month period, it begins to run from the time when the application is dated and brought to the court's bench. These reasoning is a clear deviation from the strict letters of the provision because, the date appearing on the memorandum

[24] Social Security Authority Establish Proc. 38/96
[25] Cited Supra at Note 22
[26] Ibid
[27] Peter and Delmar, Cited Supra at Note 16, P. 14
[28] Ibid

of application could be any date arbitrarily selected by the applicant and it may have nothing to do with the time when the fact was discovered.

Because of the open-ended nature of the time limit, it has its own problems; especially it may be strong, if the evidence is discovered long-delayed. It is irrelevant how much time has elapsed between the delivery of the judgment and the discovery of the ground of application, for the purpose of art. 6(2) of the code. According to Sedler "this is not unfair to the party since the evidence would usually be that of improper conduct on his part and he is not entitled to assume that a judgment obtained in that basis will be free from collateral attack."[29] It is interesting to note that, let alone the civil case which is alleged to have been resulted from a certain criminal act, the proceeding against the doer of the wrongful act itself is subject to the period of limitation as laid down under Art. 217, 218 of the revised penal code.

Practically the indefinite nature of the time limit cases have been reactivated years after the judgment is rendered and executed. In Almaz Yigletu Vs Taye Worklema[30], the case was re-litigated after three years after the judgment of execution has been rendered.

The code allows an application for review to sustain at anytime provided within one month after the discovery of the ground for application. Here, a point which reserves some discussion in connection with the issue at hand would be whether an application for review could be made after the execution of the judgment is effected. Moreover, as appeal can be lodged even after the execution of the judgment against which appeal is preferred.[31]

[29] Cited Supra at Note 2, P. 592
[30] Peter and Dalmar, Cited Supra at Note 16, P. 15
[31] Ibid

I hope that our legislature (including federal Supreme Court Seber Bench) will adopt (or gives a decision) in the future in view of doing decisions for an indefinite period.

As concerns with period of limitation, in the context of article 6 a brief examination will be made as to the states of this limitation, whether it is a defense available to the respondent or an absolute bar which may be raised by the courts own initiative. Under our civil code in the book on "obligations" it is expressly stated, "A party may plead limitation...[32]" and the court shall not have regard to limitation unless pleaded.[33] From this line of argument it may be said that "a plea of period of limitation is a personal privilege which a party may avail himself." But, in case between Taywork Lema Vs Almaz Yigletu, the Federal High Court raised the time limitation by his own initiation but not availed as a defense by the respondent, which is contrary to a writers argumentation un sound.

I comment that, the time limit under art. 6 is mandatory regulated as an essential element for the accrual of the right to apply for review. Therefore, it is more sound to hold that the one-month period under art. 6(2) is an absolute bar and not a more defense available to the respondent.

2.10. Payment of Court Fee

Out of others, a requirement which article. 6 imposes is that of review should make it "upon payment of the prescribed fee". Similarly, when filling a statement of claim of memorandum of appeal, the same obligation is imposed. But this doesn't mean that party who is unable to pay a court fee is precluded from applying for review that may be

[32] Civil Proc. C. Art. 6(2)
[33] Sedler, Cited Supra at Note, P. 25

interpreted as the gate of justice is spend for only those who can afford to discharge his/her own obligation of payment of court fee.

Before the promulgation of the civil procedure code as a principle, poverty should not be a bridge for justice. In line with such ascertain it was stated under art. 467(1) of the civil procedure code as that:- Any suit may be instituted by a pauper on the condition laid down under up to art.479, in a full chapter to regulate two problems under the title "suit by paupers" And its objective seems to enable persons who are too poor to pay court fee to institute suit without payment of it. Therefore, in application for review also though the payment of prescribed with by relying on the provisions relating to paupers if the applicant's economic position so justifies. Obviously, it is tentamount to negativing the permission if an applicant is disallowed to apply as a pauper when the circumstance so demands. Thus, paupers are hereby advised to file an application to sue as a pauper together with an application for review as required by Art.468 (2) of the code. But, currently pauperism is evidenced by certificate issued by Kebele Administration, where the person concerned resides. At face value, however, the Kebeles' would probably be much more lenient in issuing the certificate than the courts and such tendency would encourage persons to engage in litigation since they pay noting for it as far as court fee is concerned.

But, the "Kebeles Administration" doesn't go beyond to prove/disprove whether the applicant is having sufficient property or not that enable him to pay a court fee. The only thing the applicant obliged to do is that only to bring witnesses that proved an applicant is pauper without no cross examination, as I saw in some kebeles social courts.

In case between W/ro Almaz Yigletu Vs Tayework Lema, the federal high court as similar as of no giving notice to the opposite party, a court

examined an application of review of judgment with no payment of the prescribed fee, which were far from Art. 6(1) of the civil procedure code.

2.11. Discovery of new and Important Matter

To obtain review of judgment, the more common proceeding in the lower court will be based on the ground of newly discovered evidence. Review of judgment may apply in the court of rendition on the grounds where 1. no appeal has been taken from the judgment or no appeal lies, and 2. subsequent to the issuance of the judgment, he discovers new and important matter such as forgery, perjury or bribery, which despite the exercise of due diligence was not with in the knowledge at the time of giving the judgment, and 3. had such matter been known at the time of the giving of the judgment, it would have materially affected the substance of the decree or order of the review of which is sought. It should be noted that, review is not authorized in the ground that the applicant has discovered new evidence, which could have affected the decision of the case. The evidence must be such as to suggest improper conduct, which tainted the judgment with fraud. The evidence must be that of forgery, perjury, bribery or the like of which the newly discovered evidence must be such as to "materially affected the substance of the decree."

2.12. Exercise of Due-diligence

A party who is seeking review upon the grounds of newly discovered matter must show not only that the matter upon which he relies as the basis of his claim was in fact newly discovered but also that he could not with due diligence, have discovered and produced such evidence at the trial that his failure to produce the alleged newly discovered matter at the

original trial was not due to negligence or want of diligence,[34] which is a one that is difficult and impossible to determine this element (requirement). For it may depend and vary from case to case, hence it is to be left to the sound discretion of the court. If we assumed that a party who claim review of judgment possessed the evidence, prior to trial, no means of knowing that the miller was obtainable, he is not chargeable with lack of diligence. Contrarily, the application for new trial will be denied where it appears that the degree of activity or diligence which led to the discovery of the evidence after trial would have produced it, had it been exercised prior thereto.[35] If a party can't present it due to forgetfulness, a claim would be rejected as grounds for admitting the forgotten evidence since this contradicts the requirement of reasonable diligence.[36]

To sum up, due diligence have to be a matter of public interest that there be an end to litigation and that a new trial should not be granted of the purpose of enabling a party to produce additional evidence unless he has shown some legally justifiable excuse for not having produced such evidence at the former trial.[37] And these seems the rational behind inserting the due diligence criterion for the application to stand.

2.13. Relevancy of the Matter

Applicant is also expected to show that had the newly discovered matter been brought before the attention of the court, it would have come up with different decision. Thus, "the new evidence, if believed, must be sufficiently material to affect the out come of the case. If it would be of trivial significance, there would be no point in reopening the judicial

[34] cited Supra at Note 22
[35] Provisions 332-335 of the Procedure Code Shows that an Appeal can be Lodged Ever after an Execution is Effected.
[36] Civil Code of Ethiopia (1960) Art. 1854
[37] Ibid; Art. 1856(2)

decisions.[38]" Some courts tend to hold a stand that the evidence produced to justify a review must be conclusive on the issue. But, what I holds is that the most desirable standard to use is to require an appreciable degree of probability that the new matter would influence the out come of the case but not totally produce a different result due to a reason that strict requirement may deprive applicants of obtaining review on this bases

Unless serious requirement is admissible, a party can't exercise his right of producing review of judgment based on an element of relevancy of the matter. To maintain the balance of the two extremes, in as much as review is a challenge on finality of decisions, there is no any rational to re-open a case if the alleged newly discovered matter could not most probably affect the former decision.

AS usual, the court before examining the relevancy of the evidence sought to be adduced sent notice to the respondent to appear and be heard in support of the former judgment. But, as my stand both the court and the applicants were incorrect in so doing. Because pursuant to art. 2149 of the Civil Code it has been expressly stated that an acquittal by a Criminal Court has no bearing on any civil proceeding. Even if we seen it logically, the weight of evidence required by the criminal court is based on a principle "beyond reasonable doubt" standard while in a civil case a less stringent standard is the so called "weight of evidence" is sufficient to hold the respondent liable. Thus, it is highly probable that a person acquitted by employing the more stringent standard could be still hold liable by the lesser standard. Therefore, in the case under consideration the evidence sought to be adduced was irrelevant for it couldn't affect the former judgment and hence non-admissible.

[38] Cited Supra at Note 2 P. 52

2.14. Nature of the Decision

A court to which an application to re-examine its former judgment is submitted should decide whether to grant or to reject the application. Whatever a decision of a court it be, the main concern of this topic will be to examine the status of this decision is whether it is appealable or not.

Mostly certain statutes expressly authorize an appeal from orders either by granting or refusing a motion for a new trail but in some statutes, an appeal is allowed specifically only from an order granting or only from an order refusing a new trial.[39]

In other statutes, still, the denial and granting of an application is held to be non-appealable which gives discretion of the trial court to exercise not to be interfered with by an appellate court.[40]

Similarly, our procedure code state that "no appeal shall lies from any decision of the court granting or rejecting on application for review.[41]"

If the court decides under the exclusive discretion power of it, the opposing party has no opportunity except entering into the merits of the case that may gives a chance to rise the granting of application as a ground for an appeal from the final decision on the case.[42]

Courts may granted review despite of the fact that an improper conduct was not shown in the former judgment that may lead lawyers to advice or comment that "this decision is not appelable, there is noting to be done..."

[39] Ibid
[40] Tiume-Lisah Lemma, Additional Evidence on Appeal(LLB Thesis, Law Facultiy, A.A.U) (1971), P. 17
[41] HELS 7 KAPLAN, Materials for a Basic Course in Civil Procedure; (1953) P. 696
[42] Cited Supra at Note 16, P. 22

Art 6(4) of the procedure code declared as, it is granting or rejecting of the application that is non-appealable but not stated as "not the final decision" that leads to wrong interpretation because of an appeal can lie from the final decision on the merit of the case.

Finally, it is worth-nothing that as the law now stands, denial of the application for review is non-appelable. Thus, the aggrieved party has no remedy at his disposal especially if the time for appeal on the merit of the case has elapsed. But in view of the practice of our judges in the lower courts coupled with the "one man bench" court structure as of federal first instant court, it is possible that gross injustice may ensue. Therefore, this paper suggests that until and unless the bench fully structured the federal Supreme Court Seber Bench may bring remedy to the victims of such decision.

CHAPTER THREE

PRACTICAL APPLICATION OF THE RIGHT OF REVIEW OF JUDGMENTS BEFORE ETHIOPIAN COURTS

Mode of Proceedings

In this chapter I will try to examining what the practical application of review of judgment seems to be handling in our courts. It containing the mode of proceeding and modes of decisions how courts apply review differently by showing different cases that were decided by different jurisdiction.

As regards form Art 6(2) tends to oversimplify matters by employing the mutatis mutandis approach with memorandum of appeal. Thus, the particulars under article 327 of the civil procedure code are to be followed to the extent they are applicable and with necessary modifications. For instance, art 327(1) (a) requires "the name and the place of the court in which the appeal is filed," but to make this sub-article meaning full in review cases, it should be modified to read the name and place of the trial court and the world "applicant" is to be replaced by the word "appellant wherever it appears.

In case of Almaz Yigletu Vs Taye Work Lemma[1], the later when persecuting an application for review to the appellate court, employed the term "appellant plaintiff" instead of the world "applicant", which is the same word as of stated under Art. 327, but the word can't not implimented similarly when presenting at the trial court. To avoid such possible confusion in this regard, it is advisable that future, legislation pertaining to review mechanism should come up with a format exclusively suitable for it instead of cross referring to memorandum of

[1] Almaz Yigletue Vs Taye Work Lemma (Federal High Court A.A. Civil File No. 32619)

appeal. Until then, however, meaningful construction of the memorandum of appeal so that it could be practicable to an application for review is the only way out and thus, the term "appellant" should be replaced by the term "applicant" as indicated above, if it produced at any level of courts.

The other point that needs brief elaboration is an affidavity. As dictates under article 6(2), the memorandum has to support by an affidavit. And affidavit as defined by the code itself is "a statement of facts in writing lawfully sworn or affirmed[2]." As one may witness from the different parts of the civil procedure code, an affidavit may be administered at least on three situations a) when the law requires, as of art 6(2); (b) when a court orders to that effect, article 203(1); (c) when a court permits up on an application, article 204(1). In all these cases it is necessary that the affiant has an actual knowledge of the facts alleged therein[3].

As we have seen above it is necessary that the affiant should have an actual knowledge of the facts, which may raised an issue, whether an affidavit could be made on behalf of a party by his pleader. But a pleader usually derives the facts of the case from his client and it is to be held that the pleader has no actual knowledge of the facts alleged therein. Moreover, had the legislature intended to allow such delegation, it would have expressly spelt it out as it did in some instances. For example, in case of appeal "the memorandum of appeal can be signed by the appellant or his pleader[4]. But, in case of verification the pleader is not entitled to verify a pleading[5]. Thus, it is tenable to hold that affidavit may not be made by a pleader on behalf of a party because it is too personal to be made by proxy.

