

**THE JUDICIARY AND ITS INTERPRETIVE POWER IN ETHIOPIA: A
CASE STUDY OF THE ETHIOPIAN REVENUES AND CUSTOMS
AUTHORITY.**

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Table of content

1 CONTENTS

Acronym.....	v
Acknowledgement.....	vi
Abstract.....	vii
CHAPTER ONE.....	1
Introduction	1
1.1. Background	1
1.2. Statement of the problem.....	7
1.3. Research questions	7
1.4. Objective of the study.....	8
1.5. Scope of the study	8
1.6. Significance of the study.....	8
1.7. Research methodology	9
1.8. Limitation of the study	9
1.9. Ethical consideration.....	9
1.10. Chapter Outline.....	10
CHAPTER TWO.....	11
THE RULE OF LAW, SEPARATION OF POWERS AND THE JUDICIARY:	11
Normative and Theoretical Analysis.....	11
2.1. The Rule of Law in a Nutshell	11
2.1.1. The Formal Conception.....	14
2.1.2. The Substantive Conception	17
2.2. The Rule of Law, Judiciary, and Separation of Powers: Making the Nexus	22
2.2.1. The Judiciary and the Rule of Law	22
2.2.2 The Rule of Law and the Separation of Powers	31
2.2.3 Judicial Review and Separation of Powers	34
2.3 Separation of Powers in Parliamentary Systems	38
2.3.1 The Case of Ethiopia	44

conclusion	49
CHAPTER THREE	52
JUDICIAL POWER AND THE COURT STRIPPING LEGISLATIONS IN ETHIOPIA ..52	
3.1. Introduction	52
3.2. The Constitutional legal Mandate of the judiciary in Ethiopia.54	
3.2.1. Constitutional limit	55
3.2.2. Legislative limits	69
3.3. The Court Stripping Legislations	71
3.4. The Constitutional-Legal Standing of Ouster Laws in Ethiopia	77
3.6. The Pattern and Implication of the Ouster Laws	87
Conclusion	93
CHAPTER FOUR	97
COURT STRIPPING BY THE EXECUTIVE: THE CASE OF THE ETHIOPIAN REVENUES AND CUSTOMS AUTHORITY	97
4.1. The Need to Have an Autonomous Authority; an Inquiry on the Institutional Background	97
4.2. The Authority’s Power under the Regulation: Legitimate?	100
4.3. Access to Court and the Border of Justiciability	113
4.4. The Judicial Response	121
4.5. What is Left With the Judiciary?	127
Conclusion	131
CHAPTER FIVE	135
CONCLUSION AND RECOMMENDATIONS	135
5.1. Conclusion	135
5.2.Recommendations.....	139
BIBLIOGRAPHY	141

Acronyms

CCI- Council of constitutional Inquiry

ERCA- Ethiopian Revenues and Customs Authority

FDRE- Federal Democratic republic of Ethiopia

HoF- House of Federation

HoPR- House of Peoples Representatives

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Abstract

No doubt, the judiciary, if not the only, is the proper custodian of the rule of law and individual rights. This happens only if it has the power to review, at least, acts of the executive for its compliance with higher laws. In Ethiopia, it is evident that an independent judiciary with all judicial function regarding justiciable matters is constitutionally established. It is however constrained from reviewing the constitutionality of laws of any type. However, the border of its power vis-a-vis the House of Federation is beyond clarity and its independence is compromised by the acts of the 'supreme' legislature. The legislature seems to be busy of making laws that contain ouster clause which stripped judicial function contrary to the constitution. Judicial stripping is also made possible to the executive on the guise of delegation of power. The empowerment of the Ethiopian Revenues and Customs Authority by regulation to dismiss its employees for 'any reason unknown' yet irreversible by a decision of any judicial organ or other institutions with judicial power is an apparent fact in this regard.

Deprivation of court jurisdiction by the legislature and the executive have also got support from the Council of Constitutional Inquiry (CCI) which stated that the legislature is supreme, empowered to decide on issues of justiciability and limit judicial power. Ironically, the Federal Supreme Court Cassation Bench joined the game and contributed its part in further restricting judicial power. It firmly asserted that there is no inherent power for courts in Ethiopia but a power that emanates from legislations; a decision that makes the legislature as an organ that determines judicial power. Yet, ordinary courts have a share on eroding their constitutional mandate. They voluntarily relinquish their power for legally ungrounded reasons. The judiciary is left with no power, except when the other two branches will, thus no constitutional guarantee of judicial protection of rights. The effect is worst that rights entrenched in the constitution are made be deprived by ordinary legislations and subordinate laws. The confusion continues between constitutional supremacy and de facto supremacy of the legislative and executive organs

CHAPTER ONE

INTRODUCTION

1.1. Background

Let us imagine a world in which the government in particular the executive through its agencies have absolute discretion to dismiss workers from job for any reason or no reason, to deny you to go to court for justice, abdicate the constitutional mandate of courts at its own will, to reject decision of courts made against its acts. Presumably most people would feel horror and discomfort on such agencies and lawyers would argue the inconsistency of the unfettered discretion of the executive with the rule of law. However, what constitutes the rule of law?

The rule of law is the most controversial ideal in political philosophy. The common understanding in constitutional scholarship is that the rule of law requires government of laws, not of men, whose central focus is constraining the power and discretion of government officials. However, the exact scope and content of the ideal is difficult to determine. There are group of scholars who argue that the rule of law is value neutral that it does not require the evaluation of the content of a given law for its fulfillment. There is other group of scholars who stressed that evaluation of substantive aspect of a given law is mandatory for a law to be in line with the ideal. The bottom line where advocates of both sides of understanding of the rule of law agree is that the ideal requires the existence of a government whose power is constrained by law and enabling victims to seek remedy in an independent court or similar institution when the government acts illegally against their rights.

It is possible to have many constitutional designs to serve the values of the rule of law and the doctrine of separation of power is thought to be one of them. There is an argument which provides that separation of powers is an effective structural guarantee of citizens against an unwarranted abuse of their freedoms and rights by the government. The doctrine of separation of powers as proposed by Montesquieu provides for the division of governmental powers among the government branches legislator, executer and judiciary. This is because if power is concentrated in a single government branch, more worrisome in one man, liberty will be threatened because for it permits the same organ makes tyrannical laws will execute them

tyrannically. Thus, what the principle dictates is that the power to make laws, to administer laws, and judicial powers shall be kept separate so that there will not be concentration of power in a single branch or person.

There is a common consensus that courts are the ultimate guardians of the rule of law. The judiciary serves the ideal by keeping the other branches in check as to their compliance with fundamental rights and freedoms enshrined in a higher law. This is true only when the judiciary is made to be independent from any outside interference by the other branches of government. Separation of powers is thus, considered to be an important structural design to ensure the independence of the judiciary by providing a shield for it against interference by the other branches in the judicial process.¹ Unless the judiciary is kept separate from the other branches of government, it is obvious that there will be a threat on fundamental rights and freedoms of citizens and the rule of law in general. The supreme court of Canada at one time regarded separation of powers as a precondition for judicial independence.² In its statement the court argued that the judiciary is the guardian of the constitution and must be shielded from interference by other branches in the judicial process.³

The role of the judiciary becomes significant when one considers parliamentary systems. In such systems, having an independent and strong judicial organ with a power of, at least, invalidating acts of the executive is at the heart of constitutionalism if the systems are genuinely designed to serve the rule of law. This is because of the fact that, in parliamentary systems, there is a blending of executive and legislative powers. The experience in many legal systems also shows this fact. For instance, in UK where there is an established parliamentary supremacy more than anywhere else, judicial independence is strongly preserved by empowering courts at least to nullify acts of the executive if they are inconsistent with parliamentary statutes.⁴ The power of courts may also extend up to testing the constitutionality of both acts of the parliament and the

¹ Charles H. Kinnane, 'Administrative law: Some Observations on Separation of Powers' (1952) 38 *American Bar Association Journal* 19.

² Richard Albert, 'Presidential Values in Parliamentary Democracies' (2010) *Oxford University Press and New York University School of Law* 223.

³ Ibid.

⁴ Ibid, p220-222

executive in constrained parliamentary systems like Canada and Germany.⁵ The existence of an independent and strong judiciary in such systems, thus, serves as a counterweight to the majoritarianism and the problem of fusion of power that characterizes parliamentary systems.⁶

Looking to Ethiopian reality one may infer from the structure of the FDRE constitution that the doctrine of separation of power is recognized.⁷ Despite this possible fact, one may still insist to say that it is naive to think that there is a genuine separation between the legislative and executive organs given the fact there is fusion of power between these organs. The insistence still holds true because our constitution exemplifies parliamentary system. Yet, the supremacy of the lower house (House of Peoples Representatives) over the other organs is constitutionally guaranteed. What is therefore important is whether there is separation of the judicial functions from executive functions for one can only speak, in systems like ours, the possible existence of separation of powers as between these two organs. Besides, the potential influence of the legislature over the judiciary using its supremacy clause is predictable in our system.

The FDRE constitution recognizes the independence of the judiciary and all judicial powers both at federal and state level are vested on ordinary courts.⁸ Yet the House of federation is vested with the power to interpret the constitution.⁹ This raises the issue of whether or not courts are totally deprived of the power to interpret the text of the constitution. Diverged literatures are developed on the constitutional mandate of courts vis-a-vis the HoF. On top of this, there are many laws issued by the legislature which limit or otherwise abdicate the constitutional mandate of courts.¹⁰ The laws provide that the decision of some government agencies are final thus,

⁵ Bruce Ackerman, 'The New Separation of Powers' in Richard Bellamy (ed), *The Rule of Law and Separation of Powers* (2005) 431.

⁶ Supra note 2, p. 222

⁷ Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 1st year No.1, 21st August, 1995, Arts.55 (1), 72(1), 79(1).

⁸ Ibid, Art.78 (1) and Art.79 (1) respectively.

⁹ Ibid, Art.62(1), 83, 84

¹⁰ See for instance the Federal Civil Servants Proclamation, Proclamation No.515/2007, Art.74-77; the Re-enactment of Urban Land Lease Holding Proclamation, Proclamation No.272/2002 Arts 17-19, Agency for Government Houses Establishment Proclamation, proclamation No.555/2007 Arts 6 and 12, A proclamation to Provide the Expropriation of Land Holdings for Public Purpose and Payment of Compensation Proclamation No.455/2005, Income Tax Proclamation, Proclamation No.286/2005, etc.

courts cannot review the decision of such agencies. Are these laws legally justifiable and practically sustainable? Where do the victims of these administrative laws appeal to? What about the impact of these laws on the role of the judiciary? Is the judiciary subordinate to the executive? Should an executive be given such powers as to affect the core constitutional mandate of courts? How the courts are dealing with such laws, reacting or simply accepting and applying them? Constitutional speaking, Courts are deprived of the power to challenge the constitutional validity of the court stripping legislations. Thus, who does this function?

In spite of the existence of previous works on the areas of separation of powers, judicial independence, and other related regimes, there is no specific literature done regarding the enormous laws made either by the legislature or the executive which partially or totally deny the substantive and/or procedural justice of citizens and wiped out the constitutional mandate of courts in Ethiopia. The paper therefore forwards a prologue on the area regarding the various court stripping legislations in light of their constitutional basis and their impact on the protection of individual rights and the mandates of the judiciary.

Even though many of the legislations that foreclosed court jurisdiction are dealt with in the paper, the main theme of the paper is to make an appraisal of Regulation No.155/2008, which is enacted for the administration of employees of the Ethiopian Revenue and Customs Authority (ERCA). The regulation of the Authority is selected as a focus of the paper because of the fact that it is recent, it is issued by the executive, the power to dismiss employees for any reason with non judicial review is vested to a single man (the Director General) and many decision making bodies, in particular the CCI and the Federal Supreme Court Cassation Bench has come up with new jurisprudence on the matter. The Authority is established as autonomous government entity with many distinct features from other public service offices even though the reform is not unique to Ethiopia.

It can be said that the reform is similar to the phenomenon in many countries in sub-Saharan Africa and Latin American countries where revenue authorities are granted with autonomous or semi-autonomous powers, of such, broad managerial autonomy of the authorities to determine salary scales of the employees, to reward them, to recruit their employees in a different procedure from the other public sector and to dismiss them in relatively easier procedure than in

other civil service sectors.¹¹ The power given to the Ethiopian Revenues and Customs Authority is however more than what is stipulated above. The empowering provision of the regulation provides that:

1. Notwithstanding any provision to the contrary, the Director General may, without adhering to the formal disciplinary procedures dismiss an employee from duty whenever he has suspected him of involving in corruption and lost confidence in him.
2. An employee who has been dismissed from duty in accordance with sub article 1 of this Article may not have the right to reinstatement by the decision of any judicial body.¹²

It is irony that the first sub-Article gives a single man, the Director General of the Authority, an unconstrained power to dismiss any employee for mere suspension of corruption and loss of confidence on the employee, yet without adhering to the formal disciplinary procedures as provided in primary legislation (Civil Servant Proclamation). What is more worrisome, and the main concern of this proposed study is the court stripping clause as provided in the second paragraph above. This provision results various consequences; first, it usurps the power of courts to hear a matter of their jurisdiction brought to them. Second, it denies individual's right of access to justice, and third, limits the remedy options of courts by stipulating that courts cannot give an order /decision that provide the reinstatement of an employee. The problem does not seem to end here. Instead, the provision raises the issue of power, i.e. whether there is a legal authorization for the executive to come up with a law having such content. It is therefore these and other related issues that trigger the writer to conduct an in-depth study under this paper.

In fact, the justification for the promulgation of the regulation with such content is related to the reasons which necessitated for the institutional reform taken place within the Authority. The Authority is the merger of the three previously separate but related government entities; the

¹¹ Christopher Clapham (ed), 'Revenue Authorities and Public Authorities in Africa: A Quarterly Survey of Politics, Economics and Related Topics in Contemporary Africa' (March 2009) 8 *Journal of Modern African Studies*.

¹² Administration of Employees of the Ethiopian Revenues and Customs Authority Council of Ministers Regulation, Regulation No.155/2008, Federal Negarit Gazeta, 14th year No.49, 2008, Art.37.

Ministry of Revenue, the Federal Inland Authority and the Ethiopian Customs Authority¹³ The purposes for which this merger is made includes; the need to modernize the tax and customs administration system, and effective and efficient utilization of resources.¹⁴ According to the stipulation by the Authority, the reform establishes an autonomous government agency which is vested with, among other things, strong managerial power and autonomy up on the directors to find ways of motivating their subordinate staff, rewarding them according to performance and take disciplinary measures if necessary¹⁵ This power is particularly crucial owing the fact that the tax collectors are especially vulnerable to temptations to corruption, there is strong case that supports to have a distinct organizational guarantee to make it possible to effectively monitor staff behavior and take discipline.

The assertion is sound giving the fact that the state is not collecting enough tax revenue and the various corruption scandals in the Authority. The issue arises, however, regarding the legal and constitutional legitimacy of the solution taken by the authority. That is to say, granting an unfettered discretion to the Director General may be considered as a threat to the rule of law since there is no any legal mechanism to put the decision maker in check. Not only this, the law also triggers many lawyers to raise the issue that whether it is legally appropriate for the executive (the council of ministers) to come up with a law having this kind of content.

Apart from the laws that abdicate court jurisdiction, the decision of relevant government institutions calls for an in depth study on the area. The way the Council of Constitutional Inquiry, the Federal Supreme Court Cassation Bench and other ordinary courts approach such laws is unexpected and usually upheld the correctness of the laws. In particular, decisions made by the first two have established a new area of confusion, i.e. as to the border of justiciability and who

¹³ The Ethiopian Revenues and Customs Authority Establishment Proclamation, Proclamation No.587/2008, Federal Negarit Gazeta, 14th year No.44, 2008, the preamble. See also the official web site of the Authority at <http://www.erca.gov.et>

¹⁴ Ibid

¹⁵ Ato Belete Ahmed, 'an explanation on the regulation for the administration of employees of the Authority', a speech made Legal Advisor of the Director General of the Authority on training to newly recruited employees of the Authority, Addis Ababa October 12-December 12, 2008). The writer was a trainee there as a public prosecutor of the authority.

determines it under our constitution. This in turn raises the issues of whether it is within the spirit of the constitution that the legislature limits or removes court jurisdiction there by imposing a limitation up on fundamental rights, and where such power ends.

Dealing with the ouster laws in general and the regulation in particular requires analysis of the text of our constitution and values enshrined therein such as the rule of law and separation of powers. Thus, the study analyzes what mandates are constitutionally vested to courts, what is left now to same and search if there are guarantees available to courts that their mandate is not further taken away by the other branches.

1.2.Statement of the Problem

It is true that lack of judicial independence and the ever increasing promulgation of judicial stripping government laws has been continued to be interests of constitutional scholarship in Ethiopia. Thus, the subject matter of this study revolves around issue of whether the court stripping laws in general and the regulation for the administration of employees of the Ethiopian Revenues Customs Authority in particular is constitutionally legitimate when they are seen from the values of constitutionalism and the rule of law, and the FDRE constitution in particular. Furthermore, the study provides an account on the practical responses and challenges (if any) of such court stripping laws face by the judiciary and other concerned government organs.

1.3.Research Questions

Based on the general statement framed above, the followings are the chief questions of the study

1. Who has the power to determine the jurisdiction/power of courts in Ethiopia?
2. What is the constitutional standing (constitutionality) of ouster clauses in Ethiopia? When are they legitimate/ when are they not?
3. What is the constitutional –legal limit to ouster clauses? If we have to rely on them, how do we do so without undermining judicial power?
4. Can the constitutional right of citizens to have access to justice in a court of law be limited/denied by subordinate laws?
5. Most important is, what is the practical response of our courts and other pertinent government institutions to such judicial stripping laws?

1.4.Objective of the Study

The objective of the study is to examine the constitutional validity of the various judicial stripping laws in general and the Ethiopian Revenues and Customs Authority regulation No.155/2008 in particular when seen in light of the constitutional mandate of courts under the FDRE constitution and other principles of constitutionalism. In particular, this study assesses to what extent these ouster clauses affect the independence of the judiciary and addresses the response of courts for same. To this end the study forwards the following points as its chief objectives.

- Examining if there is any constitutional authority for the legislative and executive organs to determine jurisdiction of courts in Ethiopia.
- Investigate the constitutionality and legitimacy of ouster clauses in Ethiopia.
- Analyze the constitutional legal limit of ouster clauses.
- Exploring the effect of the regulation on citizens' right to have access to justice and the scope of such right. .
- Analyze if such powers should be delegated/relegated to the executive.

1.5.Scope of the Study

The scope of the study is limited to the appraisal of the various laws having ouster clauses in general and the Council of Ministers Regulation to Provide for the Administration of Employees of the Ethiopian Revenues and Customs Authority in particular in light of the constitutional vested power of the Judiciary and the protection as well as entrenchment of fundamental rights under our constitution.

1.6.Significance of the Study

Although there is a literature on judicial independence, separation of powers, and other related areas, specific and in depth study has not been made so far concerning the various laws, in particular the new regulation of the Ethiopian Revenues and Customs Authority, which divest the judiciary of its power under the constitution. Thus, the study will contribute to the literature on the subject and highlights on whether or not the various (primary/subordinate) laws that partially

or totally limit the constitutional mandate of courts are constitutionally legitimate. Furthermore, the study sheds a light on how the courts respond to such laws.

1.7. Research methodology

Being predominately of a qualitative research, the writers descriptively, analyze the various judicial stripping laws that are promulgated so far and the response given to them by the judiciary. While literature review is patent to the whole study, semi-structured interviews with concerned officials of the Ethiopian Revenues and Customs Authority, judges of the Federal Supreme Court Cassation Bench, members of the Council of Constitutional Inquiry are also intensively employed. Besides, analysis of pending or/and decided cases on the subject matter, an appraisal of the FDRE constitution and other relevant laws to the study are also utilized. So that, the specific research questions are also answered. The writers' cumulative analysis of data collected, through the means specified will provide the summery of the legitimacy or otherwise of the various court stripping clauses in Ethiopia.

1.8.Limitation of the Study

The main limitation that the writer is faced with during the study is the difficulty of collecting data from judges of the ordinary courts at federal level regarding. Despite the facts that the writer has distributed questionnaires to the courts, the judges were not cooperative and finally the judges lost themselves with the questionnaire for summer break. Therefore, it was unable for the writer to include the view of sampled judges regarding the ouster laws.

1.9.Ethical Consideration

The writer will also take an important ethical consideration in to account. Inter alia, interviewees are informed of the purpose of the study without any form of deception before securing informed consent from them. The writer also took care of the interviewees' response from unnecessary disclosure in a way abusive to their relationship with their employer. The writer also provides an accurate account of the information through examining the collected data to build a coherent justification for descriptions.

1.10. Chapter Outline

The paper is organized in to five chapters. The first chapter is an introductory part and provides the general background of the study together with the problems, the research questions, the objectives and the significance of the study. It also explains the scope, limitations, methodologies employed in the study and ethical requirements that the writer obeyed during the study. The second chapter concerns on theoretical and normative analysis of some ideals that have direct relevance to the study, includes the rule of law, separation of powers, and judicial review, and how these ideals are employed by different systems including ours. The chapter is more of broad analysis of literatures on the subject matter.

The third chapter involves an extensive discussion on the constitutional mandate of the judiciary, the constitutional limits imposed on same, and the various court stripping laws together with analysis of cases and interviews made with key organs. It also addresses the pattern that such court stripping laws established and the implication that can be drawn from such patterns. Chapter five makes focus on the Regulation issued for the administration of employees of the Ethiopian Revenues and customs Authority. It discusses the constitutional legitimacy of the regulation and the power of the authority under the same. Furthermore, it intensively analyzes the regulation in light of the constitution by considering decisions of key government organs as to the right to access to justice and the issue of justiciability of rights under our constitution. The final chapter forwards conclusion and recommendations that summarizes containing the findings in the study and the proposed recommendations to concerned government institutions.