[2] Civil Proc. Code. Art. 3
[3] Ibid; Art. 205(1)
[4] Civil Proc. Art. 205
[5] Civil Proc. Art. 92

In case of Almaz Yigletu Vs Tayework Lemma[6], however, the affidavit supporting the application for review was made and signed by the pleader of the applicant. All the same, the application was granted, irrespective of the fact that the affidavit was not made by the applicant herself.

Under Art 6(2) the facts to which the affidavit must relates are 1) the fact that either of the improper conduct has fainted the former judgment 2) the applicant has exercised due diligence during the trial and 3. The matter was not within his knowledge until the judgment was rendered[7]. This sub article of the Amharic version only requires the affidavit to show the commission of the criminal conducts in the former judgment. This divergence might have resulted from the in advertent way of translation and hence it is recommended that future amendment of the procedure should take note of this fact and thereby attain conformity between the two versions.

Be this as it may, in some of our courts the observance of the mandatorily required affidavit has not been strictly examined. As in the case of Almaz Yigletu Vs Tayework Lemma[8] in which case the application for review was entertained without being supported by an affidavit.

Modes of Decision

Any party who apply for review of judgment have to satisfy elements of Art. 6 before filing his application in view of obtaining review. Even if, review is an exception to "res judicata" and even though it defeats the face of the latter, strict conditions must themselves be construed strictly[9]. Therefore, the court should satisfy itself that review is justified before calling upon the opposing party. As the court has expended much

[6] Cited Supra at Note 1
[7] Civil Proc. Co. Art. 6(2)
[8] Cited Supra at Note 6
[9] John A. usher, European Court Practice (sweet and Maxwell-London) (1983), p. 260

time and energy in the former judgment, it should see to it that its judgment remains intact in the absence of legally justified grounds of attack. Thus, as a court is entitled to dismiss a case for lack of stating cause of action[10]; as a registrar of an appellate court should dismiss an appeal filed out of time[11]; strict procedure must hold good in review application also where either of the requirements of Art. 6 are not satisfied. Hence, it is only when the court is of the opinion that the application for review should be granted that it should give notice to the opposite party in view of enabling him to be heard in support of the decree[12]. Nevertheless, the practice in some of our courts is different. In Almaz Yigletu Vs Tayework Lemma[13], the federal high court without calling upon the opposing party on the basis of the absence of legally justified grounds of attack. But in case of Anteneh Befikadu Vs W/Gizeshwork Asgedom[14], the federal first instant court immediately called up on the opposing party.

This writer contends that the federal first instant court failed to correctly apply art. 6 to the above case, because it should not have called upon the respondents before it satisfied itself that granting review is justified. It should be born in mind that any attack upon a decision is subject, at the time of application, to an examination for its procedural correctness, timeliness, compliance with jurisdictional rules, format of papers and the like[15]. Leaving aside other requirements at least one thing is fairly obvious to the federal 1st instant court in the above cases that is the appellant has a pre-right of claming setting aside decree ex-parte against defendant rather than calling upon the opposite party.

[10] Civil Pro. C. Art. 231
[11] Ibid, Art. 324(1)
[12] Ibid, Art. 6(3)
[13] Almaz Yigletu Vs Tayework Lemma (Federal High Court File No. 32619)
[14] Antench Befikadu Vs Elzeshwork Agedom (fed. 1st instant cor, Civil file No 00272)
[15] Peter E. Herzog and Delman Kalmar, Inti' Encyclopedia of law, (1982) Vol-16 Chap. 8 P. 38

The particular the Amharic Version of Art 6(3) of the code, might have contributed negative effect in this connection. But, it is interested to note that, when this sub-article states that the opposing party must be called upon to be heard before granting the application, it doesn't mean that the court may not reject the application without calling the opposite party.

And this sub-article should be seen with the sub-articles in that provisions as well as other relevant provision of the code, like art 78 which is a core point to being a party to apply review of judgment as similar as in a case between Antench Befikdadu Vs Gizeshework Asgedom.

The procedure code under Article 5 laying down the principle of "Res-judicate" that attempts to secure the finality of decisions and to protect parties from being harassed by repetitive suits. But if parties once to be called for reappearance whenever and wherever their opposing party files an application for review regardless of whether the applicant has justified ground or not, the problem to which Res judicate is intended to remedy would be reintroduced in a round about way.

In different country laws an appeal is allowed or the denial and granting of an application is held to be non-appeable by a clear word of expression.

In a case between Almaz Yigletu Vs Tayework Lemaa[16], the federal Supreme Court affirmed the decree of federal high court by stating that "no appeal shall lies from any decision of the court granting or rejecting un application for review."

[16] Cited Supra at Note 13

As I argued above, an appeal can lie from the final decision on the merit of the case that is having its own procedural requirement and hence in the case under consideration, the fact that the high court erroneously granted review would have been raised as a ground for appeal. Thus the federal supreme court would not be rejected the appeal by looking sub art 4 of art. 6 without referring (examining) the intention of the legislature as well as other relevant articles that can be examined in connection with.

Finally, it is worth nothing that as the law now stands, the denial of the application for review is non-appelable. Thus, the aggrieved party has no remedy at his disposal especially if the time for appeal on the merit of the case has elapsed. But in view of the different application and interpretation of our courts, it is possible that gross injustice may ensue. Therefore, this paper suggests that an appellate remedy should be provided to the victim of such decision.

Case Briefs

Civil rights and privileges of persons which are dropped out in different statutes by the legislature, have to be enforced or applied through the methods or practices used in carrying on civil litigation.

The Ethiopian civil procedure code, under Art 6 declared how parties produce review of judgment as a means of claiming at a court of law to re-examine a judgment that were rendered in favor of the other party without no need of producing appeal at the higher court.

Ethiopian courts as well as lawyers interprete art 6 differently. These sub title concerns on cases that were rendered in different jurisdictions of Ethiopia.

The first case that I am going to consider is between Ejgayehu Teshome Vs Etenesh Bekele which is decided by the Federal Supreme Court cassation division on file No. 16624

In this case appellant Ejigayehu Teshome produced a claim of that, the lower court made a basic error of law on which she had produced a review of judgment against a respondent, w/r Ejgayehu.

The evidence, she produced with a claim was a "will" that was made by a deceased named Bekele Mekuria which she argued was found and produced by an act of forgery.

The lower court rejects her claim through a reasoning that stated as "no one can't claim review of judgment after once a case preferred appeal".

The appellant brought a case at the cassation court on the ground that, a decision of a lower court has contained a basic error of law. She argued that, because of the appeal that she had preferred to the high court were closed it doesn't mean that appeal is preferred, due to this reason, the appellate court did not decided entering in to the merit of the case.

After calling the respondent and examined the issue the cassation court affirmed the decision of the lower court by reasoning that "even if, an appellant closed the file that were preferred it at higher court, it does not mean that no appeal lies". Therefore, "an appellant can't produce review of judgment".

The Federal Courts establishment re amendment proclamation No. 454/2005 interpretation of a law given by the federal cassation court with not less than 5 judges is binding on every lower courts in the country. That means this interpretation of the bench is applicable to all similar cases. Therefore, the decision given by a cassation court, unless the appeal she preferred and closed is open to re-opening, it may lost her

right of appeal, which is contradictory with the Ethiopian constitution. Which limit not to exercise by her right of appeal and also a claim of review of judgment.

Therefore, a cassation court would have been examined an appellant's claim on the basis of the intention of the legislature as well as our constitution.

The second case that I am going to consider is litigation between Almaz Yiglatu and Tayework Lema in the Federal High Court under file No. 32619. In these case, the parties were Almaz Yigletu (the judgment creditor) and Tayework Lemma (the judgment debtor), who were litigated on the division of property of a deceased man Ato Lemma who were a father of the judgment creditor and the husband of the judgment debtor w/ro Almaz Yigletu.

Out of the division of properties of the decreased man Ato Lema, a division of rent of land that was used for the purpose of selling "BONDA SARE."

At the beginning, a case was produce at a court that used to be called as "Kilil High Court" under file No. 566/85, which granted a decision on Tahisas 22/88 E.C. to make a division of money that were obtained from renting a land based on a mathematical calculation of one hundred "BONDA SARE." rent at the rate of 0.25 cents per a week for the last four years.

Even if, each party produce an appeal in different grounds, the judgment creditor (Tayework Lemma) bring an action of execution against the debtor (w/ro Almaz Yigletu) at 1st instant court under file no. 11001.
While a judgment creditor producing an action of enforcement, she made a correction of judgment, 1000 instead of 100 "bonda" of grass that were available for sale at the land of deceased in every week, that aimed to

gain more division of money than she can earn from the judgment debtor (W/ro Almaz).

The judgment debtor was not aware of that the creditor made a figure correction (forgery) on the decision of Kilil High Court that were decided on Yekatit 22, 1988 E.C.

The Federal First Instance Court on Sene 15/96 E.C. ordered the judgment debtor, a division of money earned by "BONDA" grass rent from the land based on the calculation of the rent, 1000 per week times 0.25 cents for the last 4 years, based on the fault claim of the judgment debtor, Tayework Lemma.

The judgment debtor wasn't aware of that whether the judgment creditor made it 1000 instead of 100 but she bring (produce) an appeal for the federal court based on the issues other than the one that I indicate under file no. 32619. After the court gives summon to the defendant (a judgment creditor) and examined the appeal, the court amended the order of the lower court decision on Tahsas 5/99 E.C that favoured the judgment debtor but the judgment debtor was not aware still.

After taking a copy of the high court decision the judgment debtor become aware that the court made a mistake while the judge was writing the decision. To correct it she produced a claim based on under Art 208 of the civil proc. code. Because of the court refused to admit the claim w/ro Almaz Yigletu producing a claim of review of judgment in the same file of the high court.

On Ginbot 9/99 E.C. the court period reject the claim of review of judgment based on a ground that "the time has lapsed for bringing a claim" with out calling the other party but only by his own initiation.

But even if a judgment debtor brings an action of appeal for federal Supreme Court under file No. 31563 the court reject the appeal and affirmed the decision of the high court based on the ground that "a decision given on review of judgment is non-appeal able".

What the writer can easily understand is that, review of judgment can be claimed with no consideration of article 1845 of the Civil Code which is arguably applicable for any obligations which is not even arising from a contract article 1677(1). In this case a question of review of judgment was claimed after 8 years of the decision that was decided previously, which is inconsistent with the aim of the civil procedure that aimed to resolve a dispute within a short period of time as a means of protecting and enforcement of a right of individuals civil right.

Similarly, art 6 under sub article 4 declared that, the other party have to be called by summon to be heard and to appear with his statement of defense but, the higher court did not call the judgment creditor to know what her defense will be. What the court did has departed from the declared statement of art 6(4).

On the other hand, unless other wise the law says so, a court can not raise any defense by his own initiation (see art 9 of the civil pro. Code). But in these case the court himself create an issue of lapse of time limitation on a case by his own initiation, which is contrary with a concept that "courts are working according to the law.

Additionally, the federal supreme court similarly raise its non appelability with out calling the judgment creditor by his own initiation with far apart from a right of producing appeal which is contradictory with the supreme law of the land which is the FDRE constitution.

The tired case was between administrative ministry of finance branch office and Esmael Abdulahi Wado that were preceded under file No. 207/76 in Goba Awraja Court that were claimed on the payment of taxation. The court reject the claim of the plaintiff on the bases of that the tax notification was not given for the respondent. The plaintiff (the ministry) claim review by producing tax notification that was delivered for a defendant (Abdulahi Wado). The court granted review despite of the fact that an improper conduct was not shown in the former judgment. The counsel for the respondent branch office when writing a letter to its head office in this connection stated that "the Awraja court erroneously granted review and modified its former judgment and thereby prejudiced our offices interest, but as thus decision it is not appeal able there is nothing to be done …". This paper asserts, however, the counsel for the branch office himself also errored in interpreting Art 6(4) of the procedure code. Because it is only the granting or rejecting of the application that is non appeal able and not the final decision.

As of the counsel for the respondent, in case between Almaz Yigletu Vs Taye Work Lemma, the federal supreme court affirmed the appeal similarly under file No. 31563 dated on Tikemet 6/2000 E.C using the same interpretation.

As of my stand, if it is not appealable, the application of Art 6 will be meaningless and un-useful that results contradiction with the intention of the legislature.

In this litigation Anteneh Befikadu was a plaintiff and Gizeshwork Asgediom were a defendant who were litigated at the Federal 1st Instance court file No. 00272
The court decided in favor of Ato Anteneh dated on 17/7/97 to divide the property of his heir.

After a year and half, dated on Hamle 17/98 EC, the defendant, W/o Gizeshwork claimed a review for a trial court and the court decided infavabour of him on Miazia 5/1999 E.C. in favor of W/o Gizeshwork Asgedom not to divide the property of the deceased by way of reversing the previous decisions that was given in favor of Ato Antneh.

Again the plaintiff, dated on Tir, 22/2000 E.C producing a claim of review to being reversed a decision that were decided on Miazia 5/99, infavabour of the defendant. The court after giving notice to the opposite party, the court after examining the issue and merit of the case, dated on Tir 26/2000 E.C decided the case of the parties litigation for the third time infavobour of the appellant, Ato Anteneh by way of confirming the decision that were sentenced on Hidar 17/97 E.C.

When I examined these case, because of no fixed time to claim review, a case was examined and decide three times that may seems that a party can claim review with no restriction both in time as well as number of application that seems the decisions of the trial court, is going to be an appellate court, with no having an authority. Additionally, the evidence which was produced was not examined as whether it was obtained by forgery perjury or bribery.

Therefore, the case indicates that review is possible again and again, at any time with no restriction, when a party was aggrieved get new evidence without need of considering through examining the aim of the civil procedure code of Ethiopia.

A cash history was that, Ato Zeyenu Ebrahim and Ato Hagop Sisinia were a joint owner of a company based on the income tax of there workers the ministry claim to pay the tax jointly. But the court rejects and decided to be paid by only Ato Zeyenu bated on Thasas 17/1978 E.C.

After 4 months, dated on Ginbot 9, 78 the advocate of the ministry claiming a review by producing an evidence that indicates occurrence of joint venture relation and a schedule of income tax of the workers of the company that were signed by both between Ato Zeyenu and Ato Hagop Sesinia.

The court, after calling the respondent and examined the merit affirmed the previous decision by stating that "the document has not fulfilled the element that was not obtained by the act of either perjury, bribery or forgery, as of art 6(1) of the code.

From these cases, what we can learn is that, when a party claim review the evidence that he produced have to be the one that is obtained only either of those three types of criminal acts only. These mean the code, do not allow any other evidence except those that can be obtained through those three types of criminal acts.

On the other hand, a review is possible even a case was appealed up to a highest level of courts at any time but only if a party produced it within one month of time, beginning from the date, he obtained it.

The other case what I want to investigate is that the proceeding of the case between Ato Shiferaw Debele and the ministry of finance which were litigated under the Supreme Court file appeal number 1474/75. In this case Ato Shiferaw was an appellant who claim review of judgment by producing evidence that indicates "he is acquitted from an offence of breach of trust that was instituted by the prosecutor up on him by a decision of Supreme Court. Based on this decision he claim review on a ground that because of the acquittal by a criminal bench, if released by a criminal bench, I have to similarly be free from civil liability, due to the reason that both are originated from the same act.

The court, after calling the respondent and examined the case and decided by stateing that "review is not possible to claim at the appellate court" without examining to enter to the merit.

What I observed here in these case is that, a decision of the court seems that a court can't raise any issue or argument by his won initiation, but only the other party that he have to disprove and raise his counter claim that indicate the reason why the case should be dismissed and canceled.

In my opinion, even if it is the only right of the other party, a court by his own initiation have to examine the evidence produced by the applicant that would have been result to reduce shortening of the case, easily with no need of spending time and money of the parties.

To sum up, the Ethiopian courts don't apply similar and uniform application and interpretation when parties produced a claim of review of judgment. But, I don't mean that there should always be similar interpretation only but, if the law is open for interpretation.

Cases what I investigated here in above were those that were decided while Ethiopia were under different regimes.

Even if, in both regimes, a right of claiming review of judgment was going on still, due to the code is still not amended or modified. Courts apply and interprete it differently, that may be contrary with the Ethiopian constitution, the right to produce appeal or review of judgment.

In my opinion to avoid different application and argumentation of courts the element of review of judgment that are stated under art 6 have to be amended as suitable as possible, to be able to protect the right of the parties aggrieved as well as to be consistent with the intention of the legislature and the aim of the code.

4. CONCLUSION AND RECOMMENDATION

From the elaboration made hitherto our procedure code and the practice of some our courts tend to be at variance in some points. The procedure code that is promulgated by the legislature has been intended to be interpreted and applied uniformly as the intention of the legislative. Practically, it has been given different interpretations. Different factors may be submitted in view of identifying the elements that, contributed their part in creating such diversified implementation.

For the divergent application of the law, Article 6(1) (a) is the one which is responsible for. Art 6 tends to restrict the practicability of review to cases where unlawful act is shown in the former judgment whatever its cause may be, the way the provision is drafted made it hardly practicable. Therefore, I recommend that provision should be re-drafted in such a way that it could be utilized effectively, as of most jurisdictions to employ the review mechanism for any newly discovered evidence even if an unlawful act has not been shown.

The other one that has also a negative effect is the mode of proceeding on the examination of the application for review. Our code is not precise as of the other like the Indian Code. That seems at least a cause for irregularities made by our courts as shown in the body of this paper. Therefore Art 6(3), be drafted more precise and detailed manner in similar mode as of Sec-626 of the Indian Code.

Our courts are not obedient forwards towards procedural laws as they are to substantive laws. But these laws should be binding as good as any other laws. Because when the legislative promulgates these laws it is on belief that they could best serve for the promotion of speedy trail and the enforcement of the rights of person. Courts must operate under a well-defined procedure but they may not follow their own whims. Until the

code will amend courts should have to interpret art 6 of the code, consistent with the intention of the legislature.

On the other hand, the law doesn't allow how many times can the parties apply for review. Practically, as shown in the body of the paper a single case, after the judgment rendered by a trial court review of judgment was produced by the parties two times, which is far a part from a mechanism the code as of serving "speedy trial." Therefore, there should be re-drafted in such a way that it could be utilized affectively.

The other and foremost, the way art 6(2) is drafted is having a roll for the divergent application. The format of an application for review shall contain the same particulars as a memorandum of appeal. This statement may lead some to argue differently, where review of judgment can be produced. Some argued that it is possible to produce it at the appellate court but the law clearly states as of being produced at the trial court. Therefore, I suggest that, it have to be amended as suitable as a full sense of the intention of the legislative as well as consistent with the existing reality of the world and till than our courts have to be apply it by considering the aim of the code, speedy trail.

Finally, litigation by its very nature is not only unproductive but also costly in terms of time and expense. People have to minimize its duration and engage in their productive activities to promote the development our country. Therefore, courts of law are expected to do their best to resolve this paradox by striking out unnecessary litigation to continue. Here, the federal supreme cassation division may interpret art 6 which can result a binding effect all over the country that may help to reduce its different application and interpretation, till it will amend by the legislature.

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I here by declare that this paper is my original work and I take full responsibility for any failure to observe the conventional rules of citation.

Name ___*GETACHEW TILAHUN FETENE*___

Signed _____

St. Marry's University College
Faculty of Law
LLB Thesis

DELEGATION OF POWERS TO ADMINISTRATIVE AGENCIES VS PRINCIPLE OF SEPARATION OF POWERS UNDER FDRE CONSTITUTION

BY LIYUTSEGA KUMELA

Addis Ababa, Ethiopia

July 2008

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Submitted in partial fulfillment of the requirements for Bachelor of Law (LLB) at the faculty of law, St. Marry's University College.

Addis Ababa, Ethiopia

July 2008

I herby declare that this paper is my original work and I take full responsibility for any failure to observe the conventional rules of citation

Name:- Liyutsega Kumela Bayisa

Signature :- _____

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INTRODUCTION

The 1994 constitution of the Federal Democratic republic of Ethiopia has established federal system of government by which all nation, nationalities and peoples of Ethiopia could form a union based on a democratic equality.

One of the core points of federalism rest on how powers and function are separated between the central and state governments, as well as the three branches of government.

The basic purpose of this paper is to examine how powers and functions are shared among the there branches of governments and the application of the doctrine of separation of powers in relation to administrative agencies which have established and exercising certain powers. In order to reach to a conclusion whether or not separation of power in the Ethiopian context is made in a fair manner, the study is made to have a content analysis on the powers of administrative agencies and the doctrine of separation of powers incorporated in the constitution. Hence the paper is designed to accommodate three chapters.

Chapter One: - Deals with definition of delegation powers and delegation, general back ground of the concept of separation of power it includes history and definition of the concept of separation of powers.

Chapter Two**: -** Chapter two is made to contain how the concept of separation of powers existed in Ethiopia it includes the powers and function of the legislature, executive and the judiciary among the two levels of government.

Chapter three**: -** Deal with administrative agencies in whole, it includes definition, power, and reasons for delegated power of administrative agencies. In addition to this for the purpose of analysis, this chapter deeply deals with the powers delegated to administrative agencies in relation with separation of powers. Furthermore, conclusion and recommendation is done under this chapter.

Table of Content

Chapter Three

Chapter one

1. An over view of delegation, delegation of power and general background to the concept of separation powers

1.1 Definition of delegation

Delegation of power is a transfer of authority by one branch to another branch or to an administrative agency.[1] Delegation is the act of ensuring another with authority or empowering another to act as an argent or representative.[2] Delegation is the act of delegation, or investing with authority to act for another the appointment of delegate or delegates.[3]

Microsoft ® Encarta 2007 (ous) Redmond WA Microsoft corporation, 2006, defines the phrase as follows: Delegation is passing responsibility for carrying out a task down the chain of command. For example, a managing directory may delegate control of finance to the company secretary. A foreman may delegate responsibility for supervising group of machines to workers.[4]

Wade administrative law does not directly define the term (universal definition) but it puts helpful example of delegation. The examples are typical cause related to Indian government.

A. The case was registered dock workers were suspended from their employment after a strike. The power to suspend Dockers under the

[1] Blacks Law Dictionary (18th ed.), USA, P.459
[2] Ibid
[3] Http/www.Brainy quote.com
[4] Microsoft Encarta, 2007 (DVD)

statutory dock labor scheme was vested in local dock labor board. The suspensions were made by the port manger, to whom the board had delegated its disciplinary power.[5]

B. A local board had power to give permission for the laying of drains. They empowered their surveyor to approve straight for ward application, merely reporting the number of such cases to the board.[6] This shows that delegation of power of local bard to the surveyor.

C. The case where a local education committee left it to its chairman to fix the date of closure of the school.[7] This example shows a case where the power vested on the local education committee is exercised by the chairman to whom the power is delegated.

D. A local authority, having a statutory power to provide housing for homeless person, setup a company, which purchased houses, financed by a loan from a bank, which the council guaranteed.[8] Here we can see transfer of power of housing to the company since it is the local authority whom is vested with such a power.

From all the above examples used define the term and the direct definitions forwarded by different writer, it can be understood that delegation is all about the process of giving or delivering power that one organ is vested with to another organ to exercise it. As I have seen those different definitions, delegation is an act that always held between governmental organs, and which is the main concern of the researcher.

1.2 General Background to the concept of separation of powers

The concept of separation of powers between the three organs of government refers, as I understand it, to the relation between the three

[5] H.W.R Wade administrative law (19th ed)p313
[6] Ibid
[7] Ibid
[8] Ibid p.312-314

branches of government. This relation ship between them provides that the discharge of their respective constitutional mandates or responsibilities. I, therefore see my task as showing the extent of relation ship between the three organs of government under the 1994 constitution. I will attempt to explain as far as I can, the scope and nature of this relation ship in light of administration of the government, which exercised by administrative agencies and on the basis of constitutional principles. Let me begin my explanation by stating generally.

- ☞ History of the concept of separation of powers and
- ☞ What is meant by separation of powers.

1.2.1 History of the concept of separation of powers

Aristotle was the first philosopher who formulated such a divisions of " terms of government" no relation to states powers. The basis of his analysis was the need of having a government where equity rules and this government is to be found when it functions under the limitations of law.

Accordingly from this analysis we understand that the act of the three branches of government must be limited by law. Because this limitation of power and specification of functions is very important for the application of the principles of justice used to correct laws when these would seem unfair in special circumstances.

So Aristotle's approach is the first systematic analysis of the power of the state in that are points out the need for legal limitations on such power.

For the development of the Aristotle's approach, establishment of the constitutional government is an important matter. Then , the theoretical foundations of modern constitutional government were laid down in the writings of Hobbes, lock and Rousseau and their thinking power fully

influenced the great period of constitution making exemplified by the American declaration of independence and bill of rights and the French declaration of right of man .[9]

In 1960 Locke published his seminal two treaties of government. His assertion is that, all legitimate government rests up on the "consent of the government profoundly altered discussions of politics theory and promoted the development of democratic institutions.[10] With his assertion, lock argued, and guarantees to all men basic rights, including the right of life, to certain liberties, and to own property and keep the fruits of one's labor. To secure these rights, he has reasons that, man civil society enter in to a contract with their government.[11]

The citizen is bound to obey the law, while the government has the right to make laws and to defend the common wealth from foreign injury all for the public good. In addition, he asserted that when any government, becomes lawless and arbitrary, the citizen has the right to overthrow the regime and institute a new government

From the assertion of lock, what the writer understands is that, the general purpose of the establishment of constitutional government is, for the sec of protection of public interests, as well as individual rights. If the government is not protect the public interest and individual rights liberties by enacting different laws, it is, not serving the people as a government, and it is replaced by the new government bed on the interest of the people. This refers, as understand it is a clear justification for constitutional democrat and power limitation for governmental branches.