CHAPER TWO
THE RULE OF LAW, SEPARATION OF POWERS AND THE JUDICIARY:
NORMATIVE AND THEORETICAL ANALYSIS

2.1. The Rule of Law in a Nutshell

The rule of law as a political concept has an ancient origin which is believed to exist since the time of ancient Greece. According to some literatures, the ideal was known by another description called “*isonomy*” which was popular expression in the ancient Greece public discourse.¹⁶ It is also believed that the term seems to be older than that of *democratia* (democracy), and was used to signify equal participation of all in the government. Then after, the term, though its naming as “*isonomia*” ceased to be used, has got a great deal of political discourse by the then political philosophers, in particular Aristotle, despite the fact that the ideal continues to be debatable doctrinal concept in the modern politico-legal analysis as well. There is a difference between literatures in this regard, however, that some say the values and principles of the rule of law like trial by an independent jury, equality before the law, and supremacy of the law were importantly recognized as synonymous to and part of the Athenians democracy.¹⁷ Whereas another literature revealed that the Greeks ‘clearly understood’ that the two ideals (*democratia and isonomia*), though related, were not the same.¹⁸

No matter how the Greeks understood the two ideals, what is convincing in both sides is that there was a great submission of the ancient Greece society and, the then philosophers in particular, to the rule of law as a concept that is important in preserving freedom and equal Greece people. For instance, Herodotus expressed his advocacy to the rule of law saying that “*isonomia* is the most beautiful of all names of a political order.”¹⁹ Subsequently, Greece philosophers used the term as one mechanism to counterweight the populist democracy from becoming a source of tyrannical government. To take a condemning statement of Aristotle in his

¹⁶ F. A. Hayek, ‘*the Constitution of Liberty*’ (1959) Chicago, 165

¹⁷ Brian Z. Tamanaha, ‘*On the Rule of Law: History, Politics, Theory*’ (1st ed, 2004) p.7

¹⁸ Supra note 16, it is contended that the two terms were not understood by the Greek as the same. It is provided that Thucydides and Plato speak out and use the term ‘isonomy’ in deliberate contrast to democracy not in justification of it.

¹⁹ Ibid

book, the *Politics*, a government that “centers all powers in the votes of the people cannot, properly speaking, be a democracy: for their decrees cannot be general in their extent.”²⁰ Government that governs by democratic procedure, for Aristotle, is not government under the law and the fact that everything is determined by the majority vote of the people in such system induced Aristotle to regard such government as a government in which everything is determined by the people, not by law.

The contribution to the rule of law is not limited to the Greece rather the ancient Romans have also contributed a lot to the development of the rule of law. Of the many, Cicero’s contribution to the rule of law is the most influential and he upheld the prevalence of the rule of law by condemning those kings who do not abide by the law as a “despot and the most repellant creature imaginable.”²¹ Cicero’s stand for the rule of law is clearly reflected in his statements as follows:

You appreciate, then, that a magistrate’s function is to take charge and to issue directives which are right, beneficial, and in accordance with the laws. As magistrates are subject to the laws, the peoples are subject to the magistrates. In fact it is true to say that a *magistrate is a speaking law, and law a silent magistrate* (emphasis added).²²

As it can be perceived from the paragraph, it is the law that should rule, not those individuals that appeared to be governors, judges and other similar public officials. Like his Greek counterparts, Cicero did not support clear popular democracy.²³ Despite many accounts of the rule of law trace its origin to classical Greeks and Romans thought, its development continued to be relatively undermined during the early medieval periods. The Magna Carta is however, one of the historical documents in the medieval period that contributed to the development of the rule of law and symbolized the fact that the law protects citizens against the tyranny of kings.²⁴ The

²⁰ Ibid

²¹ Tamanaha, supra note 17, p11

²² Ibid

²³ Ibid

²⁴ The term Magna Carta has Latin origin that Magna means “Great” and “Carta “ means pieces of paper. See Ray Stringham, ‘*Magna Carta: Fountainhead of Freedom*’ (1966) 3-6. Clause 39 of the charter is the historical provision

charter was first designed as a simple treaty entered in 1215 between the embattled barons and King John but later became an intangible ideal, definite body of law and a symbol for British Constitutionalism and protection of freedom.²⁵

In the modern times, the rule of law continued to be famous political ideal yet the determination of its precise meaning and scope is unsettled issue. Although the concept is essentially a contested ideal, it has been unanimously advocated by governments from different ranges of societies, culture, economic and political orientations.²⁶ According to Tamanaha, the rule of law appears as the preeminent legitimizing political ideal in the world today, in which most of governments in the world, from the west to socialist, totalitarian to democrats, and developed to developing, plead in the name of the ideal, and it is claimed that none make a statement rejecting the rule of law.²⁷ One may infer from this unanimity of support that the importance of compliance with the rule of law for worldwide government legitimacy, in addition to protecting rights and freedoms, is without doubt.

Although theoretically idealized as a universally agreed standard, the rule of law, implicitly or explicitly, involves contrasting meanings over it. For instance, some argue that the rule of law requires the protection of individual rights others believe that democracy is part of it and many still argue that the rule of law is only and purely formal (that requires laws must be generally set out in advance, clearly, stable and be applied equally to all). The contrasting meanings over the ideal is said to be emanated because of the rule of law becomes a system dependent notion as a result of the deceptive and narrow perceptions it used to have.²⁸ Similar line of argument is

which provides that “No free man shall be taken or imprisoned or diseased or outlawed or exiled or in any way ruined, nor will we go or send against him except by the lawful judgment of his peers or by the law of the land”.

²⁵ William S. McKechnie, ‘*Magna Carta: a Commentary on the Great Charter of King John*’ (2nd ed, 2000) 120-123

²⁶ Supra note 17, p.2

²⁷ Ibid 2-4. For detail in which many top level government leaders including, from Russia, china, Indonesia, and Iran submit themselves to the rule of law though it is not clear in what perception of the concept they are tempting to adhere (formal or substantive conception discussed in subsequent sections). To take a statement of the embattled president, Robert Mugabe of Zimbabwe, he confessed that “only a government that subjects itself to the rule of law has moral right to demand of its citizens obedience to the rule of law.”

²⁸ Gianluigi Palombella, ‘the Rule of Law Beyond the State: Failures, Promises, and Theory’ (2009) 7(3) *Oxford University Press and New York University School of Law*, 453

forwarded by Raz which shows the extravagant nature of the ideal proposing that the rule of law is a political ideal that a given “legal system may possess or lack to lesser or greater degree”.²⁹ This is to mean that it is difficult to deal with the extent and scope of the rule of law and more so if substantive values of laws are required to be addressed. Moreover, the rule of law has been, in most cases, narrowly understood in a sense that government power must be limited by law and subject to it. However, the rule of law taken broadly also means that people should obey the rule and be ruled by it.³⁰

From the historical aspect discussed above however, the rule of law was understood more on its substantive version. As affirmed by Aristotle, Cicero and latter the Magna Carta, the rule of law requires that any government action should be based on the law and such law should be obeyed only when it is a good law. That is to say, a law, in order to comply with the rule of law, must be fair and beneficial to the society and this part is addressed on the subsequent section that deals on the substantive version of the rule of law. Generally, the diverged understandings over the rule of law can be generally viewed from two perspectives; the formal conception of the rule of law and the substantive conception of the rule of law. Thus, under the subsequent two sub-sections a modest attempt is made to analyze the rule of law as perceived from both substantive and formal conception.

2.1.1. The Formal Conception

According to the formal conception, the rule of law is considered as law of rules with which one is expected to comply with no matter what these rules are. This conception of the rule of law does not give concern to the actual content of the laws existing in a legal system. Nor does it provide a requirement as to how the law should be made; by tyrant, democratic majorities or any other ways.³¹ This version of the rule of law in its extreme sense provides that whatever the government does, it should be based on predetermined laws no matter whether the content of the law is just or unjust. It addresses the manner in which the law is promulgated which includes addressing questions like whether the law is promulgated by properly authorized organ in a

²⁹ Joseph Raz, ‘the Rule of Law and Its Virtue’ in Richard Bellamy (ed.) *The Rule of Law and Separation of Powers* (2nd series, 2005) 78.

³⁰ Ibid,

³¹ Ibid 80.

properly authorized manner, was it sufficiently clear to guide an individual's conduct so that enable a person to plan his life, was it has prospective or retrospective application, etc.³²

Another important point worthy discussing is that proponents of the formal conception of the rule of law considered the expansion of administrative functions as a result of the proliferation of the social welfare state is a threat to the rule of law.³³ This is because the fact that the administrative functions of a state increases necessarily calls for the conferral of broad discretionary powers to government officials which is of course a danger to the rule of law, for the very purpose of the rule of law is restraining discretionary power of government [thus tyranny]. In this connection, Hayek was very skeptical that substantive equality and distributive justice which are usually employed by a welfare state inherently run against the rule of law for they inevitably treat people unequally.³⁴ Raz's stand, *albeit* he is advocate of the formal perception, is however different in this regard. He argued that one should be careful in rejecting major social goals in the name of the rule of law and laws should not be criticized because of the social goals they desired to pursue, for the rule of law is meant to enable the law promote the social good.³⁵

This is not, however, to mean that all advocates of the formal version of the rule of law prohibit the conferral of discretion to government. They agreed that government must be granted with discretion for purposes of convenience and efficiency but they contend that such power must be exercised with minimum coercion that has an impact on private citizens and their property which

³² Paul Craig, ' *Formal and Substantive Conception of the Rule of Law: Analytical framework*' in Richard Bellamy (ed,) *The Rule of Law and Separation of Powers* (2005) 96.

³³ In a social welfare state the government, being the main actor in the economy, is busy of providing public goods and services to the people which requires the need to have wider discretion power to make rules now and then to cope up with the changing environment and economic needs; and with potential applicability of the rules in the short run and sometimes retrospectively to achieve some social objectives. This in turn violates the requirement of stability and prospective application of laws under the formal conception of the rule of law.

³⁴ Substantive equality as opposed to formal equality is a notion that requires the treatment of those unequal differently to address the inequalities while distributive justice is a concept which provides that there must be equal distribution of goods across the society which are to be determine based on some standard of merits so that social justice be ensured. See Tamanaha *supra* note 17, 67-69

³⁵ Raz, *supra* note 29, 93

is possible only if the administrative legal rules possess the qualities of generality, certainty, equality together with the reviewability of such coercive powers by the judiciary which is claimed that this is too often absent.³⁶

In this regard, one easily accepts the fact that having administrative rules the quality of generality, certainty, and equality plays paramount role in constraining the abuse of discretion. However, these qualities of a given law cannot be taken as sufficient guarantees of rights and freedoms even if there is a legal framework for the reviewability of the action of the government by an independent judiciary, unless and until the substantive content of the legal rules are designed in a way to constrain coercive power. This is because if the content of the law is of evil and unjust, the formal requirements of the rule of law will not have any means to guarantee rights. Nor does the judiciary through its review power will ensure constraining discretion. This seems to be true because the power of the judiciary may not be seen differently from the power the law itself has. That is to say, the judiciary is, as Chief Justice Marshall of the US Supreme Court confessed, “simple instrument of laws and can will nothing”.³⁷

There are arguments by many theorists that the formal conception of the rule of law in the modern day is in any event increasingly unattainable and is defective. Opponents of the formal version of the rule of law provide that this view of the rule of law as expounded by A.V. Dicey and more by Hayek is defective and may comply with the conception of the ideal by authoritarian regimes. This is to say, a non-democratic legal system based on the denial of human rights, racial segregation, sexual inequalities, etc may comply with the formal requirements of the rule of law (generality, certainty, clarity and prospectiveness).³⁸ Its critics relates the formal view of the rule of law with a concept called ‘rule by law’, a situation where the law exists not to restrain government power but to serve the government achieving its ends.³⁹ This is true if one looks at the situation where law is used by governments as an instrument of

³⁶ Tamanaha, supra note at 17, 67

³⁷ Ibid 64.

³⁸ Raz, supra note 29.

³⁹ Tamanaha, supra note at 17, 92-93

oppression like what is used by the Nazi in Germany and the pro-apartheid regimes in South Africa.⁴⁰

Furthermore, the formal view of the rule of law is being criticized since it complies and ultimately reinforces the principle of legality in criminal cases which simply requires that laws must be prospective, certain, equally applicable, and decisions must be made according to predetermined principles of law while the rule of law in its substantive side is far beyond the principle of legality.⁴¹

2.1.2. The Substantive Conception

So many scholars with liberal conviction [advocates of the formal conception of the rule of law] wrote that the rule of law as an ideal denotes a government of ‘law’, whose laws are pre-established, certain, prospective, and equally applicable to all. This still holds truth in it but what law is we are referring to as a ‘law’? A government may act in certain way which affects the freedoms and rights of individuals based on pre-established laws of parliament. Does such act of government always hold legitimate and just when seen in light of the rule of law for the mere fact that the law is made based on the procedures and requirements suggested by advocates of the formal version of the rule of law? For one with the conviction of the formal conception of the rule of law, the answer is likely to be of two folds. For the question of legitimacy, the answer is yes because the law is enacted through the appropriate procedures, by the appropriate authority, and possessing the qualities of a law under the formal conception. Concerning the justness of the law however the answer is different. Advocates of the formal conception admit that laws which are consistent with the rule of law as perceived in its formal version may not be good law. Joseph Raz critically pointed out this scenario saying, in its formal sense, “the law may institute slavery without violating the rule of law.”⁴² In fact, those with formal conception of the rule of law do care about the content of the law but they still insist to say that the content of the law ‘is a

⁴⁰ Assefa Fiseha, ‘the Concept of Separation of Powers and Its Impact on the Role of the Judiciary in Ethiopia’ in Assefa Fiseha and Getachew Assefa (eds.) *Institutionalizing Constitutionalism and Rule of Law: towards constitutional practice in Ethiopia* (2010) 9.

⁴¹ John De Waal, Iain Currie and Gerhard Erasmus, ‘*the Bill of Rights Handbook*’ (4th ed, 2001)10.

⁴² Raz, *supra* note at 29.

matter of substantive justice, and the substantive justice is an independent ideal, in no means part of the ideal of the rule of law.”⁴³ Raz’s premise in this regard is explanatory:

If the rule of law is the rule of *the good law* then to explain its nature is to propound a complete social philosophy. But if so, the term *lacks useful function*. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph. The rule of law is a political ideal which a legal system may lack or possess to a lesser or greater degree. That much is common ground. It is also to be insisted that the rule of law is just *one of the virtues* by which a legal system may be judged and by which it is to be judged. It is not to be confused with *democracy, justice, equality (before the law or otherwise), human rights of any kind and respect for the persons or for the dignity of man* (emphasis added).⁴⁴

Raz’s articulation in the above paragraph is that even though it is understandable to say that laws must be just, their contents be morally acceptable and should contain individual rights, this is by far not the concern of the rule of law, but may be the concern of other virtues. That is why he pleads that the rule of law is one of the virtues that a legal system may be judged, which is meant to say that other virtues (like democracy and human rights) may be used to make the substance of a law just, morally defensible and inclusive of individual rights. To him, requiring the rule of law to include the determination of the substantive goodness or otherwise of a law will have the effect of ceasing the ideal to function as an independent political theory.⁴⁵

However, for those with substantive view the response for the question raised above seems to be different and qualified. Accordingly, advocates of the substantive conception, also called the rights conception, go beyond what is provided under the formal conception of the rule of law. In addition to the formality requirements, the rule of law should also require and determine the content of the law, i.e. whether the law is good or bad, whether or not it protects individual rights. This version of the rule of law is developed as a result of disagreement on the conception of the rule of law by proponents of the formal view. According to the substantive view,

⁴³P. Craig, *supra* note 32, 105.

⁴⁴ Raz, *supra* note 29, 77-78

⁴⁵ *Ibid* 77-93.

understanding the rule of law from the formal conception view is imperfect and in many ways comply dictatorial regimes. Moreover, it is open to the rule by law and distortion of the rule of law ideal by authoritarian regimes. The substantive perception of the rule of law better incorporates the classical understanding of the ideal in looking what the content of the law should be. Aristotle in his classical work puts that the “laws, when good, should be supreme.”⁴⁶ In fact, determining how just is just is difficult question that one faces when dealing with the substantive content of the law. But if we make a recall to the classical conception of the rule of law, Cicero tries to determine the justness of a law. He proposed that a law is just if such law is made in compliance with natural justice.⁴⁷ For him, law is about making distinction between just and unjust based on the natural law principles and he concludes a law which is unjust is not a law.⁴⁸

One may still question the stand of the liberal/formal conception of the rule of law regarding their neutral stand on the content of the law. The famous liberal theorist Dicey argued that there are three aspects of manifestations of the rule of law of which the one is important here; lack of arbitrariness on part of the government.⁴⁹ The question, thus, follows, whether Dicey in his conception of the rule of law touches the need to see the substantive content of the law. One may insist to say that when Dicey uses the term ‘arbitrary’ also connotes the need to look the other side of laws other than the formal version of the ideal. To make the issue clear, what does the word ‘arbitrary’ refers to if it does not have any connotation as to the content of the law? In fact, arbitrary power is a difficult notion in which the rule of law cannot bear a direct extent of it. David Maxwell described arbitrary power as “a power of the [executive] either to interfere with the liberty of the subject in a manner *unrestrained by law* or *with a law so wide*”⁵⁰(emphasis added). In a similar vein, it is said that whether or not an action or law is arbitrary depends not on the source of the authority but on whether it is in conformity with pre-existing general principles

⁴⁶ Tamanaha, *supra* note at 17, 9.

⁴⁷ *Ibid* 11.

⁴⁸ *Ibid*.

⁴⁹ Hilaire Barnett, ‘*Constitutional and Administrative law*’ (7th ed, 2009) 62.

⁵⁰ David Maxwell Fyfe, ‘the British Courts and Parliament: The Judiciary in the British Constitution’ (1949) *American Bar Association Journal* 374.

of law.⁵¹ The definitions, albeit the former is made in light of the executive, may give us a clue that determination of arbitrariness of a government involves looking at both the formal and substantive aspect of a law and in particular, arbitrary power is far broader than the rule of law conceived in its formal version.

The above discussion as to the meaning and, may be the scope of arbitrariness may not induce one to conclude that Dicey intended to give a place to the relevance of the substantive aspect of a law. This is because arbitrariness of a law or action of a government for the liberal (formal) theorists may mean different. Hayek, one of the famous liberal theorist, for instance defines the notion in terms of equal applicability of laws by articulating that “arbitrariness, again, is not whether the source of the order or its purpose are legitimate, but of whether or not the same requirement applies under the same circumstances to all other people.”⁵² This understanding of the rule of law refers to the general equal applicability of laws enacted by the law maker to all citizens irrespective of whether the law is just or unjust. One may question such stand of the rule of law that how equal applicability of laws can be realized unless the law is substantively designed to ensure the equal applicability of same. Worthy to mention, Hayek in an article on *Freedom and the Rule of law* reflects a clear deviation from the traditional formal conception of the rule of law which he used to say that the rule of law should not be understood in its narrower sense synonymous to the principle of legality. After quoting a statement by Aristotle that a law which is merely passed by the majoritarian procedure of parliament as not a government of laws but of men, he stipulates the following statements in this connection:

If this [government of men] is to be avoided, the legislature himself must be guided by certain general principles about what the law ought to be. Yet the ultimate legislature cannot be bound by any laws in the technical sense of the word law, because he can change any law. The principles which guide the legislature if the rule of law is to be preserved must therefore be *meta legal principles, principles outside the law itself; they must be of the nature acceptable political ideals , a firm tradition*

⁵¹ Supra note 1, p169

⁵² F. A. Hayek, ‘Freedom and the Rule of law’, in Richard Bellamy (ed.) *The rule of Law and the separation of Powers* (2nd series, 2005)149.

which prevents the legislature from infringing the rule of law by the laws which it passes (emphasis added).⁵³

A reading of the paragraph may give an inference that the fact that the legislature is required to employ meta-legal principles and acceptable political ideal demands for the need to have laws with substantive fairness in order to be consistent with the rule of law. Furthermore, Hayek argues that the real essence of the rule of law and the purpose it seeks to serve is to constrain discretion and arbitrariness of authorities.⁵⁴ Thus, when one looks on the preceding statements made by the said advocates of formal conception of the rule of law, he may safely say that submission to the need of analyzing the substantive content of the law, in particular, when we make a look at his assertion that “principles outside the law itself” are necessary to the preservation of the rule of law. There are however writers who argue that the terminologies used by Hayek are not intended to refer the substantive aspect of the rule of law rather he employed these terms in light of the formal requirements though how the terms “arbitrary and discretionary” powers are to be determined in the absence of substantive standards is unsettled issue.⁵⁵

No matter how the terms are intended to be used, the stand of advocates of the substantive version is that if adherence to the principles equal applicability, certainty, prospectiveness, predictability, and generality of laws are not irrelevant, they are not sufficient by themselves to restrain discretionary power of government and ensuring the rule of law unless they are substantiated by substantive considerations.

Advocates of the substantive conception of the rule of law further argue that the importance of looking at the content of the law when one deals with the rule of law. They articulate that citizens have moral rights and duties against the state in general in which the latter is expected to recognize and protect the rights in positive law. The protection of the rights in turn requires one to specify what those rights are, which in fact involves the determination of substantive content and scope of those rights. Thus, they continue to question those with substantive conception saying whether or not individuals will have a moral right, in a court of law, to receive what they

⁵³ Ibid 148.

⁵⁴ Ibid 152.

⁵⁵ Craig, supra note 32, 99-100.

demand if laws in country are fundamentally unjust.⁵⁶ After all, they argue, adjudication of cases, in particular common law adjudication, involves the application of rules and principles which will often requires courts recourse to consideration of substantive justice and fairness which is obviously beyond the formal conception of the rule of law.⁵⁷

From reading of the above discussion, thus, it seems sound to say that ensuring the rule of law involves addressing the substantive aspect of the law. The contents of a law in the substantive conception includes, protection and entrenchment of fundamental rights, justiciability of the rights before courts or similar institution, and the overall substantive fairness and justness of a law as measured by extra-legal principles and acceptable political ideals. Besides, it is said that constitutional rights are embedded within the substantive conception of the rule of law that is intimately bound up with democracy and legitimate exercise of government power. Therefore, by adhering to the formal requirements of the rule of law alone will make the protection of rights and constraining power less achievable.

2.2. The Rule of Law, Judiciary, and Separation of Powers: Making the Nexus

It is apparent for everyone that there is direct correlation between and among the three political ideals. Even though the realization of the one does not necessarily require the achievement or existence of the other, it is self-evident that the ineffectiveness of any will likely result in the malfunctioning of the other. For instance, the preservation and promotion of the rule of law is directly influenced by the degree of independence of a judicial system in a given country. A discussion on the ideals is in order.

2.2.1. The Judiciary and the Rule of Law

The rule of law, be it in its substantive or formal version, requires the existence of an independent judiciary, which is vested with the power to interpret the constitutionality or otherwise of laws and government actions. Dicey, for instance considers the existence of an independent judiciary with the power to determine the rights of private persons in a case brought before them is the corner stone of the rule of law.⁵⁸ The role of courts in preserving the rule of

⁵⁶ Ibid 106-108.