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[9] Danid m walker,(the oxford companion to law (1980) New York p.278
[10] Information magazine (what is democracy) (October 1991).USAp.15
[11] Ibid

Next to lock, Montesquieu was another founder of constitutional democracy. He provides that:

When the legislative and executive powers are untied in the same person or body, there can be no liberty, because apprehension may arise lest the same monarch or senate should enact tyrannical laws to execute them in tyrannical manner, and where the power of judging jointed with the legislative the life and liberty of the subject would be expose to arbitrary control, for the judge would than be the legislator . Where it joined the executive power, the judge might behave with the violence of an operation.[12]

Especially the American constitution of 1789 is reputed for its having faithfully incorporated the concept of separation of powers as expressed by Montesquieu. Hence, *Article I* treats the legislative power and puts it in congress. A two-power legislature of defined authority. *Article II* places a largely defined executive power in a unitary executive, an elected president. *Article III* locates the judicial power in the Supreme Court, the state courts and any lower federal courts congress may choose to crate. *Article IV* then touches in a variety of ways the other great separation of power already mentioned that between the national government and the sates.[13]

However , the constitution of Ethiopia 1994 by its structure only seems similar approach by vesting , under *Article 55(1)* , in the house of peoples representatives, the power legislative in all maters falling with in federal jurisdiction and it is supreme than the order branches of the government. The constitution of Article 72(1) vests the highest executive power in the prime minister and the council of minister who together constitute the executive branches. While *Article 78(2)* vests supreme

[12] Montesquieu, the sprit of laws (1949)VIp.150
[13] Petter L.strauss (An introduction to administrative justice in the United States 1989. (USA)p.12

federal judicial authority in the federal Supreme Court's, and in such federal high courts and federal first-Instant courts as the house of peoples representatives may establish.

According to the writer's view this does not mean that, the practice of the concept of separation of powers in U.S.A , and in Ethiopia is the same. Hence, the U.S.A practice provides that all the executive powers vested in a president, legislative power given to the congress and judicial power for judicial branches of the U.S.A government. Then, based on this fact the practice of check and balance between the three branches of government in the U.S.A as exercised strongly. According to the Montesquieu approach. So, it is possible to conclude that the existence of the three branches of government in U.S.A are in parallel lines. This basic compromising instrument is the U.S.A constitution only .But in Ethiopia, the judicial branch has no power to review the laws enacted or passed by the parliament, and depending on position of the prime minister which is given by the government. Accordingly, the Ethiopian practice shows that, there is no reasonable application of the principle of check and balance between the three branches of Government. Now, it is possible to conclude that, the constitution of Ethiopia 1994, shows that no formal recognition of the principle of Separation of powers. This is the writers view only.

1.2.2. What is meant by Separation of powers?

Like any other difficult concepts such as democracy, politics, law, and so on. Separation of powers is hardly defined. Some describe it broadly so matters would be complicated to understand, and others define it narrowly and may not contain all characteristics of it because of complexity some authors go through it with out explaining what it is

although it is difficult. Varity of definitions of the concept of separation of powers are given by certain writers on the subject matter.

Aristotle differentiated three categories of state activities as follows:

- Deliberations concerning common affairs
- Decisions of executive magistrates, and
- Judicial rulings an indicated that the most significant differences among constitutions concerned the arrangements made for these actives.[14]

This three fold classification is not precisely the same as the modern distinction among legislature, executive and judiciary. Aristotle intended to make only a theoretical distinction among certain state function and stopped short of recommending that they be assigned as powers to separated organs of government.

John lock argued that: Legislative power should be divided between king and parliament[15]
The legal thesaurus dictionary has also stated on the matter as:-
Separation of powers is the constitutional requirement the three branches of government judiciary, legislative and executive encroach up on or usurp each others powers no branch of government should exercise the powers or functions exclusively committed to another branch.[16]

Dictionary of modern legal usable defines separation of powers as follows:

[14] Encyclopedia Britannica Inc,(15th ed 1994). Volume 25 page 1018
[15] Id, ealker cited on nate 2 p 1131
[16] William statusky "wests Kegaqk thesaurus " 1985 p 688

The phrase is usually associated with the U.S constitutions demarcations of powers in the executive legislative and judicial branches of government. But the idea is much older.

John Locke wrote about separation of powers in his two treaties of government (1960). The phrase itself is at least a generation older than the constitution. In this sprit of the laws (1748 translated to English constitution was a system of cheeks and balances among executive, legislative and judiciary - a- exertive privilege, legislative votes presidential appointment and impoundment power and so on the OLC has provided legal an constitutional guidance for the executive.[17]

Black's law dictionary puts the following definition

> The government of the state and the United States divided in to three department or branches. The legislative, which is empowered to make laws, the executive which is required to carry out laws. And the judiciary which is charged with interpreting the laws and adjudicating disputes under the laws under this constitutional doctrine of "separation of powers" one branch is not permitted to encroach on the domain or exercise of powers of another branch.[18]

These are few among the various definitions of separations of powers as we use may infer from the above mentioned defines, one of the basic and the most significant characteristics of separation of powers is the division of powers between the three branches of government, as well as distribution of powers among the federal and state governments. If I were asked " writer professor Anderson, "to point out the common features that characterize separation of powers, I will mentions the constitutional divisions of the powers and functions between the three branches of

[17] Bryan A Garner " A dictionary of modern legal usage " (2nd ed 1995) New York p 795
[18] Blacks low dictionary' (6th ed 1995) USA p951 -952

government, and among the two autonomous and constitutionally recognized levels of government, the central and the regional ."[19]

In relation to this, another writer in the subject simplifies the definition of the concept of separation of powers by saying that "separation of powers is every where a compromise between the three branches of government, as well as among central and regional governments."[20]

[19] W. Breckes Graves, American inter governmental relations p.5
[20] Encyclopedia Britannica inc, (15th ed. 1994) volume 4.p.712

CHAPTER TWO

2. SEPARATION OF POWERS UNDER FDRE CONSTITUTION

Pursuant to the 1994 constitution federal state structure was formed, i.e. the federal democratic Republic of Ethiopia.[21] Accordingly the Ethiopian state was made to consist of two levels of governments:-

i. The federal government and
ii. The regional government.

In addition to this the constitution lays down two types of power distribution. These are, power division between the three branches of a state legislative, executive and judiciary, which is known as "Separation of powers".[22] And the allocation of power between the Federal and Regional Governments, and it is called distribution of powers.[23] Among the above mentioned tow types of power divisions the first way of power division between the three branches (separation of powers is the main concern of this paper).

2.1. The Federal Government

Under the federal level we have the three branches of government., namely, the legislative, executive and the judiciary which were established in line with the principle of parliamentary supremacy as the constitution determined that the federal democratic republic of Ethiopia shall have a parliamentary form of government[24].

2.1.1. The legislative

[21] Ethiopia consitiution Art.1
[22] Ibid,Art.50
[23] Ibid, Art,50 (1)
[24] Ibid, Art. 45

The legislative institutions of the federal government are the two federal houses known as house of people representatives and house of federation. Then there is the president of the republic, who is the head of the government. Now let's examine the three branches of government starting with the federal houses.

2.1.1.1 House of people's representative

The house of people's representative is one of the organs placed under the legislature. It is the highest authority of the federal government.[25]

The house of people's representatives is an institution whose members is elected for a five-year term on the basis of universal "right of voting" and by direct, free and through secret system of the voting.[26]

It plays money important roles and functions including the legislative, financial, deliberative, representative aspects. With respect to its "power to legislate laws" the constitution states that all matters assigned---- to federal jurisdiction" fall with in the "legal capacity" of the house of people representatives.[27] Its jurisdiction exhaustively enumerated under Art 51(1-21) from the protection and defense of the constitution, through policy formulation in political economic and social matters, to more understanding the areas specified as control of fire arms, the patenting of inventories, or the protection of copy rights and the establishment, of uniform standards of measurements and calendar are specifically defined under federal jurisdiction.

Besides these, legislation of laws on different sensitive issues such as utilization of land, natural resources and interstate lakes and rivers interstate roads, postal and telecommunication services foreign commerce, enforcement of constitutionally established rights, nationality, asylum and other issues is mandated to the house of peoples

[25] Ibid, Art. 50(3)
[26] Ibid, Art. 54
[27] Fasil Nahum, constitution for a nation of nations, (1999) P.69

representatives by the constitution.[28] In addition to this the constitution gives it power to produce labor code, commercial code, a penal code, and civil laws.[29] Also, it is specifically given the power to decide on the organization of national defense, public security and national police forces,[30] as well as the proclamation of a state of emergency,[31]or state of war.[32] Pursuant to decisions made by the council of ministers. The power to ratify international agreements interred in by the executive is also mandated to it.[33]

The house of people's representatives is Specifically given the power to approve economic, social, and development policies and strategies as well as fiscal and monitory policies of the country, including legislation on the National Bank and foreign and local currency.[34] The ratification of budget of the federal government and levying of taxes and duties on revenue sources reserved to the federal government specifically provided for the house.[35]

For the sec of the administration of justice, the approval of the appointment of judges,[36]establishment of human right commission,[37] and the institution of ombudsman,[38] as well as the determination of their powers and functions are under its powers. The house of people's representatives is also specifically provided with the power of question, to approve members of the executive,[39]to call and question the prime minister and other federal officials. Its questioning power encompasses

[28] Id, cited on note 1, Art. 55 (2)
[29] Ibid, Art . 55 (3-6)
[30] Ibid, Art . 55 (7)
[31] Ibid, Art . 55 (8)
[32] Ibid, Art . 55 (9)
[33] Ibid, Art . 55 (12)
[34] Ibid, Art . 55 (10)
[35] Ibid, Art . 55 (11)
[36] Ibid, Art . 55 (13)
[37] Ibid, Art . 55 (14)
[38] Ibid, Art . 55 (15)
[39] Id, cited on nate 15

the power" to investigate the executives discharge of its responsibilities.[40] Beyond the questioning power the house may discuss any matter pertaining to the powers of the executive and may take any discussion and measure it thinks necessary. [41] However this is only done at the request of 1/3 of its members.

Also the House of People's Representatives is mandated by the constitution with the power to established standing and Adhoc committees to accomplish its work. [42]

Accordingly we do have nine standing committees, which the House has established to over work through.[43]

These are committees on:-

1. The economic affairs
2. The budget affairs
3. The social affairs
4. The defense affairs
5. The foreign affairs
6. The administration affairs
7. The legal affairs
8. The culture and communication affairs, and
9. The women's affairs

But currently there are thirteen standing committees under the parliament code of conduct regulation.

2.1.1.2 THE FEDERATION COUNCIL

The federation council of the constitution of the 1994 is the "upper house" of "second chamber of the parliament. It is not all the legislative. Executive and the judiciary. It is the special body regarding with the

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[40] Ibid, Art . 55 (17)
[41] Ibid, Art . 55 (18)
[42] Ibid, Art . 55 (19)
[43] Id, Nahum, cited on note 6. P.84

constitution. Each nation nationality and people is represented in the House of federation.

When we come to the functions the house of federation carried out, it is very different from that of the house of peoples representatives as it's functional competence revolves around the constitution. Let me proceed to see its powers.

Most importantly the house of federation is an organ mandated with power to interpret the constitution.[44] With this respect; we have council of constitutional inquiry through which issues of constitutional inquiry takes place and of advisory capacity made up of eleven members.[45]

The president and the deputy president of the federal Supreme Court serving as president and deputy president of the constitutional inquiry. The six legal experts of the members of the constitutional inquiry are appointed by the president of the republic after being nominated by the house of people's representatives and the rest three are appointed by the house of federation from among its members. The council of constitutional inquiry is subordinate to the house of federation council and gives advises on constitutional issues.

The council of constitutional inquires has given the power to examine the constitutional issues and either send the case to the legal court after it has found no grounds for constitutional interpretation, or submit its findings for constitutional interpretation to the house of federation; who has power to discuses on it and makes the final determination.[46] It is known that, a party who is not satisfied with the order of the council of constitutional inquiry to send the case to the local court for lack of grounds of constitutional interpretation

[44] Id, cited on note 7, Art. 62(1)
[45] Ibid, Art. 82
[46] Ibid, Art. 84

may appeal against the order to the house of federation.[47]

But the constitution do not define how would the federation proceed where it found the case in favor of the appellant.
Different to most federal systems around the world, which make constitutional interpretation a purely legal matter by placing it fairly in the hands of either a constitutional court or the federal supreme court, Ethiopia has choose system that benefits from authorities legal expertise with in and beyond the federal supreme court through the council of constitutional inequity, but makes the final decision a political one to be determined by the house of federation,[48] because of the supremacy of the Nations, Nationalities, and peoples sovereignty expressed by the constitution.

Based on the principles of the constitutions, the constitution is the supreme law of the land, the supreme political instrument for self-determination, peace, democracy, and socio economic development. Thus it needs an ultimate interpreter, not the highest court of law but the house of federation. Also the house of federation the collection of nations nationalities and peoples of Ethiopia, whose unity based on their mutual agreement it enhances, whose self determination it enforces and whose misunderstanding it seeks to solve, it is this political instrument that is vested with "the power to interpret the constitution"[49]

Promoting the equality of the Nations nationalities and peoples of Ethiopia encompassed in the constitution and consideration of their mutual consent is another power mandated to House of federation.[50] The last phrase "Unity based on their mutual consent" on the preamble, which opens with, "We, the Nations Nationalists and Peoples of Ethiopia

[47] Ibid, Art. 84(3)
[48] Id, Nahum, cited on note 21, P. 74
[49] Id, cited on note 22, Art 62(1)
[50] Ibid, Art. 62(4)

strongly committed to build a political community". In the same line the constitution gives the power to find solution to disputes or misunderstandings that may arise between states. [51]

The other important function of the house of federation is the financial function. It has to do with the division of fund between federal and state governments on revenues derived from joint tax sources. Together with this it is also empowered to determine the amount of subsidy that the federal government may provided to the states. [52]

In Ethiopia, the house of federation has ultimate power to defend the constitutional order.[53] One of its important legal capacities is to order federal intervention if a member state engaged the constitutional order in violation of the constitution.[54]

The provision empowered the house of federation to order the federal government to intervene "if a member state is in the process of endangering the constitutional order in violation of the constitution, is invoked either because not as issue of human right but as the constitutional crisis - thus making federal intervention unavoidable" is suggested by FASIL NAHUM. It is correct for it takes in to account the protection of human rights at the time of intervention.