⁵⁷ Ibid 109.

⁵⁸ Tamanaha, supra note 17, 63-64.

law is paramount if one considers the proliferation of government functions in recent times in particular by welfare states which necessarily results in the conferral of broad discretionary powers to administrative agencies. The conferral of discretion to administrative agencies in turn potentially and inevitably results in unreasonable violation of fundamental rights and freedoms. Here it is not to make whether or not discretion to government is necessary. Rather how the potential abuse of fundamental rights and freedoms by the exercise of discretionary powers are to be preserved and thereby realizing the rule of law.

The usual mechanism which is believed to serve the protection of fundamental rights and preserving the rule of law is judicial review of legislations and administrative acts for their constitutionality by an independent tribunal. The power to review the constitutionality of legislations is vested on different institutions in many countries. In some countries such power is given to the Supreme Court, in others to special constitutional court, still others establish unique organs for the same purpose; yet referendum may be used as a means to react to the constitutionality of laws passed by the parliament.⁵⁹

The judiciary is one of the main institutions of government in realizing the constraints of the constitution up on government. It is repeatedly said that the judiciary is established to serve as a counter majoritarian purpose. That is to say, the judiciary preserves the rule of law by declaring laws unconstitutional when they are found to be contrary to individual liberties recognized by higher laws, and in particular, it protects minorities from being abused by the laws passed through the majoritarian democracy. This is possible if there is an independent judiciary or similar organ with a power to test the constitutionality of laws and actions taken by the other branches. Despite the attachment of the importance of the judiciary with the protection of fundamental rights and serving as guardian of the rule of law, it does not escape from criticisms in relation to its review power. The critics are stronger concerning the power of courts to review

⁵⁹ Such power is give to the Supreme Court in the USA, India, and Canada; and to Constitutional Courts in Germany and South Africa while the Constitutional Council is serving the similar, if not the same, purpose in France. In Ethiopia the power is given (arguably) to a second chamber, the House of Federation, as assisted by the Council of Constitutional Inquiry. Referendum is used usually in the Swiss jurisprudence to settle constitutional issues.

legislations than executive acts and on parliamentary systems than in presidential systems.⁶⁰ One of the grounds for the critics is based on the nature of the power of the judiciary.

According to the mechanical theory of the judicial function, judicial power is held to be legitimately exercised only when the judge gives effect to the will of the legislature as reflected in the statute.⁶¹ This theory expounds that the judiciary shall not be given a power to invalidate laws passed by the legislature. The argument is forwarded in light of the separation of powers theory according to which the legislature makes the law, the executive administers it, and the judiciary apply it to a particular cases and more so complies with Montesquieu statement that “the judges are but the mouth which pronounces the words of the law.”⁶² The theory does not prohibit interpretation by courts; for application of laws necessarily involve interpretation of same, rather it is meant to say that under the pretext of preservation of the rule of law the interpretation power of courts shall not be made in any sense a law making activity for the nature of judicial power is not law making.

The mechanical theory is however faced with counter argument on the reason that the theory provides nothing when determining the intention/will of the legislature is difficult. It is admitted that interpretation is necessary only if there is a problem in determining the clear intention of the legislature or if there is a need to fill a gap in a law. In the presence of such facts, thus, strict adherence to the mechanical theory of judicial function is said to be hardly plausible. Critics of this theory strongly argued that if judges are considered a mere mouth through which the law is to be pronounced, judges’ function is an administrative, not judicial.⁶³

⁶⁰ The separation of powers based defense against judicial review is stronger in parliamentary systems than in presidential systems on the reason that in the former once a power is separated may not allow interference in each others’ function. This leads to the conclusion that there is no checks and balance between the branches, in particular, between the legislature and the judiciary. Accordingly, judicial review is considered as encroachment on the separation of powers. It is said that this model of separation of powers is adopted in France. In contrast, in presidential systems, such as the United States, the ideal is understood that each branch is autonomous with some degree of interference through check and balance of which judicial review of legislations is one. See generally Geoffrey Marshall, ‘*Constitutional Theory*’ (1971) 99. See also Section 2.5 below.

⁶¹Vincent M. Barnett, ‘Constitutional Interpretation and Judicial Self-restraint’ (1940) 39 *Michigan Law Review* 219

⁶² *Ibid*, 161

⁶³ *Ibid* 166.

The other critics of review power of courts with a view of preserving the rule of law are based on the claim that judicial power has democratic deficit. It is common for many that the rule of law is often taken and understood together with democracy and sometimes these terms are used interchangeably in the daily public discourse. However, the ideals are not, if not unrelated, the same and yet there are arguments by advocates of both ideals that one is a threat to the other. In fact, absolute adherence to one of the ideal may have a negative impact on the other but there is still a proposition that says both ideals may be consumed side by side.

As discussed above, the recognition and protection of individual rights is considered as important aspect of the rule of law. Such recognition of rights is also one of the manifestations of constitutionalism in that constitutions by providing lists of fundamental human rights tries to curb the evil exercise of power by government. It is not true that rights are recognized in constitutions to be restricted nor are they self applying, instead they are recognized to be protected and require an institution which enforces them and it is the judiciary, *albeit* not the only, that is vested with such power. It is, therefore, taken for granted that the judiciary is considered as an ultimate guardian of the fundamental rights and freedoms by limiting the power of the majoritarian legislature through judicial review. However, there is this conception that the recognition of rights and the resultant empowerment of the judiciary to question the constitutionality of legislations have antidemocratic implication. A question that often follows this regard is that why should courts through their unelected [thus unaccountable] judges have the power to invalidate laws passed by democratically elected legislature?

However, one may forward the following general justifications in favor of judicial review. First, courts from the very outset are constitutionally designed to serve a counter majoritarian role.⁶⁴ Entrusting the protection of individual rights to democratically elected body [because this is the possible option we would have in the absence of courts or similar institution] is self defeating. In this connection a statement by Alexander Hamilton is of important value:

Constitutional interpretation by the courts does not by any means suppose the superiority of the judicial to the legislative power. It only that the power of the people is superior to both; and that where the will of the legislature, declared in its

⁶⁴ Tamanaha, *supra* note 17, 105.

statutes, stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.⁶⁵

The statement by Hamilton is made in relation to a constitutional order where there is a written supreme constitution and there is no legislative supremacy; thus, cannot be taken for granted to justify judicial review in countries where the legislature is supreme over the other branches. But what can be easily inferred from Hamilton's statement above is that it is not the judiciary that is counter-majoritarian rather the constitution, through the institution of the judiciary, serves a counter-majoritarian role. In a similar argument, it is said that in case judicial review is constitutionally vested to courts, its democratic legitimacy is of greater than that of the legislations. There is this presumption that constitutions are usually adopted through explicit and rigorous democratic procedure in which both majority and minority interests are reflected. If this presumption is convincing, it can be said that the constitution is, at least at the time of its making, with better "democratic pedigree" than legislation.⁶⁶

From this one may draw a consequential conclusion that judicial review of legislations based up on the constitution is legitimate and the fact the constitution is with greater democratic legitimacy reveals the fact that what the judiciary doing is enforcing the supreme law which also contain the will of the majority, hence democratically legitimate and not deviant.⁶⁷ However, this line of argument is contended based on the reason that it is inappropriate to disregard the interest of the present majority to uphold the will of the past generation as enshrined in a constitution.

⁶⁵Eugene V. Rostow, 'the Democratic Character of Judicial Review' (2003) 66 (2) *Harvard Law Review* 196.

⁶⁶ Luc B. Tremblay, 'General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law' (2003) 23 (4) *Oxford Journal of Legal Studies* 531

⁶⁷ Ibid, such assertion is made based on the fact that constitutions are explicitly adopted through all the democratic processes (drafting, deliberation, ratification, promulgation, etc,) either through direct popular participation or through representatives of the majority and is obviously to be approved by the will of the majority. This gives the constitution a higher status in the hierarchy of laws.

The argument here is the constitution can be held to be supreme so long as it can be interpreted in a way to address the pressing needs of the generation at the time of its interpretation.⁶⁸

Second, from constitutionalism perspective democracy is not the rule of the people but always the rule of the people within certain predetermined channels and prearranged procedures which are possible only if there is the rule of law.⁶⁹ Furthermore, individual rights are prerequisites to preserve the integrity of democracy, for it is only free people that can exercise democracy.⁷⁰ Here Tamanaha summarizes the justification in a very explanatory manner saying “...democracy is therefore restrained by individual rights [thus the rule of law] for the greater good of democracy.”⁷¹ After all, according to some commentators, the protection of fundamental rights like freedom of worship and assembly, right to life, liberty, free press, and freedom of expression are not dependent on the outcome of democratic election rather are vested with every one for the reason of being a human being.⁷²

If not, strict adherence to the ideals of democracy and democratic institutions will inevitably result in the creation of ultimate power holder who is bound by no rules whatever, but who can make whatever rules it needs in order to achieve those aims he has to achieve to retain power and

⁶⁸ Ibid -9-10.

⁶⁹ De Waal, Currie and Erasmus, supra note 41, 9

⁷⁰ This is true because a man is free only if his individual rights are protected which the rule of law seeks to achieve and it is only free man that can exercise democratic rights such as self-determination. A man whose freedom of expression is denied cannot, for instance, exercise the right to self-determination, which is usually, (in fact it is also a right) a democratic question. Ultimately, it is only if there is an impartial and independent tribunal, usually the court, which is vested with a power to safeguard the rights so that that both democracy and the rule of law can be enhanced.

⁷¹ Tamanaha, supra note at 17, 104

⁷² Eugene, supra note 65, 197. According to this view, fundamental rights may not be submitted to vote and the role of the electorate should be limited to the selection of quality judges and the substance of their instructions through their representatives, never to decide the outcome a particular litigation. This view, though it has a truth in it, seems to be unrealistic for there are many practical necessities that forces for the limitation of fundamental rights which are usually decided by the parliament based on majoritarian democratic procedures subject to compliance with higher law.

win the majority in its support.⁷³ According to some writers' view such as Hayek, the so called democratic system under which human beings are now living is precisely that law has become subservient of the government rather than the other way round. They further add that government in the present system no longer is in any sense under the law, for what the so called law are rules which can be adjusted from day to day in whatever manner the ruling majority thinks proper to achieve what it wants.⁷⁴ What is important to not here is that the arguments did not intend to propagate that democracy is totally unnecessary; instead it is accepted that democracy is one of the most important safeguards of freedom. However, it is contended that democracy can easily turn tyrannical, for it favors, not only the majority, but special interests which frequently treats people unequally that is obviously against the rule of law ideal.⁷⁵ The antithetical conception of democracy with individual rights [thus the rule of law] is not Hayek's nightmare alone rather none of the classical philosophers (Aristotle, Plato, and Cicero) advocate popular democracy which they believe is "potentially the rule of the mob...susceptible to seduction by demagogue."⁷⁶

Furthermore, empowering the judiciary with review power is justified by making analogous argument to the justifications given in relation to the delegation of legislative powers to administrative agencies. The fact that the legislature, for reasons of convenience, expertise and

⁷³Kurt R. Leube, 'Hayek's Perception of the Rule of Law' (1976) 20(2) *Orbis Journal of World Affairs* 106, Of important value here is when Hayek said laws are simply the will of the majority; he is arguing taking in to consideration those laws passed by the common law, usually the UK, sovereign parliament. It does not seem that this statement of his is made taking in to account written constitutions because it is hardly convincing to say that constitutions are majoritarian and can be changed any time the legislature wishes. To take a note in this regard, the various bill of rights entrenched in many written constitutions are designed to be counter-majoritarian.

⁷⁴ Ibid

⁷⁵ Tamanaha, supra note at 17, 71. However it is important to mention that when Hayek reflects his stand as to the risk of majoritarian democracy to the rule of law it is not with the view of anticipating the promulgation of potential laws that are substantively unjust to individual or minority rights. This is not his stand for he is advocate of the formal conception of the rule of law. Instead, he meant that individuals should not be instruments of government policy which are designed to serve its momentary purpose for the mere fact that they are passed through the democratic legislative process. The democratic process to be in line with the rule of law, according to Hayek, shall therefore comply with the requirements of generality, certainty, equal applicability, and predictability (prospective effect). See also in this regard Hayek, supra note 52, 148-151

⁷⁶ Tamanah, id , 10-11

complexness of some cases, often create and empower unelected members of administrative agencies may be used to say that courts are also serving analogous role in case there are “hard cases.”⁷⁷

Thus, it could be said that the commitment to certain procedural and substantive requirements/constraints on the power of the majority that are inherent in constitutionalism [also in the rule of law] make democracy stronger not weaker. However, the rule of law is endowed with conceptual independence from democracy in that it applies to and confronts with any form of power or government.⁷⁸ That is to say, the fact that, for instance, a given system ensures democracy may not necessarily secure the rule of law, for it is possible for some non-democratic governments to comply with the rule of law, especially in its formal version, better than those democratic systems. It is, therefore, because of rights deficit potential of democracy and its institutions that calls for the existence of another branch, the judiciary, with the power of questioning the laws passed according to the democratic procedure. This is not however to mean that courts power to review legislations is without limit. It is admitted that the power of the judiciary to review the constitutionality of legislations must be exercised without usurping the inherent power of the law maker and to the extent necessary for the protection of fundamental rights and freedoms [thus the rule of law]. In fact, this may raise an issue as to the scope of the review power of courts, i.e what extent of review power is necessary, and it may involve the question of borders of justiciability and the fact that which issues are justiciable and which are not varies from country to country makes the issue very complicated.

The preceding discussion was more of about the contestation of the review power of the judiciary concerning the constitutionality of laws by the law makers which is most contested in those countries where there is parallel legislative-judiciary arrangement. The role of the judiciary in preserving the rule of law through review power of statutes in parliamentary systems is however minimal. This is because in such systems there is the doctrine of parliamentary supremacy (as discussed more in subsequent sections) in which the judiciary is subordinate to the

⁷⁷W. J. Waluchow, *A Common Law Theory of Judicial Review* (2006) 135, “hard case” in this regard is to mean those cases which are numerous and complex in their particularities that an already overloaded legislature would be swamped would it be empowered to them all.

⁷⁸ Palombella, *supra* note at 28, 445.

parliament and by no means can the ordinary courts review laws passed by the parliament unless special tribunal with similar function is established or such power is constitutionally vested to the judiciary.⁷⁹

The preceding discussion is about judicial review of laws enacted by the legislature. The argument regarding judicial review of executive acts is however different. In principle, judicial review of acts/decisions of the executive is not contested. This is because the counter-majoritarian argument which is strong defense against review of the constitutionality of legislations cannot be raised here for the executive in general and administrative agencies in particular are not necessarily democratic institutions. Nor does the principle of parliamentary supremacy (in parliamentary systems) appear to be a bar for courts to review executive action since in most cases the executive is not, at least legally, in a superior position to that of the judiciary in the horizontal hierarchy of powers.⁸⁰

Judicial review of executive action may however be contested at least for two reasons. One of the reasons is when there is court stripping law, i.e. when there is a legislative enactment which precludes courts from reviewing executive acts and decisions made within its internal appellate tribunals. Whereas the other reason is when there is standardless delegation by the legislature to the executive.⁸¹ In both cases, it is the legislation which gives the authority to the executive that is to be questioned for its appropriateness. What follows from this is whether or not a law maker

⁷⁹ One may take the UK as an example where the parliament is supreme and courts may not question and quash the constitutionality of statutes. In fact, there is a recent development since 1998 where courts are empowered to test the compliance of statutes with the European convention of Human Rights following its incorporation through the Human Rights Act; yet the power of courts is, not to decide invalidation, but limited to the declaration of incompatibility of a statute with the EU human rights law. Similar formula is available in Ethiopia where the House of Peoples Representatives (legislature) is constitutionally declared to be the highest organ of government; hence the judiciary cannot test the constitutionality of legislations. What makes our system different from that of the UK parliamentary supremacy is parliamentary supremacy in Ethiopia is relative in that it is applicable only in relation to the other two branches of government. The supreme parliament is still subordinate to the constitutions.

⁸⁰This is easily inferable from the fact that in UK where there is an extreme case of parliamentary sovereignty, courts are entitled to invalidate acts of the executive when they are found to be inconsistent with parliamentary statutes.

⁸¹Richard E. Levy and Sidney A. Shapiro, 'A Standards-Based Theory of Judicial Review and the Rule of Law' (2005) *beppress Legal Series*, 41-43

has a power to make laws which divest or at least compromise jurisdiction of courts to review executive action. Detail discussion on this and other related issues is made under the subsequent chapter⁸² but what is worthy to note here is executive acts are fundamentally subject to review of courts for their compliance with their parent legislation and the constitution.

2.2.2. The Rule of Law and the Separation of Powers

Needless to say, the rule of law is a must requirement for the protection of individual freedoms and rights, and advancement of limited governance. One of the various means of achieving these ends of the rule of law is the principle of separation of powers. The original theory of separation of powers provides for the division of government powers between the two organs, the legislature and the executive, leaving the judiciary out.⁸³ Latter however, Montesquieu advocated for the tripartite separation of powers among the three branches. He was totally against the concentration of power in a single government branch because he had the fear that if any of government powers are blended together in one man, there is no liberty because the same organ makes tyrannical laws will execute them tyrannically.⁸⁴ He confesses as follows:

Liberty is threatened when one branch of the government acquires more than one of the powers of government and all the more so when it acquires all three of the powers; so that in order to have liberty it is necessary that law be made by a legislative body, but administered by a separate executive, and applied by an independent judiciary.⁸⁵

What Montesquieu insisted to say is, in order to promote accountability of government, and protect the fundamental freedoms of citizens from the arbitrary will of the government it is essential to keep separate the legislature's power to make laws, from the executive's power to administer laws, and the judiciary's power to hear disputes according to the law. Montesquieu believed that political power is always distributed; he said that "it is distributed under a despot as much as in a republic"; but if freedom is to exist, power should be organized or distributed "in a

⁸² See generally chapter three

⁸³ R. Albert, *supra* note 2, 210.

⁸⁴ *Ibid*

⁸⁵ H. Kinnane, *supra* note 1.

certain way”.⁸⁶ Interestingly, Montesquieu argued that it is not correct to say that freedom is greater for the mere fact that the rulers have small power rather it depends on how power is distributed and limited.⁸⁷

Though the doctrine of separation of powers assigns the three powers to three distinct government branches, such separation of powers is not intended to be air-tight instead some degree of checks and balance within each branch is necessary. James Madison in his federalist paper provides that the separation of powers as expounded by Montesquieu is not a hermetic separation of government departments but the different branches were allowed to have a ‘partial agency’ or ‘control’ over each other so long as the whole power of one department was not in the same hands which possess the whole power of another branch.⁸⁸ Thus, for it is not possible, and of course unnecessary, to have a flawless, strict separation of powers, certain degree of interaction among the government branches is warranted. The question is not, therefore, whether some degree of interaction is permitted at all but in which cases, under which conditions, and to what extent such breach of the ideal of separation of powers are to be tolerated.

It is not the purpose of the paper to discuss on each and every aspects of Montesquieu understanding and proposition of the separation of powers. However, his idea on the doctrine is widely imported by many legal systems of which the founding fathers of the United States constitution are the prominent borrowers of the ideal. Many of the Federalist Papers contain articles on the importance of the doctrine in preserving freedom in almost similar way as Montesquieu expounded.

Many constitutional law scholarships today submit that the principle of separation of powers is at the heart of the rule of law and constitutionalism. This is because it serves various values of the rule of law of which the following are most important for the purpose of the paper. The first value is that separation of powers serves guarding against government tyranny. A tyrannical

⁸⁶ Barron De Montesquieu, ‘Man and Society’ in Carl J. Friedrich (ed.), ‘*An Introduction to Political Theory*’ (1967) 277

⁸⁷ He asserted that a despot is very weak because his power is the most uncertainly distributed to subordinates which results in uncertainty on the latter as to what is expected from them and may do whatever they want. This in turn makes the despot the victim of the “clumsiness, dishonesty and stupidity” of his subordinates. See Ibid, p276.

⁸⁸ James Madison, ‘The Federalist No.47’ in Jacob E. Cooke ‘*the Federalist Papers*’ (1961) 325-326

government is a government with unconstrained coercive authority that retains the power to limit popular choice. In this regard one writer argues that “it is for nothing but in the interest of freedom and liberty that the powers of government must be and supposedly are, separated and are kept separated”.⁸⁹ Thus, separation of powers provides a structural guarantee of citizens where by government authority is constrained and reduced by dividing it among the different branches yet with some degree of check and balance among themselves. Another crucial value which emanates from the fundamental principle of the rule of law is the doctrine of separation of powers prevents arbitrary government.⁹⁰ Even though the rule of law have various connotations and meanings for the reasons already discussed above, at its bottom it reflects a core requirement of legal regularity under which government actors derive their authority from and are bound by the law. Whether the government actors are acting within the authority they are entrusted by the law or established principle of law is to be determined, not by those bodies in question, but by separate government branch, the judiciary, which can be better upheld within the separation of powers principle.

The third point where the separation of powers serves the ends of rule of law is ensuring the independence of the judiciary,⁹¹ which is consider as guardian of the rule of law. This is true because the separation of powers provides a shield for the judiciary against interference from the other branches in the judicial process. Fourthly, the ideal defends against legislative supremacy.⁹² It is evident that the legislature, though following the formal democratic procedures, may issue laws that have an eminent and adverse impact on fundamental rights or interest of minorities. This value is however, as will be discussed later, hardly achievable in parliamentary systems since the legislature/parliament is superior to the other two branches. Finally, it promotes government efficiency, since there is division of labor and no branch is allowed to unduly interfere in the affairs of the other branch. This purpose is however contested for two reasons; a) the separation of powers from the very outset, as Justice Brandeis of the US

⁸⁹H. Kinnane, *supra* note 1.

⁹⁰ What is arbitrary government is difficult to determine as discussed above. It depends on how the rule of law is perceived, formally or substantively.

⁹¹ Montesquieu, *supra* note 86.

⁹² R. Albert, *supra* note 2, 212.

Supreme Court argued, was not intended to promote the efficiency of government, but to avoid arbitrary power.⁹³ Second, the principle in its pure conception is considered to be against government efficiency because the fact that there is inevitable friction between one another may result an impasse or deadlock between each branches.⁹⁴

However, it is important to note here that although the theory of separated powers is sustained by the rule of law, the rule of law can exist without the need to strict adherence to separation of powers if there is commitment to pursue the democratic and constitutional values served by the separation of powers. Regarding this, it is stated that “separation of powers is not sacred end by itself rather is a means to an end, liberty. What is sacrosanct is rather liberty.”⁹⁵ The assertion is sound if one considers the fact that the ideal has fewer adherences in parliamentary systems and despite of the absence of fullest application in its conventional understanding, the systems serve some of its core values as it is discussed in the subsequent sections.

2.2.3. Judicial Review and Separation of Powers

In the preceding paragraphs, the role of judicial review and separation of powers in ensuring and preserving the rule of law and individual liberties is briefly established. At this point, an attempt is made to see what contributions these principles owe each other. This is because there is an argument that judicial review may end up to be intrusive of the doctrine of separation of powers while there is a related conception which says that separation of powers contains mechanisms necessary to ensure the rule of law of which judicial review is the one.⁹⁶

It is taken for granted that the independence of the judiciary in any system is a critical aspect of whether the system will abide by the rule of law and recognize human rights. Constitutionalism and constitutional supremacy is nothing unless there is an independent judiciary established to enforce these constitutionally entrenched rights. The rule of law requires the existence of an

⁹³ Eugene, supra note 65, p199.

⁹⁴ Ackerman, supra note 5, p406. He argues that the principle in its pure understanding may result an impasse in case the house and the president are dominated by different political parties. The impasse, according to Ackerman, may result in constitutional breakdown.

⁹⁵ Kinnane, supra note 1.

⁹⁶ E. Levy and A. Shapiro, supra note 81, p 40.

independent and impartial organ, usually the judiciary, with a power of invalidating legislations when they are not compatible with the rights of individuals as recognized by supreme law. The importance of both in relation to government according to law and in the protection of liberty against the executive is the basic feature of judicial independence. This independence of the judiciary is usually manifested through the appointment, salary, tenure, removal of the judges and the budget allocated to the institution.⁹⁷

The independence of the judiciary can only be realized if the judiciary is functionally, institutionally, and in its personnel kept separate from the legislative and the executive organs.⁹⁸ This is possible only when there is genuine adherence to the principle of separation of powers by all government branches. On the other hand, a threat to separation of powers may arise when a branch aggrandizes itself by encroaching up on or usurping functions that are more appropriately performed by another branch.⁹⁹ Any threat on separation of powers can, therefore, be regarded as a threat posed on the independence of the judiciary the resultant effect of which is the deterioration of the judicial function in reviewing acts of other branches of government. It is important to note here that it is the constitutionally mandated independence that makes the choice of the judiciary to hold the Executive Branch in check (through review) legitimate than the appellate tribunals within the executive.¹⁰⁰

Despite the fact that separation of powers contributes a lot in realizing the practicability of judicial review by ensuring the independence of the judiciary, there is a parallel argument which provides that the unfettered empowerment of the judiciary to review the compatibility of laws and acts passed by the other branches with a supreme law violates the principle of separation of powers. Elsewhere it is said that when, for instance, a reviewing court struck down the

⁹⁷ Hilaire, supra note 49, p.77

⁹⁸ The pure doctrine of separation of powers requires that, a) There should be distinction between legislative, executive and judicial acts (functional separation of powers); b) There shall be division of government power among the three branches (institutional separation of powers) and; c) there should not be an overlap amongst the personnel who staff the branches (personal separation of powers. See Richard Bellamy, 'the Political Form of the Constitution', in Richard Bellamy (ed), *the Rule of Law and The Separation of Powers* (2005) 254.

⁹⁹ Christopher N. May and Allan Ides, '*Separation of Powers: National Powers and Federalism*' (4th ed, 2007) 294.

¹⁰⁰ E. Levy and S. Shapiro, supra note 81, p44

application of a legislation, it is in effect involving in determination of policy issues of a legislation which is an appropriate task of the legislature.

It is argued that certain degree of judicial deferral to the decision of the other branches of government is important. Considering the legislative and executive spheres to meet the exigencies and activities of modern government, and recognizing the presumption that the legislature is deemed to be better equipped to address questions of significant social and political policy choices than the judiciary, requiring the judiciary to exercise certain degree of self-restraint is justified.¹⁰¹ If not, vesting courts with review power may result in unnecessary judicial activism also called “juristocracy” or “Judicial tyranny” whose consequences may be seen from two angles. Firstly, it may be used against the democratic institutions since the court in this regard is vested with a power to invalidate acts of these democratically elected branches, thus ultimately runs against the separation of powers. Second, and most compelling, it may result in judicialization of politics, a situation where political and some social questions may be considered to be judicial question, *albeit* such questions would have been properly solved through political checks and negotiations.¹⁰²

However, these facts are far away from establishing a firm claims that judicial review always run against the principle of separation of powers. If separation of powers is intended to result in preserving individual rights and freedom, there shall be a conflict or contest among and between the different branches of government. The doctrine of separation of powers does not require a complete division of the three government powers rather allows each branch to have a limited amount of control over another (through check and balance).¹⁰³ In the absence of such tolerable contest between the branches, the principle may easily end up in creating legislative, executive or judicial tyranny for it is high likely that any of the branches becomes with an overwhelming power to influence the other branches. In this connection, Justice Brandeis of the US Supreme Court in his dissenting opinion argued that “...the purpose of the doctrine of the separation of powers was, not to avoid friction, but, by means of the inevitable friction incident to the

¹⁰¹ H. Barnett, *supra* note 49, pp174, 177. This is true owing to the proliferation of government function in modern days necessarily demands in broad legislative power and wider discretion to administrative agencies.

¹⁰²Tamanaha, *supra* note at 17, 110

¹⁰³ James Madison, *supra* note 88, p331

distribution of powers among three department, to save the people from autocracy.”¹⁰⁴ One of the inevitable frictions that may exist as a result of the doctrine is judicial check of the other branches.

Besides, it is argued that the principle of separation of powers is considered as one ground for judicial review by courts. Regarding this, Neuborne argues that it is possible to have a “separation of powers theory based judicial review” which is capable of protecting important substantive values without being against, not only democratic values, but also separation of powers.¹⁰⁵ According to the theory, the reviewing court is required to rely on the separation of powers for its review task and it is required to review legislations only when there is attempt by the government to act in a way incompatible to certain “fundamental values”.¹⁰⁶ According to this thesis, separation of powers should not always be considered as exposed to potential violation by courts, rather as one ground for reviewing courts to be used in protecting fundamental values as well as the ideal itself. To support such assertion, it is claimed that looking at the decision of the French Constitutional Council is compelling and the Council secures success in its function by employing the separation of powers based theory of judicial review. In many cases, the Constitutional Council invokes the separation of powers principle in order to deal with the protection of other fundamental rights from being restricted or violated by proposed laws without direct determination of the substantive policy issue of a proposed law.¹⁰⁷

¹⁰⁴ Myers v. United states, as quoted by Eugene V. , supra note 65, p199

¹⁰⁵ Burt Neuborne, ‘Judicial Review and Separation of Powers in France and the United States’ (1982) 57 (3) *New York University Law Review* 367

¹⁰⁶ Ibid p367-377, Neuborne stipulates that there are two versions of separation of powers. The first version is the “pure” theory of separation of powers which provides that courts are strictly required to oversee actions of the other branches to make sure that they comply with the division of powers as provided in the constitution. This is a view which is more in line with the original stand of the founders of the United States constitution. The second version is “limited” separation of powers that requires courts to conduct review only when a government insists to act in derogation of “fundamental values that are favored by the society.” It is the latter version that is referred as the “separation of powers based theory of judicial review”. However, what are these socially favored fundamental values is beyond clarity though it can be inferred from the decision of the Constitutional Council of French that the separation of powers is one of the Fundamental values of the French Law.

¹⁰⁷ The case was about reviewing the constitutionality of a proposed statute by the General Assembly in relation to freedom of association. Under Art.4 of the French constitution (1958) the right to form political parties is guaranteed

The reliance on separation of powers principle for judicial review without substantive evaluation of a proposed law reduces counter majoritarian argument against judicial review apart from preserving the doctrine itself. Yet, separation of powers based judicial review reinforces democratic values. The theory also seems to be employed by the German Constitutional Court. In one case, Court ruled against the delegation of legislative power to the executive saying that it is for the legislature to lay down in all crucial principle in particular where the rights protected by the basic law are concerned.¹⁰⁸ The decision was made based on the reason that citizens expect that it is their democratic representatives that are to take the most fundamental decisions that may affect them.¹⁰⁹

From the overall discussion what one can deduce is that judicial review and separation of powers, if consumed carefully, are mutually inclusive and serve the same end, the rule of law. The separation of powers fosters judicial review not only by helping in establishing an independent judiciary, but also serves as one ground over which courts may rely to decide cases. Thus, what kinds of review powers by courts are considered to be in excess of the normal tolerable checks under the doctrine remains to be crucial in deciding whether judicial review is against the principle of separation of powers though determining the threshold is yet hardly easy.

2.3. Separation of Powers in Parliamentary Systems

Before rushing to the application and relevance of the doctrine in parliamentary systems, the writer believes that it is worthy to deal a paragraph on the basic differences between presidential

provided that all political groupings “respect the principle of national sovereignty and democracy”. Based on this, a law was proposed by the Assembly stating that “the National Assembly itself would decide, case by case, whether to afford parliamentary recognition to a new parliamentary group whose platform raised question as to compliance with Art.4 of the constitution”. The Council denounced the proposed law on the ground that the issues of evaluation as to the compliance of the platform of political groups with Art.4 is an interpretation function, which is not the power of the General Assembly, but the power of ‘separate, functionally institutionalized organ’, thus, violates separation of powers. The Council did not directly deal with the substantive effect of the law on freedom of association but by relying on the principle of separation of powers, it indirectly protects Freedom of Association. See Neuborne, p390-399 for similar decisions of the Council.

¹⁰⁸ Eric Barendt, ‘Separation of Powers and Constitutional Government’ in Richard Bellamy (ed), the *Rule of Law and the Separation of Powers* (2005) 282.

¹⁰⁹ Ibid

and parliamentary systems of government so that a clear path of the possible limitation on application of the ideal in parliamentary systems will be established. Many differences can be mentioned but the most important are, first, in parliamentary systems the government (chief executive) is elected by the parliament (whose members are directly elected by citizens) where as in presidential systems, the executive (president) and the legislature are elected in separate and independent elections by citizens.¹¹⁰ The effect of this is that the executive in parliamentary systems needs to secure parliamentary (legislative) confidence in order to survive while this is not necessary for the president in the presidential systems. Another difference is that in parliamentary systems executive power is usually vested in the Cabinet. In contrast, executive power in presidential systems is vested on the president.¹¹¹

Thirdly, the parliament is usually put as supreme over the other branches in parliamentary systems where as in presidential systems the presumption is the three government organs are coordinate. Finally, in presidential systems the president is forbidden from sitting in the legislative chamber while the prime Ministers or/and cabinet can do it.¹¹² These are not the only differences. There are other differences such as presidential systems provide a fixed terms for the presidency but this is unusual in parliamentary systems and the power of the chief executive can be terminated any time the parliament losses confidence on him.

Having said this on the major differences between the two systems, let us turn to the main business under the section. It is repeatedly discussed that the principle of separation of powers serves various values with a view of avoiding tyranny and preserving liberty. The values that are served by the principle are discussed by the Federalist papers of the founding fathers of the US constitution more than anywhere else. In its classical formulation, the separation of powers

¹¹⁰ R. Albert, *supra* note 2, 218

¹¹¹ See generally for detail account on the differences of the two systems Douglas V. Verney, 'Parliamentary Government and Presidential Government' in Arend Lijphart (ed.), *Parliamentary Versus Presidential Government* (1992), Oxford University press, 31-47

¹¹² This is true that in the United States the president cannot sit in either of the legislative chambers eventhough the vice president serves as president of the senate yet without the power to give vote in the senate (see Art.1, sec.3 (4) of constitution of the United States of America). Where as in parliamentary systems, for instance in Germany, the Chancellor sits in the Bundestag (the lower house).see for detail Art.62-69 of the Basic Law of the Federal Republic of Germany (here after the basic law), 1949.

requires the existence of three distinct government functions; the legislative, executive and judicial which are vested to three separate departments, the legislature, the executive and the judiciary. Such strict separation was however considered to be flawed and according to the Madison's conception as discussed above, the doctrine is deemed to be designed in a way that each branch will have certain degree of "agency" or "control" over the other which we used to say check and balance.

However, it is difficult to expect the application of the doctrine in parliamentary systems in the fullest sense. There is a long held argument that the doctrine of separation of powers best fits, even is unique to, and its purposes are best served in presidential systems.¹¹³ This assertion is made based on the adherence to strict separation of powers doctrine which requires the existence of three branches of government having the same constitutional status. The argument has truth in it since the theory requires the three branches of government to be entirely separate in both membership and function with some degree of checks and balance which is better achievable in presidential systems. However, the separation of powers in parliamentary systems, except in "constrained parliamentarianism",¹¹⁴ may exist only as between the executive and the judiciary, not the legislature vis-à-vis the other two branches, because in most cases these organs are subordinate to the legislature [parliamentary supremacy] and the executive and the legislature are fused in real sense. Most ministers sit in the parliament which is against the separation of membership of the organs. In fact, in most parliamentary systems, including the UK, there is no fusion of power between members of the legislature and the judiciary.¹¹⁵ But so long as the parliament is supreme it is less convincing to say there is separation of powers principles for the judiciary cannot check the legislature's acts. Consequently, the ideal cannot serve one of its important values, defending legislative supremacy. The scenario is almost the same even in France where the separation of powers is considered to be the fundamental principle. In French constitutional history the pure doctrine of separation of powers is not yet fully incorporated

¹¹³ R. Albert, *supra* note 2, 207

¹¹⁴ Constrained parliamentarianism is an arrangement in parliamentary systems where the parliament is no more supreme rather an independent and strong judiciary occupies a central role whose mission is to serve as counterweight to the majoritarianism and problems of fused power that typifies parliamentary systems. See Bruce Ackerman, *supra* note 5, 431

¹¹⁵ Eric Barendt, *supra* note 108, p289

because the check and balance and judicial review of legislative statutes are inherently rejected by the system.¹¹⁶

What may follow from the above fact is, if genuine principle of separation of powers is to be found only as between the executive and the judiciary, genuine disputes related to separation of powers in such systems, in systems where parliamentary supremacy is firmly established, may arise only between the executive and the judiciary. This does not mean however that the doctrine does not have any value to serve in parliamentary systems. Even though the executive and the judiciary, because of parliamentary supremacy, are put at subordinate position in the hierarchy of powers, parliamentary system does not exclude the principle of separation of powers.¹¹⁷ Nor does it implicate that the values of separation of powers cannot be achieved in parliamentary systems. It is undeniable that there are threats on the values of separation of powers in such systems for there is a heavy reliance of the executive on the legislature for its political survival, and the executive's power to dissolve the legislature which is totally absent in presidential systems. Not only this, the existence of fusion of power between the executive and the legislature since, in most cases, the executive cabinet are elected members of the legislature offers a weaker defense against abuse of political power than in presidential systems.

However, Parliamentary systems, though not fully, can serve the values of separation of powers as well. This is because in such systems, by keeping at least the judiciary independent from the other two fused branches can limit arbitrary government there by preserve the rule of law; yet this is possible only if there is no parliamentary supremacy.¹¹⁸ In the existence of parliamentary supremacy, it is not easy to keep the judiciary separate (in the real sense of the doctrine) from the legislature and in such case it will be difficult for the judiciary to keep the parliament in check.

¹¹⁶ The separation of powers since 18th century France was not considered in the same as it is in the US today. Until the Fifth Republic (1958), the interpretive power of courts was subject to review by a body established under the legislature, called *Tribunal De cassation* (cassation tribunal) which had the power to quash judicial decisions when they are deemed to be contrary to the statute. Even after 1958, it is arguable whether parliamentary supremacy is avoided following the establishment of the Constitutional Council for the power of the Council is limited to the assessment of the constitutionality of laws before they are promulgated. See J. Cummins, *infra* note 117, 600.

¹¹⁷Richard J. Cummins, 'the General Principles of Law, Separation of Powers and Theories of Judicial Decision in France' (1986) 35 *International and Comparative Law Quarterly* 599

¹¹⁸ Montesquieu, *supra* note 86, 279.

In fact, there is an argument which provides that the separation of the judiciary from the other branches does not serve the same purpose as the separation of all powers from one another. The argument is that the separation of the judiciary prevents “oppression in violation of law” but the separation of the legislative and executive powers greatly discourages “oppression by law”;¹¹⁹ thus, keeping the three departments separate achieves better values in controlling government arbitrariness. The argument is tangible that the fact that the legislative and executive powers are tied together makes both to be directly responsible and trustworthy to strong party discipline, not to electorate, and this strong party line in the branches results in weak or no legislative scrutiny over the executive.¹²⁰

Note however that all parliamentary systems do not equally succeed in applying the principle. Their potential compliance to the values depends mainly on the constitutional position given to the judiciary because in such systems one can only speak separation of powers as between the judiciary and the other two branches in concert. Three scenarios can be examined in this regard. The first scenario is the application of the separation of powers in the Westminster model where legislative and executive powers are blended together and the judiciary is precluded from reviewing the validity of legislations.¹²¹ This type of parliamentarism is apparently exemplified in the UK where the government is elected from the legislature and the cabinet members sit in either the lower or upper houses of parliament.¹²² The consequences is that the executive, if it secures the majority in the houses, can determine legislative outcomes with no or nominal opposition. The second type of parliamentarism is where the parliament is not fully sovereign. In such systems, not only the parliament is subject to constitutional supremacy, but also is subject to review by ordinary court or similar institution for its acts.¹²³ The third type is semi-

¹¹⁹ The proposition is made on the assumption that the judiciary can will nothing apart from what is provided in the law. It is also to mean that if legislative and executive powers are not fused, those who make the law will not be tempted to make oppressive law for there may be no one to implement it. see Montesquieu, *Man and society*, p281

¹²⁰ Pauline German, ‘Separation of Powers: Contrasting the British and Australian Experiences’ (2006) 13 *Electronic Law Journals* 141.

¹²¹ R. Albert, *supra* note 2, 218

¹²² *Ibid* 219.

¹²³ These are parliamentary systems which are called “constrained parliamentary systems” (to use Ackerman’s expression) in which courts in the ordinary judiciary (like India and Canada) or concentrated constitutional courts

presidentialism, also called “executive separation of powers”, where executive power is divided between the president and the prime minister with strong presidential power especially when he secures majority seat in the parliament.¹²⁴

In the West Minister Model, it is argued that separation exists between the legislature and the Crown; and since the Cabinet is responsible to the parliament, the latter puts the Crown in check for the Cabinet represents the Crown.¹²⁵ However, what is evident is that the doctrine is not fully applicable in its conventional way and judicial review of legislations is strange in the UK parliamentarism. In contrast, ‘Constrained parliamentary systems’ are effective in serving the values of the separation of powers by establishing a judiciary or similar institution which is capable of putting the other two branches in check without affecting government efficiency which is one of the advantages of parliamentary systems. In such systems, the judiciary occupies a central role in monitoring the actions of the fused executive and legislative departments and serve as a counterweight to the majoritarianism that typifies parliamentarism.¹²⁶

What is important from the discussion in the preceding paragraph is that, separation of powers need not always be understood to mean in the existence of clear distribution of functions between the three distinct departments which is better achievable in presidential systems. Rather it should be seen in light of an interrelated rules and principles that are designed to ensure that power is not concentrated in the hands of one branch and it is in this sense that the ideal can have sense.¹²⁷ In this context, thus, it could be said that it is possible for parliamentary systems to comply, if not perfectly, with the doctrine and serve its core purposes. For instance, in UK by making the Crown and the legislature in tension, it serves one of the values of the ideal, reducing government tyranny. More strongly, by establishing strong judiciary that reviews both executive and legislative acts constrained parliamentary systems serves the values of the ideal. However, this is not to mean that the values that separation of powers serves in presidential systems are

(like in the South Africa and Germany) are established to serve as a constrain on the power of the powers of the legislature and the executive. See generally Bruce Ackerman, *supra* note 5.

¹²⁴ This type of parliamentarism typifies France, see for detail Richard Albert, *supra* note 2, 225-228

¹²⁵ *Ibid* 220

¹²⁶ Ackerman, *supra* note 5

¹²⁷ Eric Barendt, *supra* note 108, 284-85

equally achievable in parliamentary systems. The bottom level is that separation of powers can only serve preventing both oppression in violation of law and oppression by law only if there is strong judiciary or similar institution that is vested to review the constitutionality of both legislative and executive powers and this is possible for constrained parliamentarism.

2.3.1. The Case of Ethiopia

Ethiopia is a country established under a parliamentary system of government. Like many parliamentary systems, the government (chief executive) is elected by the legislature and is accountable to same.¹²⁸ However, it is hardly clear that the Ethiopian parliamentary system reflects the feature of the Westminster model for the sovereignty of the parliament is subject to constitutional supremacy.¹²⁹ Nor does it reflect the features in constrained parliamentary systems because the judiciary is not vested with the power to review legislations. One may argue that our system reflects constrained parliamentarism considering the House of Federation (HoF) as an institution vested to review the constitutionality legislations. The writer however, contends the assumption because the HoF is outside of the conventional power structure and cannot be considered as an organ vested to exercise judicial power. This line of argument is clearly asserted by the Constitutional Assembly that the HoF is not within any of the government branch.¹³⁰ Thus, what follows is that, how the separation of powers is employed by our constitution so that power will not be concentrated in a single man or branch of government?

It is unusual to find a constitution which provides a specific clause dealing with separation of powers. What one can find in many constitutions in this regard is an inference from the structure of the constitutions. For instance, if one observes the USA and German, constitutions, they

¹²⁸ The constitution, supra note7, Art.56

¹²⁹ Parliamentary supremacy in our constitution is subject to constitutional supremacy. See Art.9 (1) of the constitution. Thus, the supremacy of our parliament is within the constitutional bound and within the constitutional mandate of the other branches the parliament can will nothing.