Finally, The power to decide on the case of the rights of self-determination and succession of Nations, Nationalities and peoples is vested to the house of federation. [55]

2.1.2. THE EXECUTIVE

The federal democratic republic of Ethiopian constitution vests the highest executive powers of federal government of Ethiopia in the prime

[51] Ibid, Art. 62(6)
[52] Ibid, Art. 62 (7)
[53] Id Nahum cited on note 66,m P.75.
[54] Id, cited on note 27, Art 62 (9)
[55] Ibid, Art. 62(3)

minister and the council of ministers.[56] What this implies is that two institutions, the Prime Minster and the council of ministers constitute the executive body of the federal government at its highest level. Let us see each one by one.

2.1.2.1 THE PRIME MINISTER

The Prime Minister is elected by the House of People's Representative from among its member's. [57]

Different to the president the prime minister is not required to vacate his parliamentary seat on becoming prime minister. Here, the executive responsibilities is assumed by the party of coalition of parties constituting the majority in the house of peoples representatives, the leader ship of prime minister shape the direct and visible linkage between politics and government. [58]

When we talk of the powers and functions of the prime minister the constitution specifies as follows. He is the head of the council of minister, the chief executive, and the commander in chief of the national armed forces.[59]

The constitution also empowered the prime minister with the power to lead and co-ordinate the activities of the council of ministers.[60] He ensures the implementations, of laws, policies and directions adopted by the house of people's representatives and by the council of ministers.[61]
Further he ensures the efficiency of the federal administrative and takes such corrective measures as are necessary.[62]

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[56] Ibid, Art. 72(1)
[57] Ibid, Art. 73(1)
[58] Ibid, Art. 73(2)
[59] Ibid, Art. 74(1)
[60] Ibid, Art. 74(4)
[61] Ibid, Art. 74(3) and (5)
[62] Ibid, Art. 74(8)

The power to select commissioners, auditor General, and president and deputy president of the federal Supreme Court (which are part officials of the federal Government) is vested in the prime minister and it is the house of people's representatives, which approve and appoint them.[63]

Further the constitution gives the prime minister the over all supervision power over the implementation of the countries foreign policy.[64]

The submission of nominees for medals and prizes to be awarded by president based on the laws adopted by the house of people's representatives.[65]

Finally, the constitution entails heavy responsibility with duty on the prime minister. The protection of constitution,[66] the submission of periodic reports to the house of people's representatives on the states of the Nation, as to the accomplished work by the government and present on future plans are the major duties of the prime minister.[67]

2.1.2.2. THE COUNCIL OF MINISTERS

The council of ministers is the one branch of the executive. Its membership includes the Prime minister, Deputy Minster, Ministers of the federal government and other officials whose member ship has been determined by law.[68]

Organizational, legal and economic spheres specially are the main powers and functions, which the council of ministers concerned on. Strong influence in economic matters; it plans the annual budget of the federal government and implements it up on approval by the house of people's representatives.[69] To a great extent the work planning and

[63] Ibid, Art. 74(9)
[64] Ibid, Art. 74(6)
[65] Ibid, Art. 74(10)
[66] Ibid, Art. 74(13)
[67] Ibid, Art. 74(11)
[68] Ibid, Art. 76(1)
[69] Ibid, Art. 77(3)

formulation, implementation and execution of the budget is its responsibility. The formulation and implementation of economic, social and development policies and strategies are provided for in the powers and functions of the cabinet.[70] Providing important subsidies to the states for implementation of the states socio- economic policies is its powers and functions.[71] It specifically empowered with ensuring the proper execution of financial and monetary policies.

Decision on the printing of money and the borrowing of internal and external loans, regulation of the circulation of money and foreign currency and administration of the National Bank are under the powers and functions of the council of ministers.[72] The council of ministers is powerful to ensure the over all implementation of laws and decisions adopted by the House of Peoples Representatives.[73] It has power to issue the implementing regulations on the basis of power granted to it by the legislator.[74] In addition it ensure the observance of law and order through it's law enforcement agencies.[75] It has also power to issue decree of state of emergency and submit it to the house of people's representatives.[76]

The council of ministers has the power to decide on the organizational structure of all administrative agencies and coordinating their activities and providing leadership,[77]formulation of foreign policies and exercise over all supervision over its implementation,[78] the protection of patents and copy rights,[79]and the providing of uniform standards of

[70] Ibid, Art. 77(6)
[71] Ibid, Art. 77(4)
[72] Id, cited. On note 50
[73] Ibid, Art. 77(1)
[74] Ibid, Art. 77(13)
[75] Ibid, Art. 77(9)
[76] Ibid, Art. 77(10)
[77] Ibid, Art. 77(2)
[78] Ibid, Art. 77(8)
[79] Ibid, Art. 77(5)

measurement and calendar[80] are also under the powers and functions of the council of ministers.

Generally, the executive branch of government is very strong than the other federal government branches.

2.1.3 The Judiciary

Concerning the judicial system, the federal Democratic Republic of Ethiopian Constitution (1994) provides for two sets of jurisdiction of courts: [81]

i. Federal courts jurisdiction; and
ii. States (regional) court jurisdiction.

2.1.3.1 The Federal Courts jurisdiction

The constitution provides for the three layered structure of court system at the federal level; thus are federal supreme court, federal high court and federal first instate courts. The constitution gives a power to federal Supreme Court in case of cassation, review and correct any final decision of a basic error of law.[82] Including decisions of federal court and state supreme courts.

There is a doubt that to decision of state Supreme Court may be changed in the case of cassation may result reduction of the strength of the federal system and destroying the power and authority of supreme courts. The mechanisms, which are provided in the constitution to protect this doubt, are not enough.

2.2. The State Government

State governments like that of the federal government, have all the three government branches; the legislative, executive and judiciary. The

[80] Ibid, Art. (77)
[81] Ibid, Art. (80)
[82] Ibid, Art. (80)

powers and functions of state government are not clearly enumerated. The powers of the state government are those powers that are not clearly given to the federal government. These powers, which are not clearly given to the federal government, are reserved to the state under article 52 (2) of the constitution as the general rule. Hence, it may not be possible to list down all the authorities and functions of the state governments. Article 52(1) exactly we use will try only to see some of the major powers of the three branches of state governments as follows:-

2.2.1 Legislature

The state legislative power is vested in their state council.[83] States are empowered by the constitution and other subordinate laws. In addition to this, state council have the power to formulate economic, social and development policies, strategies and plans of the states; to levy taxes and duties on revenue sources reserved to the states and to draw up the states budget; setting up states police force; and to enact penal laws on matters which are not covered by federal penal law.[84]

The authority to adopt, draft and amend the constitution is belonged to the state council. Still, all the state constitution must be consistent with the federal constitution. Because any law customary practice or a decision of an organ of a state or public official is null and void if it be in consistent with the federal government.[85] Generally, on matters falling under its jurisdiction, the state council has legislation power.[86]

2.2.2 Executive

The executive organ of the state government have the execution powers and functions on matters reserved to it according to the federal constitution state government shall not be only at state levels but also at

[83] Ibid, Art. 50 (3) and (5)
[84] Ibid, Art. 52 (2) and 55 (5)
[85] Ibid, Art. 9 (1)
[86] Id, cited on note 61

other levels, such as woreda, zone etc. Powers should be given to the lowest units of government in order to enable the people to participate directly in the administration process.[87]

Finally, The protection and defense of the federal constitution; the execution of the state constitution and other laws; administration of land and other natural resources in accordance with federal laws; execution of economic; social and development policies, strategies and plans of the states; collection of taxes and duties levied by the council are power and functions reserved for the state executive.[88]

2.2.3 Judiciary

When we talk of the judiciary, states shall have their own separate judicial power, and this judicial power is given to the courts.[89] The highest and final judicial power over state matters is given to the state supreme court. In addition to such its jurisdiction, the state Supreme Court and high courts may exercise the powers of the federal high courts and first instant courts by means of delegation. [90] Since, the house of people's representatives didn't decide by its two-third of majority vote to set up federal courts in some states the power of federal high courts and first instant courts and delegated to the state supreme and high courts.[91] Thus, the state courts will be made to exercise additional powers and makes them very powerful.

Regarding their independence state courts are free from any interference of governmental act. This implies that courts should exercise their functions with out any influence by no one else. The power to review and correct basic error of law in final decisions made by state high and first-instance courts is vested to the state supreme court. Such review and

[87] Ibid, Art. 50 (4)
[88] Ibid, Art. 52 (2)
[89] Ibid, Art. 50 (2) and (7)
[90] Ibid, Art. 80 (2) and (4)
[91] Ibid, Art. 78 (2)

correction of basic error of law in case of cassation based and dealing only with state matters.[92] Also state Supreme Court and state high court have powers of appellate jurisdiction. The constitution under Art 79(4) laid down a condition by which no judge of state courts to be removed from his duties before he reaches the retirement age determined by law.[93]

2.3. JUDICIAL INDIPENDENCE

The judiciary is made independent by virtue of the constitution of 1994. It talks about independence of the judiciary. It states that judicial power is vested in the courts. The president and deputy president of the federal Supreme Court are appointed by the house of people's representatives, on submission of nominees by the prime minister. The federal judicial administration council makes the selection of judges.[94] It is true that the same principles and procedures apply to the state judiciary. Capital state Supreme Court president and deputy president are appointed by state councils on the basis of nominees submitted by heads of the executive. State councils also appoint state Supreme Court and high court. The powers of nominee are given to the state judicial administration council.

The federal judges and state court judges ones appointed may not be removed before reaching the legally mandated retirement age, not can their services extended beyond the mandated retirement age. There is a reason behind the fact that the federal judicial administration council and the sated judicial administration council play the same role with respect to removal from office of federal judges and state court judges.[95]

With regard to financials matters courts are independent of the executive. The federal Supreme Court has power to produce the

[92] Ibid, Art. 80 (3) (b)
[93] Ibid, Art. 79
[94] Ibid, Art. 81 (2)
[95] Ibid, Art. 79 (4)

administrative budget of federal courts and has power to implement it after approval by the House of Peoples Representatives.[96] Accordingly the state council produces the administrative budget of the states courts.[97] Further more, expenses used to state supreme ands high courts bring before court disputes on federal matters covered by the House of Peoples Representative.[98]

2.4. Judicial Review

There are two methods (ways) by which review of constitutionality can be exercised. It can be made either by the judiciary or by an organ out side the judicial system. If the judiciary makes review, we can say that there is judicial review in that specific country and if review is made by an organ outside the judicial system it is clear that there is no judicial review in that specific country.

Review of constitutionality more or less refers to the examination of government by judicial or non-judicial organ with a view to insure weather or not the actions are consistent to the provisions of the constitution. There are two types of judicial review systems:-

These are: - 1. The centralized system and
2. The decentralized system

1. The centralized system: - is a system by which regular courts have no power to review the constitution. Such a power is rather given to the special constitutional courts established for this special purpose.[99]

In this system the power of the constitutional organ is limited to the task of interpreting the construction.[100] So, Ethiopia is the exercising this type of review system.

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[96] Ibid, Art. 79 (6)
[97] Ibid, Art. 79 (7)
[98] Id, cited on note 75
[99] Mauro Capellit Judicial review in the contemporary world. The Bobbies (Merril inc. New York, 1971 p vii-vii.

2. The Decentralized system:- this system enables the regular courts of such country to have jurisdiction to decide over the constitutionality of governmental actions and promulgation of legislations that contravenes the constitution.[101] This system mostly is called American system.

One can reach to a conclusion that, the Ethiopian judicial branch does not have the power of judicial review of the laws enacted by the parliament. But it has the power of judicial review over administrative acts in so far as such act infringe up on rights protected under ordinary law or even constitutionally protected rights and liberties in respect of which there is no dispute of interpretation.

2.5. The Relation Between The Three Branches Of Government Under Ethiopian Constitution

Depending on their particular goals different constitutional systems apply the theory of principle of "Separation of Powers" and the system of "checks and balances" differently. For example, the base of Montesquieus system is protection of liberty of individuals. When we look at the first two paragraphs of our constitution, we can observe that, apart from the traditional goals which existed in every state by its very nature, i.e. building political community based on the rule of law and or forming a union, establishing justice, insuring domestic peace etc, the Ethiopian people appear to have set goals. Advancing economic, individual and peoples rights are goals which to have been given fore most in our constitution.

Now let us proceed to consider the relation ship between the three branches of government under Ethiopian Constitution.