¹³⁰ Minute of the Constitutional Assembly of the Transitional Government of Ethiopia, V.5, December 01-04, 1994. See discussion on Art.62 (1). The assembly firmly confirmed that the HoF is not within the power structure of the three branches and does not have legislative power in real sense. It is stated that it is a representative of the Nations Nationalities and Peoples of Ethiopia established to interpret I covenant, the constitution. This gives us the inference that the house does not seem an effective organ that puts control on the legislature.

provide provisions as to what powers are given exclusively to which government branch.¹³¹ They may state the power to make laws is given to the congress/parliament, executive power to the president/cabinet and the prime minister, and judicial power to courts. All this tells us that each branch of government is vested with certain power over which no other branch will have direct and overruling influence.¹³²

In a similar vein, the FDRE constitution enshrined the principle of separation of powers by stipulating that legislative, executive, and judicial powers of the federal government are vested on the House of Peoples Representatives (HoPR), the prime minister and the council of ministers, and the federal courts respectively.¹³³ Looking at its structure therefore it is possible to say that the FDRE constitution recognizes the separation of powers principle. However, the doctrine is not incorporated in the Ethiopian constitutional regime in similar manner as expounded by Montesquieu or Madison because the HoPR is constitutionally established to be the highest organ of the federal government.¹³⁴ The fact that the Prime Minister and its cabinet sit in the parliament and its accountability (together with its Cabinet) to same inevitably diminishes the place of separation of powers between the legislature and the executive (for it runs against personal separation of powers).¹³⁵ This is, in fact, a feature in almost all parliamentary systems. The German chancellor, for instance, is elected by and sits in the Bundestag (the lower legislative house).¹³⁶ However, two important facts may reduce, if not avoid, the effect of the blended legislative and executive powers in the German parliamentarism.

¹³¹See for instance the United States Constitution which does not include an express statement dealing with the separation of powers but contains vesting clauses of the three powers which provides that all legislative powers are vested to the congress, executive powers to the president, and judicial powers to the Supreme Court and other inferior courts under Art. I, Art. II, and Art.III respectively

¹³²Richard A. Champagne, 'the Separation of Powers, Institutional Responsibility, and the Problem of Representation' (1992) 75 *Marquette Law Review* 843

¹³³ The Constitution, supra note 7, Arts.55 (1), 72(1), 79(1) respectively. These provisions can be considered as the "vesting clauses" of the powers of the three government branches in Ethiopia.

¹³⁴ Ibid Art.50(3)

¹³⁵ Ibid Art.73 (1), Art.72(2), Art.76(3); the fusion of legislative and executive powers is clearly provided under Art.56 which reads as "a political party or coalition of political parties that has the greatest number of seats in the House of Peoples Representatives shall form the executive and lead it".

¹³⁶ See the Basic Law Art.63.

First, the fact that the Federal Council (Bundesrat) has active role in approving legislations initiated by the Bundestag will make the promulgation of laws in a way that the Bundestag and the Chancellor (executive) wished less easy.¹³⁷ Second, the existence of a relatively active president with some degree of control over the Chancellor will have crucial value in diminishing the adverse impacts of the fused Bundestag and chancellor office.¹³⁸

In Ethiopia, the arrangement is different. The president has no right to say on the selection of the Prime Minister by the HoPR nor does he/she have a role in the legislations passed by the HoPR.¹³⁹ More worrisome, the absence of second legislative chamber which is elected in separate procedure and vested with the right to participate in the legislative process opens a clear way for the HoPR (legislature) and the executive to conspire along party line and pass a law with no or less obstacles. Furthermore, the power of the Prime Minister to dissolve the parliament¹⁴⁰ and the analogous power of the parliament (HPR) to call and question the prime

¹³⁷ See Art.76-78 of the Basic law. The Bundesrat is the representative of the states (Lander) in the German federation and serve as second legislative organ. They represent the Lander in legislative and administrative functions of the federation. In fact, the Bundesrat does not have equally active legislative role with the Bundestag but has the right to introduce bills and gives its views in the bills initiated by the Bundestag. Any act passed by the Bundestag has to be referred to the Bundesrat though any objection by the Bundesrat can be overridden by a new vote in the Bundestag. See for detail on this, Eckart Klein, 'The parliamentary Democracy' in Ulrich Karpen (ed), *the Constitution of the Republic of Germany: Essay on the Basic Rights and Principles of the Basic Law with a Translation of the Basic Law* (1988) 153-154.

¹³⁸ The president is less dependent on party affiliation with the Bundesrat than the Chancellor because it is elected by the Federal Convention (Bundesversammlung) which is composed of members of the Bundestag and equal number of members elected by the laenders based on proportional representation. Additionally, the president has active role in proposing and appointing the Chancellor. See the Basic Law Art.63 (1&2).

¹³⁹The President in Ethiopia has a mere ceremonial role. Its role in the promulgation of legislations is simple formality (see Art.57 of the constitution, supra note 7). After all he is nominated by the HoPR (see Art.70 (1) of the constitution).

¹⁴⁰Ibid Art.60 (1). However, the constitution is not clear in this respect. The provision reads as "with the *consent* of the House, the Prime Minister may cause the dissolution of the house..." two questions may follow from this. It is common that dissolution of parliament by the Prime minister is to be made when the parliament is hostile to the proposals of the prime minister in approving policy and related issues. If we agree on this assumption, the first question is therefore, how a hostile parliament will give its consent to the prime minister causing its own

minister and the executive in general and take any measure it deems necessary¹⁴¹ may end to be intrusive of the doctrine.

Considering the above facts, one can safely say that true separation of powers in Ethiopia like in many parliamentary systems exists as between the executive and the judiciary. Two reasons can be forwarded to justify the assertion. First, the fact the HoPR is supreme provides less institutional defense for the other branches to counteract the ambition of the former. Second, the blending of membership in the legislative and executive branches reveals that it is naïve to imagine the existence of real separation between the branches. One may say that there is separation of powers between the legislature and the judiciary for the reason that there is no fusion of membership and the fact the judiciary is not accountable to the legislature.¹⁴² However, it is important to know that absence of fusion of membership and accountability of one to another is not enough for the doctrine. The doctrine, as it is repeatedly said, also requires that each branch must be give the “necessary constitutional means and personal motives, to resist encroachments of the others” and not to rely on the other branch.¹⁴³ In the case at hand, the judiciary is, with in the constitutional limit, subject to the will of the legislature and in this connection the judiciary cannot defend its institutional responsibility by itself against encroachment by the legislature.

However, it is worthy to remind the fact that regarding those constitutionally mandated powers it seems sound to say that neither of the branches in general and the parliament in particular can encroach up on the power of the other branches for there is no parliamentary supremacy over the

dissolution? Second, it is not clear as to what amount of vote of the house (by percentage) expressing consent for dissolution suffices.

¹⁴¹The constitution, Art.55 (17&18), Here again it is not clear whether the appropriate measures that could be taken by the House against the executive may also involve measures with similar effect to the concept of ‘vote of no confidence.’ If the issue is interpreted in the affirmative, we can say the executive is in an overruling position to the executive, hence deviates from the doctrine of separation of powers.

¹⁴² This is not to deny the fact that the judiciary is dependent for its budget and appointment of its judges on the legislature. Rather it is meant to say that the judiciary is not directly, at least functionally, accountable to the legislature like the executive.

¹⁴³ James Madison, *supra* note 88, 348-349

constitution. In similar vein, there is no any constitutional stipulation which indicates the supremacy of the executive over the judiciary nor does it provide vice versa. In the absence of constitutional stipulation to such effect, one cannot yet curiously say that the executive and the judiciary are constitutionally put at equal footing under the FDRE constitution. This is because of the vague constitutional stipulation in relation to delegation of legislative powers to the executive. The Constitution provides that the HoPR may empower the Council of Ministers (executive) to issue a regulation.¹⁴⁴ The absence of clear constitutional standard as to when the legislature cannot delegate its legislative power to the executive may result in unrestricted and standardless delegation even in those areas where fundamental rights are at issue.¹⁴⁵ Not only this, the potential for broad delegation of legislative power to the executive under our constitution may put the executive at superior position over the judiciary since the delegation may meant dressing the legislative crown by the executive. Yet, broad delegation strengthens the fusion of legislative and executive power since it contravenes functional separation that ought to exist between the two branches. The scenario, if it holds to be real, may prove the absence and practical impossibility of the application of separation of powers to any conceivable extent even between the executive and the judiciary.

To sum up, in Ethiopia, it is obvious that disputes related to separation of powers are more likely to appear between the executive and the judiciary. Yet, the assertion is conditional up on the nature and practice of delegation of legislative powers to the executive. Unless the legislature is cautious and provides standards while delegating its power to the executive, there is no constraint for the later from issuing laws that puts itself in the upper level and make the judiciary it's subservient. However, it is less likely to imagine that dispute regarding separation of powers may arise also between the legislature vis-a-vis the executive and judiciary. How the institutional responsibility of the other branches, particularly, the judiciary could be defended against an unwarranted encroachment by the legislature may therefore be an important issue.

¹⁴⁴ The Constitution supra note 7, Art.77 (13)

¹⁴⁵ The principle is that if delegation is not unnecessary, it must be done in very restricted manner especially when basic rights are at issue. The Basic Law of Germany, for instance, legislative power can only be delegated to a very limited extent. See Art.80 (1) of the Basic Law.

Conclusion

The rule of law is a political ideal which provides every action of government should be based on law and every individual aggrieved by action of a government have to have an avenue to claim a remedy in an impartial and independent institution. The ideal is known since the time of ancient Greece in the name *isonomia* which was meant to reflect the need for equal participation of all in the government. Even though the ideal is said to exist in ancient Greece before the term democracy appeared, there is difference among literatures as to whether or not the two ideals were considered to be the same during that time. The rule of law has also got a great deal of concern during the ancient Roman civilization. In both cases, the rule of law was considered in its broader perspective and the substantive justness of a given law was considered as a requirement for the ideal to exist.

The ideal has also got acceptance in the modern days. The relevance of the rule of law is approved by every government even those which are considered to be totalitarian regimes by the world community. Despite the rule of law is unanimously conceived as an essential precondition for the protection of human rights and realization of democratic governance, its scope and contents has continued to be a source of debate among many scholars. The difference among scholars regarding the rule of law can generally be seen from two perspectives; the formal conception and the substantive conception. In its formal conception, the rule of law requires that every action of government must be done in accordance with a law which is made by appropriate organ, prospective, general, non-retroactive and equally applicable. This conception of the ideal does not give concern to the substantive content of a law. The rule of law in its formal sense is value neutral that whether the content of a law protects human rights or not is unnecessary.

The formal conception of the rule of law has been criticized for many reasons. The most important is however that the ideal in its formal sense reinforces a mere principle of legality and cannot control the establishment of tyrant government. The rule of law which fulfils the requirements in the formal conception may not serve to constrain a government from exercising an arbitrary power. Moreover, the ideal in its formal sense does not prevent laws from being instruments of oppression by governments and even totalitarian governments may comply with it. Thus, if the requirements under the formal conception are not unnecessary, they are not enough to guard individuals from arbitrary action of government using laws.

The rule of law in its substantive version on the other hand requires that, in addition to the elements in the formal conception, laws must also be substantively just. It questions whether a law is good or bad and whether the content of a law recognizes individual rights. Accordingly, law is supreme and must be respected only when its content is just. In general, the substantive conception argues that if government of law is to be avoided, the legislature must be guided by general principles of fairness to address what the content of a law ought to be. However, there is a problem with the substantive conception of the rule of law that it is difficult to decide which laws are said to be just and which are not; for deciding the substantive fairness of the content of a given law is necessarily shaped by a prevailing socio-economic and political realities of a given legal system.

The rule of law as an ideal has a clear connection with the separation of powers and the role of judiciary and is determinant factor on the efficiency of both of the later. It is discussed that the rule of law, be it in its formal or substantive conception, requires the existence of an independent and strong judiciary that is empowered to decide on the constitutionality or otherwise of decisions of a government and give remedy to aggrieved parties. Moreover, the judiciary is, if not the only, one of the main constraints on government power that constitutions of nations enshrined in. This is particularly true that the judiciary by using its review power protects the abuse of rights by the majoritarian legislature though this fact may not be applicable in countries where parliamentary supremacy is firmly established. It also serves the rule of law by reviewing decision of administrative agencies which are alleged to be contrary to a higher law or an established general principle of law.

Despite the judiciary can ensure the rule of law for the above reason, its legitimacy to review the constitutionality of legislations passed through democratic process is challenged. The argument is that since judges are not elected by the people and not accountable to the people, they lack the democratic legitimacy to invalidate laws passed by the legislature which have better democratic legitimacy. The argument is however challenged, at least, two reason. First, the judiciary is established to serve a counter majoritarian role by a higher law, the constitution, which is (in the proper sense) with a higher democratic pedigree, to serve the purpose of constraining majority tyranny. Second, the judiciary is not obstinately counter-majoritarian, especially since judicial appointments are never completely insulated from political control and influence.

Besides, the approval of budget of the judiciary by the legislature and the due process of law are mechanisms that can put the judiciary on similar accountability ground with the legislature.

The rule of law has also a direct nexus with the principle of separation of powers and both owe a role to each other. The rule of law by keeping the judiciary independent ensures the protection of human rights. However, this is possible only if the judiciary is independent which in turn is achievable in a system where the doctrine of separation of powers is firmly recognized. In parallel, the judiciary preserves the separation of powers doctrine by invalidating action a government that is alleged to be vested to another branch. This is practically true if one looks the experience of the German Constitutional Court and the Constitutional Council of France where, especially in the latter, separation powers based theory of Judicial review is being employed to quash laws issued by the legislature.

However, the doctrine of separation of powers is not strictly adhered in parliamentary systems. This is because the separation of powers in strict sense requires the existence of horizontally equal government branches in which neither will not have substantial influence over the other branch. Moreover, the legislative and executive powers are substantially fused in such systems both in personnel and functionally (because of delegation). Therefore, in such systems it is naïve to think that the ordinary courts will have the power to review the constitutionality or otherwise of a law that is issued by the legislature. However, there are some countries, such as Germany, where a separate institution, the constitutional court, is established to constrain the strong parliament through reviewing the constitutionality of legislations.

In Ethiopia, the constitution incorporated the principle of separation of powers as it can be understood from its structure. Yet, the parliament is declared to be the highest organ of the government which assures its supremacy over the other branches, if not the constitution. Furthermore, the absence of clear constitutional standard on delegation of legislative power to the executive may, in addition to infringing the functional separation between the already fused branches, put the executive at position with overwhelming influence over the judiciary. In general, the separation of powers in parliament systems, including Ethiopia, can genuinely exist only between the judiciary and the executive organs of government for the supremacy of the legislature in such systems will make possible for the legislature to put substantial influence over the other branches.

CHAPTER THREE

JUDICIAL POWER AND THE COURT STRIPPING LEGISLATIONS IN ETHIOPIA

This chapter deals on the analysis of the constitutional mandate of the judiciary in Ethiopia by taking in to account the constitution, other laws and decisions of relevant government bodies that have direct or implied impact up on the power of the judiciary. The chapter begins with introduction that provides a general account on judicial power in constitutional jurisdictions. Then it proceeds with appraisal of the constitutional mandate of courts in Ethiopia by reviewing some of the literature that dowel in the area and determine the constitutional basis of the various laws and decisions of concerned government bodies that remove or limit jurisdiction of courts in Ethiopia.

3.1. Introduction

Despite the judiciary is considered as one of the *trias politica* in government power structure, the scope and legitimacy of its power is usually contested. In principle, judicial power, the power to say what the law is, is vested on courts.¹⁴⁶ However, the extent and scope of such power of courts is not the same all over nations. Instead, judicial power is dependent on the type of specific legal system and accordingly, it may be broad or narrow. Judicial power also varies from country to country on the ground where the power emanates from. In many countries, judicial power is expressly vested under a constitution and courts cannot exercise lesser or greater power than is vested by the document. Yet, the scope of judicial power may develop, not only from the express constitutional stipulation, but from the actual exercise of the power by courts, either through judicial activism or judicial self-restraint.

In the United States, for instance, the constitution is silent as to whether the Supreme Court and other federal courts are authorized to engage in judicial review of laws and acts of the executive. The power of the federal courts to review the constitutionality of congressional statutes and acts of government is firmly established through strong judicial activism by the activist judge, Chief Justice Marshal of the US Supreme Court in the case *Marbury V. Madison*.¹⁴⁷ In France, on the other hand, courts are constrained from reviewing the constitutionality of statutes issued by the

¹⁴⁶ Erwin Chemerinsky, 'Constitutional Law' (2nd ed., 2005) 10

¹⁴⁷ Walter F. Murphy, 'Congress and the Court: A Case Study in the American Political Process' (2nd ed., 1964) 7-12

parliament. The power to check the constitutionality of statutes is vested to the Constitutional Council and yet, this power of the Council is limited in time that it can test the constitutionality of proposed laws before they are promulgated.¹⁴⁸ In Germany, the power to engage in constitutional adjudication is vested on the constitutional Court.¹⁴⁹

In Ethiopia however, the power of courts does not seem to be clear. In fact, the constitution clearly stipulates that judicial power is vested on courts. The same constitution provides that the power to interpret and decide all constitutional disputes resides on the House of Federation (here after the HoF). The disagreement arises as to whether ordinary courts are completely excluded from interpreting the constitution. The fact that there is no constitutional stipulation that provides clear demarcation on the power of the HoF vis-à-vis the role of ordinary courts in the enforcement of the various constitutional provisions created divergent opinions among many authors who worked on the respective role of courts and the HoF.

Moreover, the promulgation of laws in the last one and half decade which limit or totally removed court jurisdiction to review decisions of administrative agencies is argued as a threat to judicial power. The laws may be contested both on the ground of legitimacy of their compatibility with the constitution and on the allegation that they reinforce the conferral of unconstrained powers that establishes factual supremacy of both the legislative and executive organs of government in a way incompatible to the supremacy of the constitution. Not only this, the logical soundness of decisions of relevant government institutions, particularly, that of the CCI and the Federal Supreme Court Cassation Bench in relation to the jurisdiction stripping laws from the constitutional perspective also rises a great deal of controversy on the area. Considering the relevance of the CCI in ensuring the supremacy of the constitution by declining any law or government action that contravenes the constitution, making reference to some of its decisions in similar area is found to be necessary. In similar vein, the decision of the Cassation Bench on the

¹⁴⁸ See for detail Martin M. Shapiro, 'Judicial Review in France' (1990) 6 *Journal of Law and Politics* 543-548 and Burt Neuborne, *supra* note 105, 387-391. There is difference among authors as to the identity of the French Constitutional Council. Shapiro considers the Council as the "third legislative chamber" on the ground that its power is checking the constitutionality of a law after passed the two legislative Assembly and the members are representatives of the people since they are elected by the political representatives. On the other hand, Nueborne regarded the Council as reviewing judicial organ.

¹⁴⁹ The Basic Law Art.93

same area is found to be a contested and the writer believes that recalling to the decisions is mandatory owing the fact that the Bench plays a paramount role in shaping/determining jurisdiction of ordinary courts.

To this end, analysis of the laws that stripped court jurisdiction, appraisal of cases decided by concerned bodies in the area, and interview with key persons to the subject matter is widely employed in this chapter. Based on this, an attempt to establish the pattern of the jurisdiction stripping laws and decided cases on the same subject area together with the possible implication they connote on the rule of law, judicial power, and protection of fundamental rights is in order.

3.2. The Constitutional-legal Mandate of the judiciary in Ethiopia

Judicial power is among the controversial powers of the three departments of government. Yet the power of the judiciary to interpret the constitution is the most contested area in constitutional law scholarships. In principle, it could be said that constitutional interpretation is vested up on the ordinary judiciary. This principle does not however always hold true in all countries and depending on the type of legal system, the institution involved in constitutional adjudication varies.¹⁵⁰ Under the FDRE constitution, this power is given to the HoF even though the scope of the power is still a contested area in post 1995 Ethiopian constitutional history and many contending literatures have been witnessed in the last one and half decade regarding the issue.¹⁵¹ Most of the literatures address the area of constitutional interpretation in Ethiopia from the perspective of two main issues; which are, whether or not constitutional dispute and constitutional interpretation as employed by the constitution meant one and the same and what is the scope of the power of the HoF vis-à-vis the judiciary in constitutional interpretation. Many of the literatures respond to these questions differently and the disagreement has flared up when one looks the late published Article by Getachew.¹⁵²

¹⁵⁰ It can be taken different institutions which are vested with the power to interpret the constitution like the US Supreme Court in the United States, the Constitutional Court in Germany and South Africa, and the Constitutionnel Conseil in France. The nature, legitimacy and scope of the power of these institutions vary as well.

¹⁵¹ Works in this area includes Assefa Fiseha, Yonatan Tesfaye, Ibrahim Idris, Takele Soboka, for the diverged opinions and scholarly articles on the area, see *infra* note 152.

¹⁵² Getachew Assefa, 'All About Words: Discovering the intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation' (Dec. 2010) 24 (2) *Journal of Ethiopian Laws* 139-175.

Judicial power in Ethiopia is challenged not only by the constitutionally posed limits but also by parliamentary legislations enacted at different times. There are legislations promulgated in the last few years that have the effect of, partially or totally, stripping courts from their [inherent] jurisdictions. Thus, under this part, it is intended to establish judicial power in Ethiopia by looking it against two limitations imposed on it; the constitutional and legislative limits as discussed here under.

3.2.1. Constitutional Limit

It is common that the power of ordinary courts to see some category of cases and controversies is constrained by their national constitutions. Constitutions at times have provided that particular constitutional or legislative issues cannot be reviewed by the courts. For instance, the US constitution limits the jurisdiction of courts only to cases and controversies thereby constrain them from giving advisory opinion and hear hypothetical cases; and in the German constitution the constitutional court will not review the constitutionality of a matter which the Basic Law has given to the discretion of the legislature.¹⁵³

It is true that there is constitutional limitation imposed on the judiciary that the power to interpret the constitution is vested to the HoF/ the Council of Constitutional Inquiry (hereafter the CCI)¹⁵⁴ and this raises the argument that courts in Ethiopia cannot interpret the constitution. Two important issues may however follow from this constitutional stipulation. First, the determination of what amounts to constitutional interpretation is far from clarity yet its similarity or difference with constitutional dispute is part of the issue.¹⁵⁵ Second, the scope of the power of the HoF/CCI vis-à-vis the role of courts in constitutional interpretation seems to be unsettled issue. It could be said that it is not part of this work to discuss about constitutional interpretation and the scope of the power of the HoF/CCI; however, it is believed that determining the interpretive power of courts in Ethiopia necessarily requires the determination of the scope of the power of the

¹⁵³See in general Chester J. Antieau, ‘*Adjudicating Constitutional Issues*’ (1985) Oceania Publications 13-16. The inadmissibility of hypothetical cases by the Supreme Court in the United States is in fact the articulation of the US Supreme Court and is inferred from the stipulation of Art.III of the US constitution.

¹⁵⁴ See The constitution, supra note 7, Art.62(1), 83, 84

¹⁵⁵Ibid. There constitution uses the two terms, constitutional interpretation and constitutional adjudication, almost equal times and there is disagreement among authors as to whether they are employed to connote the same message in the constitution.

HoF/CCI for the power of courts is basically influenced on the perceived and real powers of the HoF/CCI.

There is diverged understanding of the above framed two issues by different authors. To begin with the first issue, there is an understanding that the two terms are employed in the constitution differently. Accordingly, it is argued that constitutional interpretation refers to the review of constitutionality of laws made by state and federal legislators whereas constitutional disputes involves cases of concrete/real dispute between parties involving constitutional issue.¹⁵⁶ Others still argue that constitutional interpretation is more than reviewing of the constitutionality of laws and includes the determination of the scope, meaning and content of a constitutional provision in question.¹⁵⁷ According to this view, dealing with constitutional interpretation requires the determination of the meaning of constitutional dispute; thus, constitutional dispute is both the task of determining the scope of specific constitutional provision and ascertainment of the constitutionality of laws made by state and federal law makers.¹⁵⁸

Interestingly, Takele argued that the two terms should not be seen differently instead constitutional dispute should be construed to mean constitutional interpretation; and in this way, constitutional dispute refers to ‘interpretation dilemma or disagreements’ not the disposition of interpretive function by the HoF involving factual disputes.¹⁵⁹ The reason for the argument is that constitutional dispute cannot be meant the determination of factual or concrete cases between parties because the HoF is not vested to interpret or resolve factual disputes rather disputes in their abstract form.¹⁶⁰ A concurring argument is reflected by Getachew that

¹⁵⁶ Assefa Fiseha, ‘Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation’ (June 2007) 1(1) *Mizan Law Review* 10. It seems that the assertion as to the meaning of constitutional interpretation is given based on the fact that the constitutionality of legislations may be contested up on the complaint lodged by any of the organs under Art.23 (4) of proc. no.250/2001(infra note 163) in the absence of real parties in dispute.

¹⁵⁷Yonatan Tesfaye, ‘Whose Power is it Any Ways: the Courts and Constitutional Interpretation in Ethiopia’ (2008) 22 (1) *Journal of Ethiopian Laws*, 133-134.

¹⁵⁸ Ibid p134

¹⁵⁹ Takele Soboka, ‘Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory, in Assefa Fiseha and Getachew Assefa (ed), ‘Institutionalizing Constitutionalism and the Rule of Law: Towards a Constitutional practice in Ethiopia’ (2010) 3 *Ethiopian Constitutional Law Series* 67.

¹⁶⁰ Ibid

constitutional dispute is said to be arisen when there is a “disagreement between two or more constructions of constitutional principle or rule each of which is forcefully persuasive”.¹⁶¹ He reaffirms that constitutional dispute does not involve factual dispute rather involves interpretation in terms of the text of the constitution like the task of filling the gaps in the constitution and he argues that constitutional dispute is nothing but a precondition to exist in order to the HoF/CCI engage itself in constitutional interpretation.¹⁶²

Considering the fact that the HoF is vested to see only abstract cases of constitutional issues, it seems plausible to understand the two terms as inseparable. It is true that constitutional issues may be raised from real/factual cases in a court of law in the same manner as they may be lodged by government organs; however, such issues can only be referred to the HoF/CCI in their abstract sense.¹⁶³ Another point which may strengthen this way of understanding is that it is provided in the enabling legislation (proclamation No.251/2001) of the power and responsibility of the HoF is required to interpret the constitution and the term resolving constitutional disputes is not employed.¹⁶⁴ More convincing is that, as Getachew revealed, what one can find from digging in to the Minute of the Constitutional Assembly is that there is no distinction made between the terms by the Assembly while dealing with the pertinent provisions of constitutional interpretation and it does not seem that the makers of the constitution has intended to make distinction between the terms.¹⁶⁵

The other issue is that whether courts are completely divested of the power to interpret the constitution. Like the disagreements discussed in relation to the two terms above, there are diverged opinions among authors regarding the scope of the power of the HoF vis-à-vis courts in

¹⁶¹ Getachew, supra note 152, p156.

¹⁶² He asserted that the two terms are ‘part of the same continuum’ and it is the presence of constitutional dispute that leads to constitutional interpretation. See in general Id, p156-166

¹⁶³ Council of Constitutional Inquiry Proclamation, Proclamation No. 250/2001 Federal Negarit Gazeta, 7th Year No. 40 (July 2001), Arts.21 (3), 22 (4)

¹⁶⁴ Takele, supra note 159.

¹⁶⁵ Getachew, supra note 152, p162. A reading of the Minute of the constitutional Assembly will not give us that the Assembly uses the terms to connote different meanings instead, the Assembly repeatedly forwarded that any sort of constitutional dispute or interpretation is the jurisdiction of the HoF. See the discussion of the constitutional Assembly (supra note 130) on Art.62, 83 and 84.

Ethiopia. It is difficult to deal with all literatures in the area but an attempt is made to see briefly some of the important works which are deemed to have relevance to the paper. Accordingly, we can have three views as to the power of the HoF and of courts in interpreting the constitution. The first category of understanding provides that courts are wiped out from the power to review the constitutionality of laws made by state and federal legislature and determination of the scope, meaning and content of provisions of the constitution.¹⁶⁶ According to this view, courts have only the role of enforcing provisions of the constitution and they can do so to the extent it does not involve interpretation of the constitution. The argument is made based the presumption that there are some provisions of the constitution which are explicit and clear which do not require interpretation and it is in such cases that courts are required to apply the provisions of the constitution.¹⁶⁷

The argument is however open to challenge at least for two reasons. First, based on the indeterminacy theory, constitutional texts are general, vague, and abstract that may require interpretation and construction of a given provision based on some values that are not explicitly provide in the text of the constitution.¹⁶⁸ To use Assefa's expression in this regard, to think that it is possible to apply the constitution without interpreting it is more of "a myth than a reality".¹⁶⁹ This is not to justify that courts in Ethiopia can dispose any sort of constitutional issues because there is an intended limit by the makers of the constitution on the power of courts to interpret the constitution. However, this is to remind those who argue that courts are allowed to apply the constitution when it is explicit or clear that constitutions are indeterminate and the direct application of a constitutional text that seems clear or explicit may at times end up to result in absurd outcome. Second, direct application of constitutional provisions by courts may be challenged based on the nature of judicial power. Judicial power in strict sense is determining

¹⁶⁶ This view is mainly reflected by Yonatan Tesfaye which is solely based on the mechanical theory of judicial power that requires courts to apply a law as it is clearly available in the text. And to him constitutional interpretation is both the determination of the scope, meaning and content of a given constitutional provision and the review power of the constitutionality of laws enacted by the federal and state parliament. See yonathan, supra note 157, p141.

¹⁶⁷ Ibid

¹⁶⁸B. Tremblay, supra note 66, p535.

¹⁶⁹ Assefa, supra note 40, p25-26.

what the law says, not application of the law without looking at what the law is. If judges are considered as persons through which the law is to be applied, their function is an administrative proper, not judicial.¹⁷⁰

The second category of understanding regarding the power of courts vis-à-vis the HoF, which is mainly advocated by Assefa and Takele, provides that courts in Ethiopia are excluded from interpreting the constitution only when the un/constitutionality of laws by state and federal legislative bodies is questioned; and in all other cases, it is not the intention of the constitution to preclude courts from interpreting the constitution.¹⁷¹ The authors, though their stand as to the meanings of constitutional dispute and constitutional interpretation is diverged, have similar stand as to the power of courts in interpreting the constitution. They build their argument from different provisions of the constitution and principles. Accordingly, Assefa asserted that the judiciary is duty bound to “respect and enforce” the provisions of chapter three of the constitution and to ensure the observance and enforcement of the constitution is achievable if courts have certain degree of interpretive power in the constitution.¹⁷² Moreover, he forwards strong argument that owing to parliamentary supremacy in Ethiopia, yet subject to constitutional supremacy, it could be soundly argued that courts’ power is foreclosed only if it involves the determination of the un/constitutionality of laws enacted by federal and state legislatures as it is clearly provided under Art.84(2) of the constitution.¹⁷³

Takele on the other hand gives more emphasis on Art.79(1) and Art.78 of the constitution and explained that courts are constitutionally apportioned with the power to see any case of justiciable matter other than those the constitutionality of laws enacted by federal and state legislatures is in question.¹⁷⁴ He even argues that if there is clear unconstitutionality of laws, there is no need for courts to refer the case to the CCI/HoF because, in such case, there is no

¹⁷⁰ M. Barnet, *supra* note 61, p166.

¹⁷¹ Assefa, *supra* note 40 and Takele, *supra* note159.

¹⁷² Assefa as quoted by Getachew, *supra* note 152, p142. The argument revolves around the provisions of Art. 13(1) and 84(2)(Amharic version of the constitution).

¹⁷³ Assefa, *supra* note 40, p15.

¹⁷⁴ Takele, *supra* note 159, p67-69

constitutional dispute (in his expression ‘interpretation dilemmas’) and courts can set aside the application of such laws.¹⁷⁵

The third view of the power of the HoF/CCI and of the courts in interpreting the constitution is reflected in the late published article by Getachew.¹⁷⁶ Getachew’s finding on the power of courts in interpreting the constitution is “fresh” and is made by relying mainly on the intention of the makers of the constitution as reflected in the Minute of the Constitutional Assembly after reviewing existing literatures in the area. Accordingly, the reading of the article revealed that he came up with three new findings as to the power of courts regarding to constitutional interpretation. First, contrary to what is argued by Yonathan, he concluded that it is up to the power of courts to determine the meaning, scope and content of a constitutional provision in resolving factual disputes before them so long as they are not faced with ‘constitutional dispute’.¹⁷⁷ Second, courts cannot pass a decision up on issues of constitutionality or settling constitutional disputes irrespective of the type of cases and regardless of the fact that the legislations are apparently unconstitutional.¹⁷⁸ Third, different from Takele and Assefa, ‘all constitutional disputes-whether involving federal or state proclamation, regulation, directive, or decision of federal or state organ or official’- are precluded from the jurisdiction of courts rather within the interpretation power of the HoF/CCI.¹⁷⁹

To justify his argument and challenge those who rely on the terminology employed under Art.84 (2) of the constitution to support courts interpretive power, he forwarded two points; a) relying on Art.84(2) alone to determine the respective powers of the HoF and courts is inappropriate

¹⁷⁵Ibid, his argument is consistent with his understanding of what constitutional dispute is and accordingly, he believes that if there is clear unconstitutionality of a law, there is no constitutional dispute, for there is no interpretation dilemma of the constitutionality of the law.

¹⁷⁶ Getachew, supra note152

¹⁷⁷Ibid p168, here it is important to remember once again that constitutional dispute for Getachew means the existence of two or more persuasive interpretation dilemmas of a constitutional text that require constitutional interpretation.

¹⁷⁸ Ibid p165

¹⁷⁹Ibid p167, the point here is made by condemning the proposition that courts are empowered to review laws and decision s of government bodies other than the constitutionality of laws which is fundamentally made based on Art.84(2).

because the provision is not meant to determine the jurisdiction of the HoF rather mainly meant to lay down procedures for the CCI when dealing with constitutional disputes of the federal or state law; b) Art.84 is not about regulating the powers and functions of the HoF concerning resolving constitutional disputes but it is meant to provide the powers and functions of the CCI, thus, to say that the power of the HoF is limited to settling constitutional disputes involving federal and state laws based on the interpretation of a single sub-article is not sound.¹⁸⁰ On top of this, he strongly reaffirmed that “there is no another correct way of understanding the understanding of the makers of the FDRE constitution on this matter”.¹⁸¹

The writer however contends Getachew’s argument for two reasons. First, it is worthy to make a point right here that Getachew’s stand which says that courts in Ethiopia cannot set aside those laws which are clearly and apparently unconstitutional rather such power is left to be the exclusive domain of the HoF seems to be inconsistent with his discussion on the meaning of constitutional dispute and constitutional interpretation.¹⁸² He argued that the two concepts are inseparable and it is the existence of constitutional dispute that leads to constitutional interpretation. On the same discussion, Getachew concurs with Takele that constitutional dispute that leads to constitutional interpretation by the HoF arises when there is ‘*disagreement between two or more equally persuasive arguments*’ of interpreting constitutional text (emphasis added). The otherwise understanding of his argument, however, proves that if a law is clearly unconstitutional, there is no constitutional dispute (since there is no disagreement between two or more equally persuasive interpretations of the text of the constitution) that leads to constitutional interpretation, thus, no need for courts to refer to the court rather they can set it aside.¹⁸³

Second, the way Getachew justifies his argument in the foregoing discussion does not seem to be plausible enough. He argued that Art.84 is not about the power and functions of the HoF but *the procedures* to be consumed by the CCI when settling disputes involving the constitutionality of *federal and state laws*; hence cannot be employed to decide the power of courts vis-à-vis the

¹⁸⁰ Ibid p164-165

¹⁸¹ Ibid 169

¹⁸² Ibid p162-169

¹⁸³ This logical deduction is made based on the fact that if a law is clearly unconstitutional, it is obvious that there is no constitutional dispute because a clear constitutionality does not involve two or more equally persuasive interpretation dilemmas, to which Getachew himself agrees on.

HoF (emphasis added).¹⁸⁴ However, is it not true that the powers and functions of the CCI are inseparable from and derivative of the powers of the HoF? It seems that it is because of the inseparable nature of the powers of the HoF and the CCI concerning constitutional interpretation that we (including Getachew himself) used to write as the HoF/CCI.¹⁸⁵ If Art.84(2) is principally about the procedures of the CCI in settling disputes involving the constitutionality of laws enacted by state and federal legislatures as Getachew pleads, can we think of other procedures that the CCI would employ when it faces constitutional disputes involving issues other than the constitutionality of laws issued by state and federal legislatures? Even in the discussion of the Assembly on Art.84, the power of the CCI was used interchangeably as the power of the HoF and by no means is the CCI vested with powers regarding constitutional interpretation that the HoF does not. Moreover, there is no separate procedure that the CCI uses to settle disputes other than those involving constitutionality of federal and state laws (for instance regulations) nor does the enabling proclamation for the CCI, proclamation No.250/2001, provides separate procedures to be used while dealing with disputes other than those under Art.84(2)of the constitution.

Coming back to the main business, it is admitted that in the discussion of the makers there was strong debate that courts should not be vested with the power of interpreting the constitution and most of the justifications to preclude courts from such power was forwarded from the angle of protecting and ensuring group rights.¹⁸⁶ Like what Getachew has rightly pointed out, the Assembly revealed that the constitution is a political document of the Nations Nationalities and peoples of Ethiopia and it is the political representatives of these groups that should be vested to interpret their covenant, the constitution.¹⁸⁷ Further, the makers had the fear that if courts are allowed to interpret the constitution, there is the risk of changing or amending the spirit and content of the constitution via interpretation like what is witnessed in the American

¹⁸⁴ Getachew, supra note 152, 166-167

¹⁸⁵ Throughout his article, Getachew uses the ‘HoF/CCI’ style of writing on the same area. To take on statement of his own, “This must lead to a conclusion therefore that so long as there is a constitutional or a question of constitutionality that needs resolution , it has to be submitted to the CCI/HoF...”, see Getachew, supra note 152, p165, see further p164, 162, 156, 167, etc.

¹⁸⁶ See the discussion on Art.62, 83, and 84, supra note 130.

¹⁸⁷Ibid discussion of the Assembly on Art.62, the Assembly boldly affirmed that the constitution is not a legal document but a political document which contains principles and objectives.

constitutional history. This is however far from concluding that the courts are with no power to interpret the constitution in all matters.

The reading of the primary discussion on the relevant provisions of the constitution seems to confirm that courts are totally excluded from interpreting the constitution. However, if we look at the discussion of the Assembly made following a questions by one member as to the appropriateness of excluding courts from interpreting the constitution, whether courts are totally excluded from interpreting the constitution becomes dubious.¹⁸⁸ In response to the question, the Assembly explained that the “fact that the power to interpret the constitution is given to the HoF does not mean that every cases appeared before a court that is claimed by a party as involving constitutional issue is to be referred to the CCI, rather the issue should pass through the various level of courts up to cassation; and so long as it is not said that the decision of these bodies involves erroneous interpretation of the constitution, no case is to be lodged to the CCI.¹⁸⁹ More briefly, the issue as to the role of courts in interpreting the constitution is expressed in the Assembly by giving an illustrative example saying:

...a constitutional issue arises, for one thing, when citizens file a case to courts to ensure their rights and if they believe that the court decides it in contradiction with the constitution. For instance, if members of a football team, while they are expressing their support and happiness in a street because their team won, are accused of conducting demonstration without securing permission from the appropriate authority and if the court before which the case is brought decided they are guilty of the charge, they may rise a question that their act is considered as demonstration contrary to the constitution. During this time if they cannot find a solution *from courts through appeal*, they may apply to the HoF/CCI requesting the interpretation of ‘*peaceful demonstration*’ under the constitution (empahis added).¹⁹⁰

¹⁸⁸Ibid discussion of the Assembly on Art.83, one member forwarded to the assembly his fear that “if courts are excluded from interpreting the constitution it is difficult to say that there are courts in Ethiopia” and the response given from the house was that courts are not totally excluded from their traditional interpretation power.

¹⁸⁹ Ibid discussion of the Assembly on Art.84

¹⁹⁰Ibid (the translation from Amharic to English is mine).

More clearly, it is asserted by the Assembly that there is a difference between issues of constitutional interpretation involving individual rights and those involving group rights. Accordingly, it is stipulated that “in cases individual rights are at issue the case is to be brought to the CCI after passing the remedies in the hierarchy of courts up to the Cassation level, and in general there is no provision in the constitution which prohibits individuals who allege their rights are affected contrary to the constitution to pass through the various levels of courts.”¹⁹¹

The above paragraphs, though may not give us a coherent and comprehensive message as to the power of courts in interpreting the constitution, one may be tempted to argue that the statements of the Assembly reflect the fact that the makers did not intend to oust courts totally from interpreting the constitution. Instead, it may be inferred from this that citizens may apply to courts that their rights are affected by the act or decision of a government body contrary to the constitution. As someone has rightly pointed out, it is difficult to expect from ordinary representatives (the Assembly) that they addressed all technical details and in their discussion inconsistencies can be detected. However, when the Assembly discussed that the HoF/CCI hears cases after they exhaust the various remedies available in courts, the writer believes that it may mean to say that courts have the power to entertain cases involving constitutional rights as elaborately provided in enabling legislation and to the extent the rights can be enforced by interpreting legislation, courts' power is constitutionally guaranteed. Not only this, courts have the power to interpret directly a constitutional provision to determine the scope, meaning and content of that constitutional provision so long as they are not engaged in the determination of the constitutionality of laws.

In similar vein, while giving justification as to why the HoF is vested to interpret human and democratic rights apart from group rights (like self-determination), it is disclosed by the Assembly that in the guise of democratic and human rights, the rights of Nations, Nationalities and Peoples could be compromised if interpretation of human and democratic rights in the constitution is given to courts. If this apportionment of interpretation jurisdiction between courts and the HoF is adhered to, it is argued by the Assembly that “in case individual rights are in conflict with group rights, it may result in difficulty of which interpretation, the interpretation of

¹⁹¹ Ibid

courts favoring individual rights or the interpretation of the HoF favoring group rights, should prevail”. In such cases, it may result in “constitutional crisis in the country if a body with ultimate interpretive power (HoF) is not established”.¹⁹² This view is also inferable from the document which provides brief explanation on the finally adopted draft of the constitution.¹⁹³

The stand of the writer is therefore, regarding the issue of whether or not courts have the power to interpret the constitution; yes they can if it is to determine the scope, content and meaning of a specific constitutional provision absent of deciding the un/constitutionality of laws. As discussed in the Minute of the Constitutionally Assembly (discussed above) courts are excluded from the power to review the un/constitutionality of laws of any type. The Assembly discussed that courts are excluded from interpreting the constitution in order to prevent the constitution from possible manipulation (in fact this is not the only reason) by individual judges.¹⁹⁴ This can happen only if courts are empowered to review the un/constitutionality of laws not a mere interpretation of the constitution to determine the meaning, content and scope of its specific provision.¹⁹⁵ This stand becomes plausible if one reconsiders the fact that a court is required to refer a case before it to the HoF/CCI when *it believes* that the case at hand is contrary to the constitution (emphasis added).¹⁹⁶ It is apparent that the court necessarily involves in interpreting a law at issue in line with the constitution because without doing this, it is impossible for the court to decide whether a

¹⁹² Ibid discussion of the Assembly on Art.62

¹⁹³ See ‘*Betewekayoch Mikir bet Yetsedekew Yehige Mengist Rekik Achir Mabrarria*’ October 29, 1994, p.122. This brief explanation provides that “be ankets 62(1) ena ankets 83(1) mesert behigemengistu dingagewoch lay yetirgum liyunet yetenesa endehone **yemecherasha tirgum yemestet** siltan ye federation mikir bet new” (emphasis added). What can be inferred from this statement is that the HoF is the ultimate interpreter, thus courts can interpret provisions of the constitution save the limitation under Art.84 (2), i.e. to declare laws unconstitutional.

¹⁹⁴ Discussion of the assembly, supra note 40

¹⁹⁵ The spirit of the constitution cannot said to be changed or manipulated by individual judges for the mere fact that courts are involved in interpreting the scope, content and meaning of a constitutional provision. It is if the courts are empowered to decide on the constitutionality of laws that could shape and change the original spirit of the constitution because in such case courts may reject to enforce main policy instruments that the law maker my issue to enforce the general policy objectives of the constitution.

¹⁹⁶ The question as to when courts are required to refer a case to the HoF/CCI is in fact beyond clarity. However, the cumulative reading of Art.84 (2) of the constitution (supra note 7) and Art.21 (2) of proclamation No. 250/2001 (supra note 163) connotes that it is when the court believes that the issue before it is contrary to the constitution.

case before it requires constitutional interpretation. Therefore what is prohibited for the courts is to decide a law unconstitutional.¹⁹⁷

One can still add a point that solidifies the argument in the preceding paragraph. The Judiciary under Art.13 (1) of the constitution is duty bound to respect and *enforce* chapter three of the constitution (emphasis added). To enforce chapter three of the constitution necessarily requires (for courts) interpreting the constitution. However, such interpretive power of courts concerning chapter three of the constitution does not include the determination of the constitutionality or otherwise of laws that are alleged to violate the mentioned chapter of the constitution. In this regard, the writer concurs with Yonatan as to the meaning of ‘constitutional interpretation’ (not with his stand on judicial power) that interpretation of the constitution constitutes two components; reviewing the constitutionality of laws and determining the scope, meaning and content of a constitutional provision.¹⁹⁸ Thus, courts are required to discharge their obligation of enforcing chapter three of the constitution by interpreting the constitution with a view of determining the scope, content and meaning of a constitutional provision. They cannot however involve in deciding the unconstitutionality of a law for such power is exclusively vested to the HoF/CCI.