2.5.1. Legislative and executive Relation

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[100] Ibid, P. 66
[101] Ibid, P 66

The House of Peoples Representatives in Ethiopia exercises certain powers, which can enable it to have a control and check over the executive body. The first power by which the house can keep a check on the executive is that, the House's power of legislation, which is necessary for the implementation of the executive programs. This means that, the house can be able to check the executive through the legislations it enact for executive.

The next is that, it is the house that ratifies the annual budget, and thus, can deny the executive the funds necessary for the implementation of its programs. The house determines the size of the purse of the executive, and there fore, the strength of its financial muscle.

Thirdly, it is the House that appoints the prime minister and approves the appointment of members of the cabinet, commissions and other key executive officials. Such approval and appointment process enables the house to control in the appointment of the executive officials.

The other situation by which the legislature cheek and control the executive is, its power of question and investigate in to the discharge of responsibilities by the prime minister and other federal officials.[102] And to discuss any matter pertaining to the power of the executive.[103] When we look at the two constitutional provisions Art 55(17) and [18] together, they appear to give the house power to under take investigation on the executive by establishing committees of inquiry, where such a committee is formed, it is usually given full powers necessary for the collection of required information. The committees which debate the matter may report back to the house or take any measure it thinks fit.

[102] Ibid,
[103] Id, cited on note 76 Art 55(17)

The parliament also controls the utilization by the executive of the annual national budget it adopts through the Auditor-General.[104] The legislative exercise this control over the executive through its specialized standing bodies. The Auditor- General audits the financial affairs of the Government and submits his report the House of people's Representatives. Then the house may take any measure it seems fit based on the report sent to it.

The legislature controls the executive, to the effect that, whether or not it violate, through public servant, the human right or citizens guaranteed by the constitution and international human right instruments to which Ethiopia is a party. The constitution empowered the house to established Human right commission.[105] However, such its power has a limitation by law.

The constitutional provision that empowers the legislature to establish an ombudsman.[106] Is the other way of legislative control over the executive. The ombudsman is simply a body, which ensures the dispensation of administrative justice to citizens when they are victim of decisions of the public servant. So, its power to establish an ombudsman who stands fore the citizen's justice, the house can keep control on the executive's administrative actions.

Further more, the head of the government is elected by the house of peoples representatives and the council of ministers and the prime minister are accountable to the house, however, the house has only the power of approval with respect to the appointment of the minister and other high executive officials. The prime minister retains the power of nomination and presentation for appointment. The House of People's Representative can approve or reject the nominees presented by the

[104] Id, cited on note 20
[105] Ibid Art 101(2)
[106] Id cited on note16

prime minister. It cannot appoint persons not nominated by the prime ministers.

When we look to vise versa of the parliament and executive relations. The executive plays a major role in the legislative process. This means that, not only the paramagnet exercise control over the executive but also the executive has mechanisms by which it exercises control over the parliaments. The strong weapon that the executive can use to control the legislature is the power of the prime minister to dissolve the House of people's Representatives with the majority agreement,[107] such a dissolution occurs not be settle any disagreement between the House and the government, but to take an opportunity to strengthen the position of the party or coalition of parties. However, dissolution can be used, as a weapon by the government with the house cannot be settled otherwise. This weapon is the control of ministerial responsibility, a counter. Weapon available to the government as the dissolution of the government a result of a vote of censure of a vote of non-confidence. In the constitution of ours, dissolution of the house is mandatory when these situations happen. It is in the sense that the president has no option other than dissolving the house and calling for a new general election. In this new general election some of most members of the House may not return their seats and hence, an eventuality most would like to avoid.

In the other hand, normally, bills submitted by government are given priority and, from this point of view; the House acts on the initiative of the government. The laws passed are, therefore, to a large measure fall under executive control.

Private members bills are not given priority and normally fail for lack of the required majority even when given the chance to be heard, so long as

[107] Id cited on note 17

the government enjoys majority in the House such bills do not have any chance of passage when in-consistent with government policies.

Concerning the national budget, too, the House can only act on the proposals of the government. The preparation of annual work programs and budget appropriations for such is so complicated and needing much effort that the House can rarely afford to deal with them in depth. What usually happens is that the house passes the budget bills as proposed by the executive with out substantial modification.

2.5.2 Legislative and Judiciary Relations

With regards parliament and judiciary relations there are two ways by which the parliament exercise control over the judiciary branch. These are the process of appointment of federal judges and the process of interpretation of the constitution. Let us see them one by one.

In the case of the appointment of judges, it is the House of People's Representatives who approves the appointment of federal judges.[108] Thus it has a hand on the judiciary branch with which it may choose to control by refusing to approve the appointment of particular judges. The same apply to state governments.

The interpretation of the constitution is the second incidence of control by the parliament. The federation council, which is referred as the other branch of our parliament, has the sole authority to interpreter the constitution when constitutional dispute arises. Therefore, the parliament plays key role through which it exercises control. Because when interpreting the constitution the parliament is exercising a judicial function.

Normally, control over the constitutionality of laws passed by the parliament is control exercised over the parliament itself. Such control is usually exercised weather by judiciary or by an independent body of the

[108] Ibid Art 60(1) and (2)

parliament. In our case, the House of federation is part of the parliament and it can be said that the House of federation do not exercise control on its other part, the parliament. Yet, the House of federation does not take part in issuing laws and is independent of the House, which enacts all laws.

The house of federation, therefore, is in a position to control the constitutional validity of the laws enacted by the House (parliament). But the purpose to which the House of federation is given power to interpreter the constitution is not so much to control the parliament as to control the judiciary on constitutional matters. This clearly implies that the judiciary, in Ethiopia, does not have the power of judicial review of the laws issued by the legislature.

This arrangement is in conformity with one of the min goals set by the constitution, i.e. for the sec of the protection of people's rights and the equalities of Nations Nationalities and people's. Accordingly the House of federation, composed of representatives of Nations Nationalities and people's is deemed to be the guardian such people's rights and controls decisions of the judiciary involving these rights of peoples.

2.5.3. Executive and Judicary Relations

The only incidence of relations the executive has with the judiciary branch is reflected in the power of nomination of federal judges by the prime minister. [109] By this power of nomination the prime minister will be able to control both the legislature and the judiciary. The House of People's Representatives can only appoint persons nominated by the prime minister; it cannot appoint its own nominees as judges. The prime minister also controls the judiciary through his power on nominating the judges as it enables him to select person of his choice to be appointed judges.

[109] Id, cited on note 18

On the other hand the supreme federal judicial authority is vested in the federal Supreme Court and in such federal high courts and first instant courts as the House of the people's representatives may establish.[110] The judicial authority of our judiciary consists the settling of disputes which arise under ordinary law and disposing of disputes involving constitutional interpretation on the basis of the constitutional interpretation the House of federation.

It follows, there fore, that the judiciary has the power of review over administrative acts as long as such acts infringe rights protected under ordinary law or even constitutionally protected rights and liberties in respect of which there is no dispute of interpretation. This is, therefore, a power exercised by the judiciary with a view to keeping the executive with in the bounds of constitutional and legal mandates.

2.6. The Concept of Checks and Balance

The concept of checks and balances, in general term, has two manning: Federalism and separation of powers.[111] Federalism is the division of the government between the national, state or provincials and local levels. In a federal system the division of powers and authority are never neat and tidy-federal, state and local agencies can all have over lapping and even conflicting agendas in such areas. But federalism does maximize opportunities the citizen's involvement so vital to the functioning of democratic society.[112] The idea of cheeks and balances, in its second sense, refers to the separation of power that the framers of the USA constitution in 1789 so "done by tasking great care" to ensure that the political power would not be concentrated with in a single branch of the national government.[113]

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[110] Ibid Art 74(7)
[111] Ibid Art 78(2)
[112] U.S.A information Agency (what is democracy). P.22
[113] Ibid P. 22

The concept of separation of powers as expressed by Montesquieu has been understood and applied differently in different constitutional systems. The Ethiopian system of 1994 provides that the House of people's representatives have power to check, other branches of government by enacting legislation which are necessary for the implementation of the programs of the executive, ratification of the annual federal budget, exercising the power of approval and appointment of prime minister, federal judges and other governmental officials, questioning and investigation of prime minister and other federal officials, using such special standing institutions, Auditor-general human right commission; office of ombudsman and federation council-in the case of interpretation of the constitution.

In the other hand the executive checks the other branches of government by power of nomination and presentation for appointment, submission and giving the priority for legislative bills, production of the annual budget, dissolution of the parliament by the prime minister.

The judiciary has no power exercising for checking the legislative as well as the executive. But it has power to review over administrative acts so long as such acts infringe up on rights protected under ordinary law or even constitutionally, protected rights and liberties in respect of no dispute of interpretation of the constitution.

Generally, in the Ethiopian context, there exists checking mechanisms in a limited manner between the legislature and the executive and between the judiciary and executive. But the judiciary has no power to check the legislative; while it is checked by the legislature in respect of interpretation, of the constitution and appointment as well as approval of the budget. We have no more checking mechanisms except the above ones.

Finally it can be concluded that there is no balance between the three branches of government.

CHAPTER THREE

DELEGATION OF POWER TO ADMINISTRATIVE AGENCIES V/S PRINCIPLE OF SEPARATION OF POWERS UNDER FDRE CONSTITUTION

3.1 DEFINITION OF ADMINISTRATIVE AGENCIES

To the phrase "***Administrative agency***" different definitions have been provided by different scholars. Some have defined the term based on the power agencies have, and others have defined it by listing out those specific institutions which are deemed to be administrative agencies. Breyer Stewart defines body ***Administrative agency*** as "an authority of a government other than a court or a legislative, with power to make and implement laws in various ways"[114]

The term *"in various ways"* refers to how the laws are made in different ways. These different laws being, either through case by case adjudication or through promulgation of rules and regulation of general applicability.[115] But the fact of making law through case by case adjudication is more relevant to common law countries. According to this definition administrative agencies have the power to make and implement laws.

The other definition is that, which provided by K.C Devis who have based the definition of administrative agencies on the power they have vested with. He defined it as follows. "Administrative agency is a governmental organ, other than a court and a legislative body, which affects the rights of private individuals through either adjudication or rule making. Administrative agencies can also known by different names such as

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[114] Stephen G. Breyer and Richard B. stewart**, Administrative aw and regulatory policy.** 1979.P.1
[115] Ibid

department, authority, commission, Berou, board officer, corporation, administrator, agency, divisions or office.[116]

In its definition, K.C devis, by excluding the courts and the legislative body has shown that Administrative agencies consists of only the executive body of government. Another point noted in his definitions the power these administrative agencies have according to his definition, these agencies are vested only with the power to adjudicated and make rules. When compared with breyer's definition the K.C.S definition fails to address a power of administrative agencies. i.e. the power to implement laws of administrative agencies. There fore, administrative agencies have the power to make, adjudicate and implement laws.
The draft administrative procedure proclamation of ours is used to define the term by pointing out those institutions which are deemed to be administrative agencies. Article 2(1) of the draft proclamation defines it as " any ministry, commission, public authorities of the Federal Democratic Republic of Ethiopia , including the Addis Ababa and Dirre Dawa cities administration, competent to render administrative decisions and exercising regulatory or supervisory functions. The term shall include the agency head and one or more members of the agency head or agency employees or other person directly or indirectly purporting to act on behalf of or under the authority of the agency head".[117]

The draft administrative procedure proclamation's definition seems to be different from the above definitions. It begins to define the term by listing out those institutions that it deemed Administrative agencies. From this definition one can understand that administrative agencies are parts of the executive. That is because only those organs that are competent to

[116] Kenneth Culp Oavis, Administrative law, **triatise** , 1958,page 1
[117] **Draft federal Administrative procedure proclamation**, prepared by Ethiopian justice and legal system research institution.2001

render decisions and exercise regulatory or supervisory functions that are to be deemed Administrative agencies.

In general, based on the above dealt definitions, we may define the term ***administrative agency*** as: an authority of government other than a court or legislative body with power to regulate and supervise behavior, to make law, to interpret and implement law in various ways.

3.2 POWERS OF ADMINISTRATIVE AGENCIES

Administrative agencies are established for the main purpose of carrying out administrative functions. It is said that government agency action can include rule making, adjudication and the enforcement of a specific regulatory agenda.[118] Unlike their judicial and legislative powers, which they acquire by delegation, administrative powers are inherent to them. Some agencies are vested with all of the above mentioned powers, while others are versed with only one or to of the powers. These, however, are not the only powers with which administrative agencies are vested. They are also vested with the powers to investigating, supervising prosecuting, advising and declaring.[119]

As mentioned above, all these powers are given for these agencies for a certain reason. And this purpose is to enable these agencies to carry out or execute the functions they are given.[120] These functions may be regulation of private conduct, government exactions, disbursement of money and direct government provision of goods and services.[121] Let us, now, try to see each power of administrative agencies one by one.

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[118] Bizuneh Beyene **Protection of individual right in administrative proceedings**,(unpublished) AAU,page 4
[119] Supra note 1, page,5
[120] Supra note 3, page 2
[121] Supra note 19

3.2.2 RULE MAKING POWER OF ADMINISTRATIVE

Rule making is defined as the process that executive agencies use to create, or promulgate regulations.[122] These definitions have a problem. That is it only recognizes regulations as rules made by administrative agencies.