Regarding the issue of whether courts in Ethiopia can review the constitutionality of laws other than those issued by state and federal legislative bodies, the writer argues that the separation of powers principle as recognized in the constitution have to be considered. Our constitution in its structure recognizes separation of powers and accordingly the power to make laws is vested to the House of Peoples Representatives. Other organs are not vested with the power to make laws. This fact gives us a clue that what the makers could, in principle, think and are expected to think is that the term ‘law’ refers to those issued by the law makers, not those laws that are enacted by the executive as a result of delegation. This does not mean that other laws cannot exist rather there is a proof that shows the makers anticipated the possibility of delegation of such legislative

¹⁹⁷ Assefa, supra note 156, p29

¹⁹⁸ Yonathan, supra note 157, p134

power to other organs (the executive).¹⁹⁹ However, it would not be an issue that need to be addressed by the makers that who and how the constitutionality of laws other than legislations be settled. This is because other laws (issued through delegation) are derivative of the legislations issued by state or federal law makers and the very existence of such laws is dependent on the legislative bodies, not on the constitution. This provides a concrete fact that legislative power of the executive organs is not an inherent power but a power it acquired as delegated by the legislature; and by no means can make law without authorization by the legislature and exceed the scope of delegation.

If the presumption that the executive organ cannot enact laws in the absence of clear authorization by the legislature is acceptable, the argument that it is not intended by the makers that the HoF is vested to interpret laws other than those issued by the legislature seems to be unwarranted. This is because the resolution of disputes involving constitutional issues arising from byelaws does not necessarily need the invocation of constitutional interpretation provided that they are enacted within the scope of delegation under the parent law. Issues in relation to byelaws (secondary legislations) can presumably be settled by looking them against the parent legislation without directly applying constitutional provisions and the power to review the compatibility of a regulation/directive with a proclamation is not given to the HoF/CCI by the constitution rather it is the power of courts.

Thus, what could be imagined, in principle, is byelaws can be in clear violation of a constitutional right only if the parent legislation is unconstitutional or a problem exists in relation to the delegation. However, if the parent legislation is issued in line with the constitutional values, it is expected that laws that are promulgated based on such law is necessarily to be in line with the constitutional values. If not, the executive enacts the byelaws outside the scope of delegation, and in such cases courts can decline the laws on the ground that it is beyond the intended scope of delegation under the parent laws.

For the above mentioned reasons, to argue that courts can review the constitutionality of laws and acts of the executive on the ground that what is excluded from courts is review of the

¹⁹⁹ See Art.77 (13) of the Constitution (supra note 7) which provides that the House of Peoples Representatives may delegate the council of Ministers to issue a regulation on a specific area. See also Art.55 (16) of same which has the connotation that the House of Peoples Representatives may issue directives in addition to regulation.

constitutionality of legislations seems to be self-defeating. If courts cannot review the constitutionality of legislations, the same should be applicable to review the constitutionality of laws enacted by the executive based on the express authorization of the legislature; for declaring them unconstitutional may, in effect, amounts to declaring the parent laws unconstitutional. How courts can declare regulations unconstitutional without challenging parliamentary legislations [thus parliamentary supremacy] provided that the regulations are issued as authorized by the legislations? What if, for instance, the legislature itself issues a regulation that has the same content as what would be had it was enacted by the executive? The answer is predictable that courts cannot review the constitutionality of a regulation that is enacted by the legislature (HoPR). The writer believes that the argument that courts can review the constitutionality of laws other than legislations emanates from the presumption that state and federal legislative organs can only issue a proclamation, which is legally and practically unjustifiable. There is however evidence in this regard showing the HoPR has issued a regulation.²⁰⁰ There is no reason to think otherwise when such power is delegated to the executive for what the executive is exercising is not its inherent power, but a power that is constitutionally given to the legislature.

In a nutshell, as long as byelaws are issued within the scope of delegation, they should be considered as if they are laws enacted by the law maker, thus, cannot be reviewed by courts for their un/constitutionality. The assertion is convincing if we see the fact that when the legislature delegates part of its power, its responsibility in relation to the delegated power is retained with it and any problem related to the delegated power is attributable to the original power holder (the law maker), not to the body which exercised it through delegation.

From the reasons discussed in the foregoing paragraphs, this writer believes that it is more convincing to hold the view that the power of courts to interpret the constitution is constrained except the determination of the scope, meaning and content of a constitutional provision. Considering the intention of the makers, the separation of powers principle as enshrined in the

²⁰⁰The House of Peoples Representatives of the Federal Democratic Republic of Ethiopia Rule of Procedures and Members Code of Conduct Regulation, Regulation No.03/2006, Federal Negarit Gazeta, 2006.

constitution and the opinion of key persons in the area²⁰¹ that the power to settle any type of constitutional disputes is exclusively vested in the HoF. Any case that involves issues of constitutionality, no matter where it emanates from (proclamation, regulation or directives), is within the exclusive domain of the HoF and as Getachew concluded, courts are totally ousted from deciding the constitutionality of laws of any type.

Courts in Ethiopia can interpret the constitution if they believe that a contested law before them is not contrary to the constitution. However, if the court believes that a law before it is unconstitutional, it shall refer it to the HoF/CCI no matter whether the law is proclamation, regulation or directives. The argument is also confirmed by Fasil Nahom who argues that “so long as any law (proclamation, regulation, directives) is contested to be unconstitutional, the issue has to be decided by the HoF/CCI.” He added that “even in case where an internal directives issued by a single high school is contested to be unconstitutional, it is up to the HoF/CCI to decide the issue”.²⁰² Courts can however dispose the same case by interpreting it in light of parent legislations. In this regard, it is worthy reminding the experience of countries where concentrated judicial review is employed like the case of Ethiopia. In Germany, courts can interpret the basic law if they ruled that the law in dispute is not contrary to the constitution.²⁰³

3.2.2. Legislative Limits

In the preceding paragraphs, it is tried to establish the role of courts in constitutional interpretation and the constitutional constraints imposed up on them. Accordingly, courts in Ethiopia are vested with the power to decide only justiciable matters that do not deal on the determination of constitutionality of any type of laws. Under this part, the limits that may be put on the power of courts by the legislature (HoPR) are to be addressed. The limits to be discussed here are those that have constitutional basis and do not arise for the mere fact that they are posed by the legislature in Ethiopia because it is the highest organ of the three government organs.

²⁰¹Interview with Ato Hagos Weldu (judge and chair person of judges of the federal Supreme Court Cassation Bench), July 8, 2011, Addis Ababa, Ethiopia, and Fasil Nahom (Dr.)(Member in the CCI), July 11, 2011, Addis Ababa, Ethiopia, reveals that courts do not have the power to review the constitutionality of any sort of laws.

²⁰² Interview with Fasil Nahom(Dr.), *ibid*

²⁰³ The Basic Law, Art.100(1)

In the United States, ouster clauses challenge judicial autonomy and the courts' position as a coequal branch of government in a constitutional order that has rejected legislative supremacy. In such a system, we might expect that the courts would never allow Congress to oust their jurisdiction under any circumstances.²⁰⁴ In countries where parliamentary supremacy is firmly established, the parliament may provide statutory limit on judicial power by ousting some of its powers.²⁰⁵ In such systems, there is no legal ground for courts to challenge the court stripping legislations by the parliament. However, in Ethiopia, though the legislature (HoPR) is constitutionally established to be the highest organ of government,²⁰⁶ its supremacy is not absolute rather it is subject to the supremacy of the constitution as provided under Art.9 (1) of the constitution. Constitutionally speaking, therefore, the supremacy of the HoPR is subject to constitutional limit and cannot by any means exceed from its power stipulated under the constitution; thus, cannot make laws which have the effect of encroaching up on the constitutional mandate of the other branches except where there is clear constitutional stipulation to this end.²⁰⁷

Coming back to the legitimate legislative limits on the power of courts, one may not easily find an express provision that allows the legislature to limit the power of courts recognized under the constitution.²⁰⁸ However, there is a stipulation in the constitution which implicates that judicial power may be exercised by institutions other than ordinary courts. The provision provides that “special or ad hoc courts which take judicial power away from regular courts or institutions *legally empowered to exercise judicial functions and which do not follow legally prescribed*

²⁰⁴ Douglas E. Edlin: ‘A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States’ (2009) 57 *the American Journal Of Comparative Law*70. In this connection, "whether there is a constitutional right of judicial review" can be restated as the question "whether Congress has the constitutional power to preclude review through the withdrawal of jurisdiction". See *ibid*, p72.

²⁰⁵ This is true of the UK constitutional system where there is an absolute sovereignty over the other branches.

²⁰⁶ See Art.50 (3) of the constitution, *supra* note 7.

²⁰⁷ This is because in a country where constitutional supremacy is firmly established, it is hardly sound to think that the supreme legislature which is subject to constitutional limit will have the power to grant or deny the constitutionally mandated powers of the other branches.

²⁰⁸ See Art.79 (1) of the constitution, *supra* note 7. Judicial powers, both at federal and state level, is vested the courts. This constitutional power of courts can be acceptably limited by the same document or other laws which are clearly authorized by same.

procedures shall not be established (emphasis added).”²⁰⁹ The otherwise reading of the provision reveals that judicial power may be taken away from regular courts and given to special or ad hoc courts or government institution provided that they follow legally prescribed procedures. These institutions include, within agency tribunals, appeal commissions and similar organs which may be established by the HoPR and this way of understanding is easily conceivable from the discussion of the Constitutional Assembly.²¹⁰ Thus, the HoPR may limit judicial power through legislations by establishing institutions which exercise judicial function according to legally prescribed procedures.

The arrangement is not unique to the FDRE constitution; instead it is common in many countries even in those with well advanced judicial system that institutions with quasi-judicial power play a pivotal role in administration of justice.²¹¹ From this, it is clear that apart from the clear limits by constitutional provisions as discussed above, the limits by the HoPR up on judicial power by establishing institutions that could take away judicial power according to the constitution is legally and practically justifiable. The prevailing reality in Ethiopia however shows different scenarios of giving judicial power to other institutions and government offices in a way which seems unintended in the constitution. Two important issues may be framed in this regard. First, can the HoPR establish institutions, special or ad hoc courts which exercise judicial functions but do not follow legally prescribed procedures? Second, is it warranted by the constitution that the HoPR establishes institutions or special courts which exercise judicial function following legally prescribed procedure but their decision is not reviewable by regular courts? These issues are dealt below after looking at the various laws that totally or partly divested judicial power.

3.3. The Court Stripping Legislations

As it is discussed above, whether the legislature can remove or limit court’s jurisdiction varies from country to country and depends on the type of system established in the country. In countries where the parliament is sovereign, jurisdiction stripping legislations are less

²⁰⁹ Ibid Art.78(4)

²¹⁰ See discussion of the Assembly on Art.78, supra note 130.

²¹¹ Considering the proliferation of government functions in providing public goods and services which consequently results in increase of cases follows to courts, it is believed that in the interest of technical expertise and reduction of court backlogs to establish institutions with semi-judicial power. See for detail Assefa, supra note 40, p19-20.

controversial. In countries where the parliament is supreme subject to the supremacy of a constitution, legislations that oust judicial power are relatively contestable. Whereas, in countries that establish government organs with equal constitutional status, the issue is highly contested. For instance, in the United States constitutional history the congress has proposed bills that remove or limit the jurisdiction of Federal Supreme Court as well as state courts in many occasions and the measure continues to be area of controversy until recently.²¹² In Ethiopia too, there are many legislations which remove or partially limit courts' jurisdiction and it seems that stripping court jurisdiction is the new threat to the judiciary these days. The trend in Ethiopia seems to prove that there is an increasing practice of promulgating laws containing court stripping clauses that establish tribunals within administrative agencies which take away judicial power. Many of the legislations with ouster clauses are well disclosed and discussed by Assefa²¹³ and under this section these and other laws are to be touched.

The enactment of the two related laws, proclamation No.250/2001 and Proclamation No.2511/2001 are argued to be legislations that preclude judicial power to review in a way unintended by the constitution.²¹⁴ The laws are considered as ousting judicial power because they define the term “law” that is within the jurisdiction of the HoF/CCI as includes proclamations issued by the federal or state legislative organs, and directives and regulations enacted by federal and state government institutions and includes international agreements that have been ratified by Ethiopia.²¹⁵ This broad definitions of the term law is argued to be ‘unconstitutional’ since the

²¹² Max Baucus and Kenneth R. Kay, 'The Court Stripping Bills: Its Impact on the Constitution, the Courts and Congress' (1981-1982) 27 *Villanova Law Review* 986-992. It is argued that many of the motions by the congress to limit or remove courts' jurisdiction was needed to diffuse the practice of judicial activism by the US Supreme court in handling “social issues of controversial nature” and the practice of the Court was challenged on the ground that it is against the separation of powers.

²¹³ See Assefa, supra note 40, p16-23

²¹⁴ Id, p16

²¹⁵ Art.2 (5) and Art.2(2) of proclamation No.250/2001(supra note 163) and Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities proclamation No.251/2001, Federal Negarit Gazeta, 7th Year No. 41, 2001 respectively.

constitution does not intend to divest of courts from the power to interpret laws other than those issued by Federal and state legislative organs.²¹⁶

The definition in the proclamations is not without consequence; instead, following the promulgation of the laws it is argued that the stand and perception of courts and the CCI/HoF is changed. Accordingly, the CCI had the position that reviewing the compatibility of regulations with parent legislations and the violation of rights by the executive cannot be regarded as reviewing the constitutionality of laws; hence remedy should be sought from courts.²¹⁷ It is forwarded, however, that the position of the CCI and of courts seems to be changed following the promulgation of the laws that the jurisdiction of the HoF to review the constitutionality of laws is extended to include all laws and acts as included in the definition of the term ‘law’ in the two proclamations. The Coalition for Unity and Democracy (*CUD*) *V. PM Meles Zenawi* case is cited as one confirming incident for the allegation that the CCI has changed its decision.²¹⁸

The above argument may however be challenged for the fact that, after the two laws are promulgated, the CCI has decided a case in a similar manner as that of the one decided before the promulgation of the laws. In the case *Ethiopian Blind Persons Association V. Oromia Education Bureau and Jimma College of Teachers Education*, which is decided in December 2003, the CCI ruled with the concurring opinion of all members that if what is contested is the constitutionality of laws other than state or federal proclamations, it is not up to the CCI to decide the case but for the courts.²¹⁹ The CCI in the case clearly stated that it is only if the

²¹⁶ See Assefa supra note 40, p16-17, the argument is built on the definition given to ‘law’ under Art.84 (2) of the constitution [Amharic version] and the principle of parliamentary supremacy.

²¹⁷This position of the CCI is reflected in cases brought before it, includes the *Addis Ababa Taxi drivers union V. Addis Ababa City Administration and in Biyadgign Melese et al V. Amhara National Regional state* in its decision held on 25 Jan, 2000 and 8 May, 1997 respectively, see Assefa supra note 40, p15 for detail.

²¹⁸ See Assefa Fiseha, supra note 40, p16

²¹⁹Decision of the Council of Constitutional Inquiry, File No.4, December 2003. The case was brought before the CCI challenging the constitutionality of the directives issued by in the Oromia Education Bureau, Jimma College of Teachers Education which prohibits the admission of persons with some disabilities including those visually impaired. The CCI ruled that since the directive is not issued by state or federal legislatures, it is up to the courts to adjudicate the case. An interview with Dr. Fasil Nahom,(supra note 201) however, reveals another scenario of how the case before the CCI was disposed that an order was given to the president of the regional State of Oromia to make necessary amendment of the directives so that it will not violate the constitutional rights of the complainants.

constitutionality of a “*proclamation*” issued by state or federal legislature is contested that the case should be brought before the CCI (emphasis added). In its very recent decision, however, the CCI regain its previous stand in the *CUD V. PM Meles Zenawi* case. In the case *Ashenafi Amare et al v the Ethiopian Revenues and Customs Authority*, the CCI entertained the issue of violation of a right (access to justice) by the executive through regulation and gives its reasons justifying the regulation is not contrary to a constitutional right.²²⁰ What may be inferred from this is that the constitutional stand and practice of the CCI even after the promulgation of the two laws does not seem consistent. It could be said therefore, that the constitutional position of the CCI in relation to its/HoF’s power is determined, not necessarily by its perception in the two laws vis-à-vis Art 84(2) of the constitution but also on other extra-legal factors like the sensitivity of the cases in light of the socio-economic and political realities in Ethiopia.²²¹

The effect of the two laws is also reflected in the position of courts. It is argued that in the *CUD V. PM Meles*, the referral of the case to the CCI is argued to be nothing but consequential to the fact that the court has adhered to the jurisdiction of the HoF/CCI in the two laws than to the constitutional provision.²²² An interview with Ato Hagos Weldu, judge of the Supreme Court Cassation bench confirms the argument.²²³ He firmly asserted that it is not the jurisdiction of courts to see matters that involve constitutional issues except the compatibility of subordinate laws with the enabling legislation. From all the facts, it is acceptable to say that the two laws provide limit on judicial power to see the violation of rights by executive acts and decisions. The writer again argues that the two proclamations are limits on judicial power, but are issued, according to the stand of the writer, in line with the spirit of the constitution as discussed above.²²⁴

The Re-Enactment of Urban Land Lease Holding proclamation is among the laws that foreclose judicial power which provides that the decision of the Commission delivered both on points of

²²⁰ Decision of the CCI, File No 101/2009, decided on February 9, 2010.

²²¹This is true because the CCI in its decisions made after the promulgation of the two laws does not reveal consistency.

²²² See Assefa Fiseha, *supra* note 40, p16, and Takele, *supra* note 159, p75 for detail

²²³ Interview with Ato Hagos Weldu, *supra* note 201.

²²⁴ The writer believes that the two proclamations reflect the true spirit of the constitution because courts in Ethiopia do not have the power to solve the constitutionality of laws of any type.

law and fact shall be final, except on issues of compensation.²²⁵ The law prohibits citizen's right to challenge the legality of measures taken by the concerned government authority, for instance, the legality of a lease issued by the agency, and excludes courts' power to entertain the issue. In the case *Southern Region Hawassa City Municipality V. Hawassa Debre Genet St. Gabriel Church*, the Federal Supreme Court Cassation Bench decided that courts do not have the jurisdiction to see claims challenging the legality of lease issued by the Lease Board.²²⁶

According to Ato Hagos, the law was first intended to be promulgated with no chance for persons to go to a court of law challenging the decision of the Commission including on issues of compensation.²²⁷ He continued to state that "...of course, apart from issues of compensation, an act of administrative agencies may be challenged for other grounds of illegality like claims related to discrimination. We are also observing the prevailing reality in this regard but such issues are decided to be within the administration realm, not the judiciary."²²⁸ In similar vein, the proclamation for expropriation of public holdings provides that aggrieved persons by an expropriation decision could appeal both to the tribunal established in the agency and the High court, only on question of compensation.²²⁹ Questions concerning factual dispute and the legality of the expropriation could not be heard by any institution including the Tribunal (to be) established under the agency.

Another law that precludes court jurisdiction is the Social Security Agency Re-establishment Proclamation that provides the decision of the Social Security Appeal Tribunal is final and conclusive.²³⁰ This is an absolute denial of jurisdiction of ordinary courts on issues (law and fact) of pension and related benefits. The federal Supreme Court Cassation Bench in the case

²²⁵The Re-Enactment of Urban Lands Lease Holding proclamation, proclamation No.272/2002, Federal Negarit Gazeta, 8th Year No. 19, 2002, Art.18(3).

²²⁶ Decision of the Cassation Bench, file no.46220, decided on January 27, 2010.

²²⁷Interview with Ato Hagos Weldu, supra note 201, he revealed the fact that it is on the comment and suggestion of some legal professionals, including himself, that courts' power to see issues of compensation is finally included.

²²⁸ Ibid.

²²⁹ Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation, Proclamation No.455/2005, Federal Negarit Gazeta, 11th Year No. 43, 2005, Art.11

²³⁰ The Social Security Agency Re-establishment Proclamation, Proclamation No.495/2006, Federal Negarit Gazeta, 12th year No. 31 2006, Art.11(5)

Maheberawi Wastina Balesiltan V. Ato Berhanu Hiruy and Kebede G/Mariam has confirmed the power of the commission to render final decision and ordered lower courts not to review cases that come from the social security tribunal.²³¹

The law that empowered the Agency for Government Houses is another legislation that forecloses judicial power to an administrative organ. The law empowers the Agency to evict a tenant who is alleged to be breaching the contract or is an illegal occupant, and to this end it is vested with the power to order the police force on its own motion and without the need to have court warrant.²³² In fact, there is no a clause in the proclamation that stipulates the decision of the Agency is final. However, in the case *W/ro Mogninet Tiruneh V. Agency for Government Houses*, the Federal First Instance Court relinquished its jurisdiction to see the complainant by merely stating the court does not have jurisdiction to see the case while there is no clause in the establishment law to this effect.²³³ The interview with Ato Almaw Wolie and Ato Hagos Weldu, Cassation judges, revealed that a complainant challenging the measure of the agency taken based on the allegation that the tenant is an illegal occupant is not reviewable by courts but issues related to the alleged breach of contract is within the jurisdiction of courts.²³⁴ Thus, except for issues of breach of contract, the law has taken away court jurisdiction to hear cases and complaints related to the measures taken by the agency.

The late promulgated regulation of the Ethiopian Revenues and Customs Authority is the most outrageous law that strips courts' jurisdiction in Ethiopia.²³⁵ This law is central to the paper and is dealt in detail under the next chapter. It provides that any employee of that Authority that is dismissed by the Director General of the Authority under the summary dismissal procedure will

²³¹ Decision of the Federal Supreme Court Cassation Bench, File No.18342, December, 2005.

²³² Agency for Government Houses Establishment Proclamation, proclamation No.555/2007, Federal Negarit Gazeta, 14th Year No 2, 2007, Art.6 (3) and Art.6. The Agency is further empowered by the proclamation to demolish constructions which are considered to be done illegally on government houses and possessions.