However, Administrative agencies are empowered with power to make regulations, directives , rules, orders, schemes, by laws, licenses, warrants, instruments of approval minutes, etc… as the legislator thinks fit.[123] The house of people's representatives, who is the primary legislator of our country, as inshrined in article 55(1) of the constitution, may try to fill the gaps that it can't adequately address, by entrusting administrative agencies with the above mention powers.

The House of Peoples Representatives, as pointed out by Breyer, may authorize the agency to prescribe standard of conduct while providing it with sanctions for who ever has violated the prescribed standards of conduct."[124] Also in other cases, a statutory scheme will not become operative until after the agency has exercised a delegated authority to make such rules.[125] The rule making authority may also be given to resolve doubtful cases, or to prevent avoidance of statutory commands.[126] In other case, it may be necessary to carry out the purpose of the statue.[127] This, though, has raises debates in many cases, that agencies only have power to make laws relating to their internal administration and procedure and that they don't have authorization to

[122] Supra note 8, page 31
[123] Supra note 3, page 399
[124] Ibid
[125] Ibid
[126] Ibid
[127] Ibid

make substantive rules.[128] All in all, the legislator can give powers in the above listed ways.

Laws can be enacted through adjudication or promulgation, where an agency has been vested with both rulemaking and adjudicatory powers.[129] In common law countries, agencies usually have to first decide whether to develop law and policy through adjudication or promulgation.[130] However, this is not an issue in Ethiopia because it doesn't use precedent law and the proclamations empowering the agencies with certain powers expressly state the kind of power the agency is supposed to use. A good example would be proclamation number 262/2002/ empowering the council of ministers with the power to make regulation by virtue of Art 88(1).

Further more, the legislator is not left with out any limitation when empowering agencies with power to make rules. There are limitations on the legislator. This limitation is that , the legislator cannot give them power to make general rules.[131] First it has to provide the agencies with the general frame work and leave the specifics of the law to the administrative agencies.[132] There for administrative agencies are only empowered to make detailed laws but not general ones.

It can be concluded that, though administrative agencies legislation is considered as an infringement of the doctrine of separation of powers, still more legislation are produced by these agencies than by the legislator.[133] Also it is this fact that has led administrative law writers to conclude that administrative legislations are necessary evils.[134]

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[128] Ibid
[129] Ibid
[130] Ibid
[131] H.W.R , Wade, Administrative law, 5th Edition 1988,page 733
[132] Supra note 19
[133] Supra note 39
[134] Supra note 5 page 47

3.2.1.1 THE REASON FOR DELEGATED LEGISLATION

The reason for delegation of legislative power to administrative agencies lies on the fact that the complexities of modern administration, pressure up on parliament, technicality of subject matter, need for flexibility, state of emergency case, and experimentation.[135] The legislator only enacts only general guidelines and it then delegates rulemaking power to agencies to enact laws with in the required specifications.[136] This is because of the fact that it is not feasible for the legislator to enact detailed laws that govern every aspect of social, economic and political life.[137]

The fact that some legislation may need consultation with experts and interested parties before being enacted is the other reason justifying delegation.[138] In this respect, it is believed that administrative agencies are better suited for the facilitating of such consultation.[139] Laws that

directly affect the society are known as detailed laws.[140] Hence, these laws require due deliberation and consultation with those affected before enactment. This believed better done in the hands of administrative agencies rather than the parliament.

Detailed laws may also need frequent amendment. This is because of their detailed nature they tend to exclude different possibility.[141] Also the change in general conditions of the society may need change in these laws.[142] And this need of change in law can be better addressed by administrative agencies than the parliament. The latter can not swiftly

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[135] Aberra Jembere, **Materials on Administrative law**, Unpublished, AAU. 1985 P.32
[136] **httpillen. Wikipedia.org /wiki/ Rule making,** February 2007.
[137] Terence Ingman, **The English Legal process**, 1996, page 23
[138] A.W. Bradley and K.D Ewing, **Constitutional and Administrative law** , 12th Ed, 1997, P. 718
[139] Ibid
[140] Supra note 3, page 18
[141] Supra note6, page 719
[142] Supra note 3

respond to the need for change in laws due to its cumbersome law making procedure and because it is burdened with other tasks to perform.[143]

In other hand, cases by which the government should have take immediate action may arise.[144] For example, a state of emergency constitutes one of such case.[145] The other reason for delegation of legislation is the opportunity it provides for experiment action which refers the application of newly evolved techniques and procedures through enacting laws.[146]

In general, these are the main specific reasons for the delegation of legislative power to administrative agencies.

3.2.1.2 Rule Making procedure

As we have seen earlier, the powers of administrative agencies, they have the power to enact laws through delegation. When exercising such power there is a danger of using it arbitrarily. There fore, there are procedures that are believed to serve as a limitation on arbitrary use of the rule making power by administrative agencies. Let us see them in general.

Wade administrative law lists down some procedures for administrative rule making. These are informing the public of the proposal rules, taking public comments on the proposed rules, analyzing and responding to the public comments, creating a permanent record of its analysis and the proceeds.[147] Etc…

On the other hand, the American Administrative procedure act of 1946 lays down the procedures governing rule making by administrative

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[143] Ibid
[144] Ibid
[145] Supra note 6 page 719
[146] Supra note 3
[147] H.W.R Wade, **Administrative law**, 5th edition, 1988 P. 733

agencies. The primary procedure in this act is initiation.[148] Next we have the preliminary drafting.[149] And then comes notification of the draft.[150] After notification comments on the proposal will follow.[151] Then the next and final stage is publication of the rule proposed.[152] These are the procedures for rule making by administrative agencies of the American administrative procure Act.

When we come to the rule making procedures of Ethiopia, the draft federal administrative procedure proclamation provides some basic procures to be followed by agencies when they make delegated legislation. The first is the procedure before the adoption of the rules. This includes notice solicitation of comments from classes of persons likely to be affected by the rule to be adopted,[153] publication of the text of the proposed rule and they shall give due attention to the comments of the interested parties.[154]

The next procedure is the adoption step. This is only done after claims, issues or requests of interested parties on the topic are settled. They cannot adopt substantially different rules from the proposed and announced rules. Then publication[155] of the proposed rule is the other under this.

The last procedure deals with review of the agency rules. It requires the agencies to review their rules at least annually to determine whether any new rule should be adopted.[156]

3.2.2 JUDICIAL POWER

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[148] **http://link.istor.org/sici?sici=00263397%28196008%294%3A3%3c267%3APMBGA%3F.2.0.Co%3BE-2, February**, 2007. Page 269

[149] Id, page 277

[150] **Http://Web.2.Westlaw.com/welcome/Law school practioner /default .W/?bHcp=1&FN=%5Ftop&MT=Law school practioner &rs=Law 52%=split 2%2Eo**, April 2007

[151] Administrative procedure Act. Section 4(b)page 55

[152] Ibid

[153] Draft federal procedure proclamation prepared by Ethiopian Justice and legal system research institution, 2001, AA5-19

[154] Ibid Arts 5-9

[155] Ibid Arts 10-19

[156] Ibid page 20

Administrative agencies are endowed with judicial power. They may only have such power through delegation by the legislator.[157] And the legislator itself can only delegate such power when it is permitted by the constitution.[158] This is so because this power is believed to be interference on the court's power.[159]

According to Wade administrative law judicial power of administrative agencies consists of two elements i.e. hearing and determination, and Finality.[160] Unlike hearing and determination, our draft administrative proclamation, under its Art. 2(2) have recognized the finality clause in adjudication by an administrative agency. It reads:- *" Adjudication is every final decisions, order, or award of an administrative authority having as its object or effect the imposition of sanction or the grant or refusal of relief. "*

The effect finality clause, there fore, is that the determination becomes enforceable from that day the decision is forwarded. when one say's certain determination is final, it refers to the fact that the determination is not subject to review or it can also be refereed as that the decision is subject to review. Administrative agencies by exercising this power seek to determine if the conduct of individuals are inline with the laws that they have made.[161] And also they protect the right and interests of individual citizens using their judicial powers.[162] Administrative adjudication would have a recognized status, if once adjudication by administrative agencies is recognized. Administrative agencies decisions have the same effect as judicial decisions.[163] Such a case is also

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[157] Milton Michael Carrow, **The Background of Administrative Law**, 1948,page 35
[158] Dalmas H.Nelson, **Administrative Agencies of the USA**,1964.P6
[159] Ibid
[160] H.W.R Wade Administrative law, 5th Ed. Oxford university press. Page 25
[161] H.W.R Wade Administrative Law 5th Ed, 1988,Page 15
[162] Milton Michael Corrow, **The Background of Administrative Law** 1948,Page 35
[163] Supra note 3.Page 6

enshrined by the draft administrative proclamation of ours. Under its Article 46(1). It states that~"¾‹KA~ ¬d'@-‹ ¾õ`É u?~ ¬d'@-‹ ÃJ"K<::"

From this, one can understand that administrative agency decisions are equally recognized and effective with that of the regular courts. This status given to administrative decisions enables administrative agencies to pass judgments on administrative matters by themselves. But this does not mean that administrative decisions are not subject to appeal to the ordinary courts.

3.2.2.1 REASONS FOR DELEGATION OF JUDICIAL POWER

There are certain reasons that necessitate the exercise of judicial power by administrative agencies. These are: - the belief and facts that administrative tribunals could offer speedier, cheaper and more accessible justice while the process in the court of law is elaborate slow and coasty.[164] The other reason for delegation of judicial power to administrative tribunal is that of Expertise judges in the ordinary courts may lack the expertise to handle the cases that arise in administrative process while administrative decision makers have an expert knowledge about particular administrative matter there are assigned with and this enables them to dispose of the mater more fairly and expeditiously.[165]
Generally, these are of important reasons for the creation of administrative tribunals.

3.2.3 EXECUTIVE POWER

[164] Ibid
[165] Supra note 22, page -15

The Executive function of the government consist primarily of initiating, formulating , and directing general policy including administration which involves the implantation and application of general policy.[166] When we see this power of execution in relation of administrative agencies it could be seen from two perspectives. The first sense, executions means the power to put decisions in to action.[167] And in its second sense, execution by administrative agencies is the power to carry out or put in to action a certain function entrusted by the legislator.[168]

Administrative agencies are to appoint, supervise remove and direct subordinates in their executive capacity.[169] The other kind of execution is enforcing the decisions of a certain administrative agency with judicial power. Execution by administrative agency can be done either in respect of a decision rendered by administrative agency or a court.[170]

As we have seen all these execution powers an administrative agency is supposed to exercise a specific function while doing this the administrative agency is not under any procedural obligation from the legislator. The administrative agency is to come up with its own procedure to be followed in the course of execution of its function. In general terms, administrative agencies do have the power to execute which ever way execution is explained.

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[166] Dagnachew Asrat,summery notes on administrative law. April 2007,page 25
[167] Semahegn Gash, **Due process of law and Administrative Decision in Ethiopia** , (Unpublished) AAU. Page 16
[168] P.H.Collin, **Law dictionary**,2nd Ed Universal Book Stall,
[169] Riginald parker, Administrative law, The Bobbs – Merril Company, Inc. publishers, Indian polis, 1952,page 287
[170] Ibid

3.3 LEGISLATIVE AND JUDICAL POWERS OF ADMINISTRATIVE AGENCY VIS A VIS SEPARATION

In every democratic government there are three distinct organs with distinct powers. These are the legislative, executive and judicial powers. The legislative organ is the law making organ of the government while the executive and the judiciary are the law implementing and law interpreting organs of the government, respectively. The basis for this federation is the separation of powers principle.[171]

The doctrine of separation of powers has been stated by different scholars differently. From among these scholars, Montesquieu, James Madison and Sir Carleton Allen are the main ones argued about what is meant by separation of power. Now let us examine whether the exercise of legislative and judicial powers by administrative agency is in conformity with or against the doctrine of separation of powers. We will do so by analyzing the arguments forwarded by the above mentioned scholars.

Montesquieu argues that:-

When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws and execute in a tyrannical manner. Again there is no liberty, if the power of judging be not separated from the legislative and executive powers. Where it joined the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator, were it joined with the executive powers; the judge might behave with all the violence of an apprehension.[172]

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[171] Administrative Act, Section 4(B) page 37

[172] Supra note 17, page 15-16

Different scholars forwarded many arguments on such Montesquieu's meaning interpretation of separation. Some argue what he meant was that one branch of government should stay in its limiting walls and not

go beyond these walls affecting the other branch of government.[173] This means that the executive will only be concerned with implementing laws and shall not issue or interpret laws for it is the function of the legislator and the judiciary respectively.

In the other hand, James Madison argues that:-

Montesquieu did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning , as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which posses the whole power of another department, the fundamental principles of a free constitution are subverted.[174]

There fore, Madison's argument is that the doctrine of separation of power is only countered only when the executive takes the whole law making and implementing powers, which is the power of the legislator and of the judiciary, respectively.

Using Madison's line of argument

In relation to the doctrine of separation of powers, one would conclude that since administrative agencies are not exercising the whole of law making and law interpreting, the conferring of these powers to administrative agencies wouldn't be contrary to the separation of powers

[173] Morris D.Forkoskh, **A Treatise on Administrative Law**, The Bobbs Merrill Company, Inc, Publisher, Indian police, 1956, page 36
[174] Supra note 17,page 16

doctrine. Sir Charlton Allen also forwards his argument in support of the above argument.

He said that:- Conferring administrative agencies with law making, adjudicating and executing is not contrary to the doctrine of separation of powers. Let me state the wording of his argument.

> " … Separation of powers suggests that freedom is preserved if the sum of power is widely distributed and that it is more important that
>
> there should be many authorities exercising legislative, administrative and judicial powers then that each of these three types of powers should be exercised by the different authority. Thus the real argument is not whether the executive, for example, is executive legislative or judicial powers which properly belong to parliament or the courts (for no kind of power belongs to any particular authority best suited to exercise it and whether the exercise is sufficiently controlled by political and legal action "[175]

The basis of sir Charlton's argument is different from that of Madison's. Even though sir Charlton argues that empowering administrative agencies with different powers is not in contradiction with the doctrine of separation of powers, he argues that the doctrine of separation of powers is not really abut conferring different organs of government with different and distinct power; rather it is about conferring these organs with pieces of different powers so that an organ may not monopolize all the power.

However, many scholars tend to agree that conferring of legislative, adjudicative and executive powers on administrative agencies are contrary to the separation of powers doctrine. They argue that such conferring of powers is necessary and has to be viewed as an exception to

[175] Supra note 3,page 15

the doctrine of separation of powers.[176] It is necessary in that society has grown complex and the need for government to be more involved in societal day to day affairs has arisen.[177] The government, in order to efficiently and effectively address the needs of societal affairs the state has to confer the powers of its different organs on agencies that are best suited to address those needs.[178] Even though, conferring administrative agencies with different powers is necessary and do have all the above mentioned reasons necessitated them to be delegated, it is an infringement of the doctrine of separation of powers.

So far we have been discussing the general aspects of separation doctrine in light of legislative and adjudication powers of Administrative agencies by analyzing the arguments of the different scholars. Now let us see it in the Ethiopian context.

3.3.1 LEGISLATIVE AND JUDICIAL POWERS OF ADMINISTRATIVE AGENCIES VIS A VIS SEPARATION IN ETHIOPIA

When we talk of the doctrine of separation of powers under FDRE constitution, it is clear that our constitution upheld the doctrine of separation of powers. This can be asserted under Articles 72(1),79(1) and 55(1). As has been defined in chapter (one) of the paper" separation of powers" is simply to mean the distribution of the three branches of government into three distinct areas. Thus we can say that our constitution is one that upheld the doctrine of separation of powers. This is because for it vests the highest executive power in the prime minister and council of minister under Article 72(1) , Judicial power in the courts under Article 79(1) and for it exclusively vests power of legislation to the

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[176] Wade and Forsythe, **Administrative Law**, 7th Ed.1988,page 415
[177] Lord Jempleman and Michael .T. Molan **Administrative Law**, 2nd Ed, old Bailey press, page 1-2
[178] Craig R. Ducat and Harold W. chase, **constitutional interpretation**, 3rd Ed, West publishing co., St ,Poul, 1988page 132

House of people's Representatives under Article 55(1) . This means that our constitution vests the three government organs three distinct and separated powers. i.e. law making to the house of people representatives, adjudication to the courts and law implementation to the executive. But the executive in Ethiopia through its agencies is exercising all executive, Legislative and judicial powers. There for, one can conclude that the exercise by administrative agencies of both law making and adjudication is an infringement of separation of powers under FDRE constitution.

We have seen the legislative and adjudicative powers of administrative agencies in light of the doctrine of separation of powers. Now let's proceed to see constitutionality of such powers under FDRE constitution.

3.4 CONSTITUTIONALITY OF LEGISLATION AND ADJUDICATION BY ADMINISTRATIVE AGENCIES IN ETHIOPIA:-

In the previous sections we discussed that the administrative agencies have both legislative and adjudicative powers. In this section we will try to see whether rule making and adjudication by administrative agencies is constitutional or not under FDRE constitution. Let us see them one by one.

3.4.1 CONSTITUTIONALITY OF LEGISLATION BY ADMINISTRATIVE AGENCIES IN ETHIOPIA

The FDRE constitution vests primary power of legislation in the house of people's representatives. This house has the power to make law in all matters assigned by the constitution to federal jurisdiction by virtue of Article 55(1) . Though the house of people's representative is vested with this power, the constitution doesn't exclude all others from making of laws. This is clearly seen in Article 77(13) of the FDRE constitution, which gives the council of ministers of power to enact regulation. But

this is only where the house of people's representatives delegates such power to the council.

The council of ministers being an administrative agency, as it falls under the definition given in the ongoing chapter, is empowered by the constitution to make regulations.[179] There is also anther situation by which it is empowered to make directives in Article 74(5) of FDRE constitution, hence, it can be concluded that the council of ministers have the right to make rules as enshrined by the constitution.
There fore, we have get one administrative agency i.e. the council of ministers which is constitutionally empowered to rule making. Now let us try to discuss the rule making power being exercised is constitutional.

In Ethiopia, other administrative agencies make and apply directives. Since, directives in the constitution are only cited in Article 74(3) and(5) . Even these directives are directives to be adopted by either the House of People's Representatives or by the Council of Ministries. Nowhere in the constitution is the power of administrative agencies to make rules expressly provided for. Also nowhere in the constitution is the power to delegate rule making to administrative agencies grated to any organ of government. Thus, one can argue that the exercise of rule making power by administrative agencies is unconstitutional except for the council of ministers. This is for the council is given such power by the constitution.

Even though the exercise of rule making power by administrative agencies is unconstitutional administrative agencies should be able to exercise rule making power. This is highly because they need these powers to facilitate the day to day encounters with society and to effectively deal with the ever increasing and complex, issues facing society. In addition to this as has been briefly discussed, for the legislator

[179] FDRE constitution Article 77(13)

is short handed to regulate all aspects of every day affairs, For administrative agencies are with the required specialization, agencies are better
suited than the legislator to make laws that pertains to the day-to-day life of the society in addressing their needs. There fore, despite their being unconstitutional in rule making powers, administrative agencies do have important role in the exercise of such rule making power.

3.4.1.1 LEGISLATIVE PROCEDURE IN ETHIOPIA

In this chapter we have seen the general aspects of rule making procedures. Now we will try to discuses particularly the rulemaking procedures in Ethiopia.
In Ethiopia though administrative agencies are conferred with the rule making power, they use their power in any way they think fit.

Although the absence of procedures might help them conduct their work expeditiously thereby enabling them to answer in a speedy manner to the demands of the public, there is a danger that these agencies would use their power arbitrarily. This is a well established fear since the executive with all its discretionary powers for running the routine administration may abuse its power.[180] And the society is direct victim of these adverse consequences for specific laws tend to attach themselves to the primary, direct and day-to-day interest of the society.[181]
There are also another disadvantages of not having well established procedures, this means that not only tyrannical laws but also unpredictability and instability are also possible negative consequences.

[180] Riginald Parker, **Administrative Law**, The Bobbs –Merrill Company, Inc, Publisher Indian polis, 1952,page 18
[181] Ibid

Where there are not procedures to be followed by administrative agencies. They would have the opportunity to alter any rule at any given day which in turn would lead to unpredictability and instability.
There fore, administrative agencies when they make rule should have rule making procedures to be followed however, in Ethiopia there are no legally binding procures for rule making. Administrative agencies are using their own ways of making rules.

3.4.2 CONSTITUTIONALITY OF ADJUDICATION BY ADMINISTRATIVE AGENCIES IN ETHIOPIA

So far we have seen that administrative agencies have adjudication power. It is true that the executive is one branch of the government. It takes its primary power from the constitution. Since administrative agencies are part of the executive they are exercising adjudication which is the power to be exercised by and mandated to the ordinary courts. If this, now the question in this section is that whether the adjudication by administrative agencies is constitutional or not, for this purpose, let us proceed to examine the constitutional provisions regarding judicial power.

The FDRE constitution under its Article 79(1) vests judicial power solely in the courts. This means that, courts are vested with an exclusive power to adjudicate cases as it is in their nature to entertain cases and pass binding decisions.

We have also other constitutional provisions which vests judicial power in the courts and declared the independence of courts. It is Article 78(4) of the constitution. It reads that an independent judiciary is established by this constitution. from this constitutional provision one can understand that ordinary courts are declared to be independent from any interference of government institutions, i.e. the legislative and executive branches.

Though the above two provisions confer judicial power solely in the ordinary courts, this means not that the constitution completely deprive of other institutions from the exercise of adjudication power. This is clearly stated under Article 78(4) which allows the exercise of judicial power to be exercised by special or adhoc courts. When we see the wording of this Article, which says **"***special or adhoc courts which take away judicial power from the regular courts***"** we simply can understand that the constitution is mandating administrative agencies to exercise judicial power.

In addition to this, we have also another constitutional provision which mandated the exercise of judicial power by an organ other than ordinary courts. The constitution under Article 37(1) clearly shows us that exercise of judicial power by administrative agencies. The phrase that reads "a court of law or any other competent organ with judicial power" clearly could be mean to Administrative agencies. There fore, the constitution under this article has recognized other organ with judicial power though it does not enumerate the names of those specific institutions.

We have said that the constitution has recognized administrative tribunals with judicial power. This recognition by the constitution of other administrative tribunals having judicial power is therefore, a contradiction between the two provisions of the constitution. i.e. a contradiction between Article 79(1) cum 78(4) with Art 37(1).

In addition to this, Article 37(1) of the constitution which recognizes Administrative tribunals is not only a contradictory article to Article 79(1) but also is a provision which abolishes the constitutional provision that reads judicial power be vested solely in courts. Hence it could not be said that there is an independent judicial organ, for we do have other

constitutional organ endowed with judicial power. i.e. administrative tribunals.

Therefore, According to Article 37(1) of the constitution, not only the ordinary courts but also administrative agencies are conferred with the power to exercise of judicial power. Hence, one can conclude that the exercise of adjudication by Administrative agencies is not unconstitutional for the constitution itself provided the exercise of such power by special or adhoc courts. i.e. Administrative agencies or for it provides judicial power to be exercised by not only ordinary courts but also by any other competent body with judicial power.

Finally, Administrative tribunals that exercise judicial power in Ethiopia are constitutional. But the constitution doesn't specifically enumerate the names of these institutions.

CONCLUSION AND RECOMMENDATION

As discussed deeply in chapter three of the paper, it is the increasing and complex relation between the state and private individuals that resulted the coming in to existence of administrative agencies. To discharge their responsibility, these agencies are conferred with powers like execution, adjudication and rule making. Because of this concentrated powers these agencies have along side them the danger of abuse of power. And society has through history has learned that with power comes arbitrariness and abuse. Also the exercise of these concentrated powers by agencies contravened the pillars of any modern legal system, i.e. the separation of powers doctrine and constitutionality. Therefore, though the conferring of administrative agencies with adjudication and rule making power has helped lighten the burden of the government by answering the ever increasing demand of the society, there is also a danger of arbitrariness and abuse of such powers. As has been pointed in the proposal part, due to abuse of power public liberty and property will be endangered.

There are different mechanisms of limiting or controlling abuse of powers by administrative agencies. These are through applying the separation of power doctrine, looking into the constitutionality of their powers and providing them with procedures while exercising their powers. Applying all these serves as prevention for the existence of arbitrariness.

It has been concluded that exercise of the three powers by administrative agencies is a necessary evil. Such conferring of powers on administrative agencies is contrary to the separation of powers. We have said that the Ethiopian constitution is the one that vests the function of the three branches of government in different organs. But administrative agencies in Ethiopia are exercising all the three forms of powers. There fore, since the constitution vests each organ of the government with respective

powers, the exercise by administrative agencies of all powers is an infringement of the doctrine of separation of powers under FDRE constitution.

With respect to constitutionality, the paper has tried to see the different provisions as to constitutionality of the exercise of such powers by administrative agencies in Ethiopia .The FDRE constitution, in respect of rule making, empowered only the council of ministers which is part of the executive i.e. an administrative agency. But also we have said that other administrative agencies are exercising legislative powers by delegation. Though these agencies do not directly drive this power from the constitution they could not be said unconstitutional. , Rather it be regulated by the principle of hierarchy of laws and the principle of delegation.

When we come back to constitutionality of adjudication by administrative agencies, the FDRE constitution clearly allows the exercise of such power by an institution other than the ordinary courts. But it does not provide these quasi judicial institutions. We have said before that Art. 37(1) of The Ethiopian constitution has given recognition to administrative tribunals having judicial powers. Thus adjudication by administrative agencies is not unconstitutional. When we see this Article with Art.79 (1) and 78(4) it seems to be contradictory, But there is no contradiction rather, it is a matter of interpretation.

The other mechanism of controlling abuse of power is providing procedures for administrative agencies when they exercise their powers. As we have seen earlier, in Ethiopia the legislator doesn't provide procedures for administrative agencies to use. Since, procedures for administrative agencies exercising abuse of powers, the legislator did not provide procedures for administrative agencies in Ethiopia. And the procedures applied by administrative agencies are not binding. Hence,

this lack of procedure to be followed by administrative agencies when they discharge their duties creates possibility of abuse of power. This highly endangers societies life liberty and property.

The writer recommends that the legislator have to provide administrative agenesis with a legal frame work by enacting an administrative procedures law to be followed, to address and safeguard societies interest from possible abuse of power by an administrative agenesis.

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