²³³ Decisions of the Federal First Instance Court, civil file No.129014, November 22, 2008. The Agency provides preliminary objection in the case that its decision made according to the proclamation is not subject to review and the court upheld the objection.

²³⁴ Interview held with Ato. Hagos Weldu (Supra Note 201), and Ato Almaw Wolie (Judge of the Federal Supreme Court Cassation Bench) 10th July, 2011, Addis Ababa.

²³⁵ The Regulation, supra note 12, Art.37 (2).

not be reinstated by the decision of any judicial organ. Many issues are associated includes whether the law totally removes judicial power and the legality of the regulation when it is seen from higher laws which are dealt in the next chapter. Yet, there are other legislations that partly remove court jurisdiction.²³⁶

The above discussed laws are not exhaustive in that there may be other legislations with similar effect on the jurisdiction of the judiciary.²³⁷ However, the discussion is sufficient at least to address some issues and establish the general trend of laws promulgated and decisions of appropriate government institutions so far vis-à-vis the interpretive power of the judiciary as discussed in the subsequent sections.

3.4. The Constitutional-Legal Standing of Ouster Laws in Ethiopia

Judicial power in its general context is the power to say what the law is and this power is, in principle, vested on ordinary courts.²³⁸ It cannot be argued that judicial power is legitimate at all times and the fact that the power to determine what the law is given to unelected judges has been continued to be an area of contention and this calls for the proposition that the power should be subject to some constraints.²³⁹ The extent of the constraints may be either legislative limits or constitutional limits as discussed above and this varies from country to country.

²³⁶The Federal Civil Servants Proclamation, Proclamation No.515/2007, Federal Negarit Gazeta 13th Year No.15, Art.76(2), Income Tax proclamation, Proclamation No.286/2005, Federal Negarit Gazeta 8th year No.34, 2002, Art.112, Value Added Tax Proclamation, Proclamation No. 285/2002, Federal Negarit Gazeta 8th Year No. 33, 2002, Art.43(4). All these laws provide that appeal against the decision of the Administrative Tribunal and the Tax Appeal Commission is possible only on ground concerning question of fact.

²³⁷We can see, for instance, the Property Mortgaged or Pledged with Banks Proclamation, Proclamation, No.97/1998, Federal Negarit Gazeta, 4th Year No. 16 and the Privatization of Public Enterprises proclamation, Proclamation No. 146/1998, 5th year No.26, Art 28(2), Charities and Societies Proclamation, Proclamation No. 621/2009, 15th Year No.25, 13th February, 2009

²³⁸ Chemerinsky, supra note 146.

²³⁹Id, p11-31, in the United States there are some commonly employed limits on judicial power includes, interpretive limits (involves the issue of whether courts should limit their interpretation only as intended or expressly provided by the framers, also called the originalism), congressional limits (this is a limit by the congress up on power of the supreme court though it is contested for its constitutionality), and justiciability limits (are limits emanated either from the constitution or from doctrine judicial interpretation). See also Charities and Societies Proclamation,

Before analyzing the constitutional standing of the laws that limit or remove court jurisdiction in Ethiopia, it is worthy first to see once again the legitimate constitutional constraints up on judicial power very briefly. The first constraint is the judiciary is excluded from interpreting the constitution that involves the constitutionality of a law even though the scope of such constraint is still debatable. Another constraint is justiciability. The judiciary in Ethiopia is vested with the power to see only justiciable matters brought before it though which matters are justiciable and which are not, and who decides this issue is unsettled.²⁴⁰ Finally, judicial power may be constitutionally taken away through legislations when it is vested up on other institutions other than ordinary courts *provided that they are required to follow legally prescribed procedures* (emphasis added).²⁴¹ This is the most important constitutional provision regarding judicial power and at the same time the most silent and disregarded issue by concerned bodies while dealing with laws that limit or remove judicial power as it is discussed subsequently.

Having a general glance at the constitutionally provided constraints of judicial power in Ethiopia, now it is on the right truck to analyze the stand of the laws that stripped judicial function in light of the constitutional limits on judicial power and other relevant principles of law as ascribed by our constitution. The first category of ouster laws can be seen from the angle of Art.78 (4) of the constitution. According to this provision, institutions or other bodies other than ordinary courts that do not follow legally prescribed procedures cannot be established to exercise judicial functions. The constitution is very clear in this respect and establishing an organ or institution vested with judicial function but that does not follow legally prescribed procedures is unconstitutional. The constitution, when it requires the need to follow legally prescribed procedures while exercising judicial function by organs other than ordinary courts, it should be construed that it is within the spirit of our constitution that due process of law should be ensured.

Proclamation No. 621/2009, Federal Negarit Gazeta 15th Year No.25, Art.104 (2), which provides the decision of the board regarding claims by foreign charity or society organizations over the agencies activities is final.

²⁴⁰ See Art.37 (1) of the constitution (supra note 7). See also chapter four for detail on the issue.

²⁴¹ Id, Art.78 (4), the constitution stipulates that special or ad hoc courts that take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures shall not be established. It is important here to remind readers that this constitutional stipulation has a connotation that due process of law must be observed when institutions exercise judicial function involving individual rights.

Thus, what could be raised right here is a couple of issues; 1) whether or not the institutions or bodies established by the various laws to exercise judicial functions are constitutionally legitimate, 2) whether or not making the decision of these institutions to be final is in line with the constitution.

It is repeatedly said that institutions that exercise judicial functions and follow legally prescribed procedures can be established. Based on this, some tribunals are established in administrative agencies, such as the civil service Administrative Tribunal, the Tax Appeal Commission, and the Social Security Appeal Tribunal.²⁴² The important point that should be addressed in relation to these tribunals is whether or not they follow legally prescribed procedures so that they could be considered as institutions established in a way compatible with the constitution. The determinant factor under the constitution regarding the legality of the tribunals exercising judicial power is the fact that they follow legally prescribed procedures. When seen in light of this, the above mention tribunals could be said that they are constitutionally legitimate not only because they follow legally prescribed procedures²⁴³ as required in the constitution but also because they are necessary in enhancing government efficiency and reduction of court burden.

However, there are institutions that are established to exercise judicial function while there is no legally prescribed procedure they may follow. The appeal commission established by the Urban Land Lease Proclamation is not required to follow any procedure; instead, it is empowered that it shall not be governed by the ordinary Civil Procedure Code while conducting its functions.²⁴⁴ Furthermore, the Agency for Government Houses, through the Director General, is entitled to exercise a function that would be appropriate to be vested to the courts. Accordingly, it is empowered to evict tenants of Government Houses for an alleged breach of contract and for

²⁴² See the Federal Civil Servants Proclamation No.515/2007 (supra note 236) Art.74, Income Tax Proclamation No.286/2002 (supra note 236) Art.113, Social Security Agency Re-establishment Proclamation No.495/2006 (supra note 230) Art.11 .respectively.

²⁴³Supra note 236, Art.74(4) The Civil Servant Administrative Tribunal is vested with a power given to an ordinary court under civil procedure code, to execute its own decision, decree, order and the court procedure. Statements with similar procedural requirements are available under Art.11 (4&7) of the Social Security Agency Re-establishment Proclamation (supra note 230) and Art.114 and 115 of the Income Tax Proclamation (supra note 236).

²⁴⁴ See the Re-Enactment of Urban Lands Lease Holding proclamation (supra note225) Art.19 (8).

presumed illegality of the occupation by the tenant without the need to follow a clear procedure or court permission.²⁴⁵ These institutions, no matter whether their decision is final or not, do not have constitutional basis since there is no legally prescribed procedure they are required to follow while discharging such functions.

In this connection it is important to see how the Cassation Bench addresses the issue of who can exercise judicial functions other than ordinary courts. In many cases, the Bench confirms the legality of discharging judicial functions by these and similar institutions by citing the civil procedure code of Ethiopia.²⁴⁶ In the case *Welday Zeru et al V. the Ethiopian Revenues and Customs Authority*, the Cassation bench in its ruling making an express reference to Art.4 of the civil procedure code reasoned out that courts cannot adjudicate and decide on cases that are prohibited by *other laws* not to be brought before them (emphasis added).²⁴⁷ The reasoning repeats itself in the interview made with Ato Almaw Wolie, judge of the Bench.²⁴⁸ Constitutionally speaking, the reasoning is less convincing for at least two reasons. For one thing, judicial power can be taken away and given to other institutions only if such institutions are required to follow legally prescribed procedures, not merely because some claims are prohibited by other laws not to be adjudicated by courts. Judicial power is a constitutional vested power and to argue that this power may not be exercised by courts if other laws (proclamation, regulation, and directives) provide so is unintended by the constitution. The Bench's understanding in this respect reinforces assisting the other two branches to continue issuing laws that divests of judicial power and let them put the judiciary to be their subservient. What if all conceivable judicial powers are foreclosed by laws? Should the bench rely on the same reasoning (invoking the provision under the civil procedure code)?

²⁴⁵ The Agency for Government Houses Proclamation , supra note 232, Art.6(3)

²⁴⁶ The civil procedure code of the empire of Ethiopia, 1965, Art.4 which provides that “Without prejudice to the provisions of the following Articles, the courts shall have jurisdiction to try all civil suits other than those of which their cognizance is expressly or impliedly barred.”

²⁴⁷ *Welday Zeru et al V. the Ethiopian Revenues and Customs Authority*, decision of the Federal Supreme Court Cassation Bench, file No.51790, decided on May 24, 2011. This decision involves about 72 complainants having the same cause of action against the defendant.

²⁴⁸ Interview with Ato Almaw Wolie, supra note 234.

For another thing, relying on a law that is issued by a sovereign emperor where there was no constitutional supremacy to justify the foreclosure of judicial power which is vested under the supreme constitution seems to be absurd. The Cassation Bench may argue that to decide whether the removal of court jurisdiction through law is constitutionally appropriate is not its mandate but the mandate of other institutions (HoF/CCI). However, the absence of jurisdiction of courts to see the constitutionality of the law should not lead the Bench to make a resort to a law enacted when there was no constitutional supremacy, but the supremacy of the emperor and laws passed by them.²⁴⁹ To argue that courts do not have jurisdiction to interpret as to whether the court stripping law is in line with the constitution is one thing but to cite a law that have a contrary implication as intended in the supreme constitution to justify court stripping laws is completely another thing.

Therefore, in the absence of the responsibility to follow legally prescribed procedures, any exercise of judicial function is apparently unconstitutional and in such cases it is up to the ordinary courts to interpret laws except testing the un/constitutionality, and to review decision of administrative agencies. This argument is forwarded from constitutional perspective and the laws that establish bodies and institutions vesting judicial function without the need to follow legally prescribed procedure are constitutionally contestable. Even if it could be said that, owing to its supremacy, the parliament can decide on issues of power of the judiciary, such legislative authority to divest the court of its jurisdiction must be exercised in conformity with constitutional provisions. This is, therefore, not whether courts' power is taken away or not rather it is whether the institutions and body established to exercise judicial power are at the same time required to follow certain procedure as stipulated in the constitution while discharging the vested power up on them.

Another, point based on which the constitutional standing of the laws that remove or limit the jurisdiction of courts can be checked is, whether it is within the intention and spirit of the constitution that the law maker issued laws that contain finality clause. A related issue is that

²⁴⁹ The civil procedure code is enacted during the time where there was no supremacy of a constitution, the concept of separation of powers, judicial power, human rights, etc. by then, to exclude court jurisdiction to adjudicate some cases because of imperial decree may not be surprising; for , during that time, there was supremacy of the emperor, not the constitution, thus Art.4 of the civil procedure code may be justified as acceptable.

when the legislature provides that decision of a tribunal or government institution is final, should it be taken for granted that it is meant to say they are not subject to review by courts? Regarding this, it is enough to recall some of the laws with finality clause and while some of the finality clauses are partial (only in relation to fact or specific subject matter) others are total (both as to issue of fact and law). The Civil Servants Proclamation and the Income Tax Proclamations provide that the decision of the tribunal as to issue of fact is final.²⁵⁰ The decision of the Social Security Appeal Tribunal is final both on issues of fact and law.²⁵¹

Coming back to the first issue, the constitution does not contain an express provision that deals on the issue. What the constitution clearly provides is that judicial power is vested on courts both at federal and state level.²⁵² A related constitutional provision provides that the power of courts is limited only to justiciable matters.²⁵³ Another important constitutional stipulation is Art.78(4) which provides, as repeatedly discussed, judicial function may be given to other institutions other than ordinary courts only if such institutions are required to follow legally prescribed procedure. Courts, in particular, the Cassation Bench should see all these relevant constitutional provisions while addressing cases involving the legality of laws that declares decision of government agencies are final.

However, case study of the decision of the Cassation Bench reveals that courts have jurisdiction to see justiciable matters if such power is not legally given to other institutions that exercise judicial function. In the case *the Ethiopian Privatization and Public Enterprises Supervising Agency V. heirs of Ato Nur Beza Terga*, the Cassation Bench interprets Art.37 (1) of the constitution very literally without making nexus with the other relevant provision.²⁵⁴ The constitution provides that “everyone has the right to bring a justiciable matter to, and to obtain a decision or a judgment by, a court of law or *any other competent organ with judicial power* (emphasis added). The Cassation Bench interprets Art.37 (1) of the constitution saying “courts may adjudicate a complainant before them when such judicial power is not vested to other

²⁵⁰ See the Federal Civil Service Proclamation, and the Income Tax Proclamation (Supra note 26) Art.76 (2) and Art.112 (1) respectively.

²⁵¹ The Social security proclamation, supra note 230

²⁵² Art.79 (1) of the constitution, supra note 7.

²⁵³ Id, Art.37 (1)

²⁵⁴ Decision of the Federal Supreme Court Cassation Bench, file No. 23608, decided on November 12, 2010.

organs by law.”²⁵⁵ The writer however contends the decision as being made by relying on the literal understanding of a single constitutional provision. It is true that Art. 37(1) of the constitution tells us (incidentally) the fact that other organs that exercise judicial power may be established and in such cases it provides that individual complaints do have the right to bring their cases before such organs. However, the provision does not tell us how these organs should be established to exercise judicial power and the provision is not meant to deal with the establishment of other organs that may exercise judicial function, rather it is meant to address when and how everyone may pursue access to justice when its rights of justiciable matters are alleged to be violated. A mere reliance on such single sub-article is therefore less sound.

If relying on the provision is not unnecessary, the same reference shall be made to the other provision under Art.78 (4) of the constitution which is the direct provision that governs how judicial power may be taken away by other organs other than ordinary courts. Thus, even though judicial power may be vested to other organs by law as it is deduced from Art.37(1) of the constitution, this cannot warrant the Cassation Bench to justify decision of the organs having finality clause as it is compatible with the constitution. Instead, it would have been correct for the Bench had it tried to check whether these organs vested with judicial power are at the same time required to follow legally prescribed procedure.

From these constitutional stipulations, one may safely conclude that ordinary courts are vested to interpret laws other than (arguably) the constitution provided that they are justiciable and the empowerment of judicial function to other organs cannot exclude judicial function so long as these organs do not employ legally prescribed procedure. Let us assume however that the legislature according to the constitution establishes institutions that exercise judicial power. Can the legislature establish such institutions that include a clause which says the decision of these institutions is final and not reviewable by courts?

The constitution is not clear in this respect and in the absence of clear constitutional stipulation what one can do is to resort to ideals and general principles of law as recognized in the constitution and one of the ideals that our constitution enshrined is the rule of law. The ideal, as it is broadly discussed in chapter two, is extravagant that many contesting views are forwarded as

²⁵⁵ Ibid

to its content and scope. The least common denominator of the ideal, both in its formal and substantive conception, is that there must exist an independent tribunal before which an aggrieved individuals require a remedy for harms and injuries they earn from illegal act of government. The rule of law in Ethiopia is enshrined in broader scope that has an implication of including the substantive fairness of the various laws to be promulgated by the legislature. The constitution first recognizes the need to obey the rule of law in its preamble which provides “...to build a political community founded on the rule of law.”²⁵⁶ The preamble does not, in fact, tell us how the ideal is intended to be recognized in Ethiopia. However, the commitment to the rule of law under our constitution may be inferred from the elaborate list of fundamental rights and freedoms recognized by the constitution.²⁵⁷ The long lists of fundamental rights in the constitution are recognized to be respected and implemented, not to be restricted. This is clearly provided in the constitution which provides that human rights and freedoms are inalienable and inviolable; and shall be respected.²⁵⁸

Furthermore, the constitutional entrenchment of fundamental rights and freedoms which is reflected by providing stringent amendment procedure of them²⁵⁹ is another indication as to how our constitution tries to ensure the rule of law. Entrenchment of rights is among the mechanisms that constitutions employ to ensure constitutionalism and the rule of law.²⁶⁰ This becomes real only if the rights are respected and enforced by government bodies and most importantly the judiciary. However, the laws that provide decision of government agencies to be final do have an impact on the fundamental rights and freedoms²⁶¹ and as it is discussed above this is interpreted by the Cassation Bench that courts do not have the power to review the decision of the tribunal.

²⁵⁶ Preamble of the constitution, supra note 7.

²⁵⁷ Id, Chapter three of the constitution which established the bill of rights regime in the constitution covers the largest portion of the text.

²⁵⁸ Id, Art.10

²⁵⁹ Id, Art.105 (1), comparing to other provisions of the constitution, amendment of chapter three that deals with human rights is rigorous and this is an indication of entrenchment of rights.

²⁶⁰De Wall et al, supra note 4, p7.

²⁶¹ For instance, the reenactment of urban land lease holding proclamation which provides that the decision of the appeal commission is final except in amount of compensation (see supra note 225) adversely affects the right to property and the right to access to justice as provided under Art.40 and Art.37 of the constitution.

If it is true that our constitution established the rule of law, it is curious to say that the supremacy of the constitution is possibly achievable if there is compliance of all government organs with the ideal in discharging their functions. One of the core values of the rule of law that government organs need to ensure is that individuals must be vested with legal remedy for the violation of legal rights and such remedy should be judicial, not administrative remedy only. Two reasons may be mentioned here; first, as Chief Justice Marshall argued, it is “profoundly the province of the judiciary to say what the law is.”²⁶² There is no reason which prohibits us from borrowing Marshall’s argument regarding our judiciary that it is the power of courts in Ethiopia to say what the law is except the [constitution], and to prohibit the judiciary to say what these laws meant by incorporating finality clauses is a limit on the rule of law which requires individuals to claim a remedy when they receive injury by the government. Second, the laws that exclude court jurisdiction to review decision of the administrative agencies including decision of within agency tribunals provide an insufficient guarantee in the protection of the rights and freedoms in a country where the rule of law is constitutionally embedded. This is because appeal rights available at within agency tribunals cannot replace the role of courts because the tribunals do not possess the constitutionally mandated independence that is vested to our courts,²⁶³ thus are not trustworthy of remedying administrative grievances.

Another important point against which the laws containing ouster clause may better be challenged is the doctrine of separation of powers. Our constitution, as it can be inferred from its structure, recognizes the separation of powers and accordingly Art.79 of the constitution provides that judicial power is vested on the judiciary [thus courts]. Moreover, from the separation of powers perspective, the principle is that the judiciary is the ultimate guarantor of the legality of laws and actions of government.²⁶⁴ No matter how and to what extent the ideal is recognized in our constitution, the very purpose of the ideal is to ensure that power is not

²⁶² Sidney A. Shapiro, ‘Standards-Based Theory of Judicial Review and the Rule of Law’ (2005) *bepress Legal Series 6*

²⁶³ Art.78 (1) of the constitution (supra note 7), within agency tribunals are argued as defective in ensuring administrative justice rather they are considered as part of the problem. This is because, they do not have the same constitutional independence as that of the judiciary, and rather they are part of the executive.

²⁶⁴ Louis L. Jaffe, ‘*Judicial Control of Administrative Action*’ (1965) 154

concentrated on a single body or organ of government²⁶⁵ and by diffusing government power the separation plays an important rule of law value. It is hardly realistic to imagine that while our constitution recognizes the ideal it does not intend to ensure that power is not concentrated in one person or organ of government.

When the legislature empowers government agencies with decision making power which potentially affects individual rights and judicial power to review the decisions of such agencies is excluded, this goes clearly against the ideal; not only because the executive is carrying out judicial functions but also it reinforces a concentration of power in a single government branch (executive). This ultimately confirms the dictum “power corrupts and absolute power corrupts absolutely”. Moreover, judicial review of administrative action is inseparable with the separation of powers doctrine²⁶⁶ and to provide a legislation that excludes judicial review of agency decision completely defeats the very essence of separation of powers. Exclusion of jurisdiction of courts regarding determination of facts may be acceptable since it may involve the determination of the substantive policy of a given law; and it may not grossly go against the principle of separation of powers if such power is left up to agencies. However, if the judiciary is divested of its power both as to law and fact, the constitutionality of the laws causing foreclosed of jurisdiction of courts is highly contestable.

Thus, when our legislature precludes courts’ power to review agency decisions, it apparently violates the separation of powers because this choice makes the executive branch the ultimate authority of determining its own compliance with the legislative standards. This apparently reinforces the concentration of powers (administrative and judicial) in a single government organ (the executive) or single person as in the case of the Ethiopian Revenues and Customs Authority.²⁶⁷ The various laws that provide for the exclusion of judicial power in Ethiopia can therefore be seen in light of this potential risk and one cannot find an express constitutional provision that empowers the legislature to enact laws that exclude review by courts of, at least, the legality of administrative decisions. The laws exclude jurisdiction of courts at least to the

²⁶⁵Barendt, *supra* note 108, p283

²⁶⁶ Shapiro, *supra* note 262, p40

²⁶⁷ See chapter four

point of correcting violations of the clear statutory text or failure to apply correctly statutory standards or factors.

However, case study of courts, in particular, the Cassation Bench confirms the fact that the separation of powers is wrongly applied not to defend judicial power but to narrow same and broadened the power of the agencies.²⁶⁸ In the case *W/o Zelekawerk Bekele et al V. Agency for Government Houses*, the Cassation Bench ruled that courts determination of whether a house is nationalized by proclamation or not based on evidences is, not only beyond the jurisdiction of courts, but also *usurps the power of the executive* (emphasis added).²⁶⁹ The bench forwarded this reasoning on its own motion while there was no objection made against the jurisdiction of courts by the applicant (Agency) and this may indicate how the Bench is active enough to defend executive power than judicial jurisdiction.

3.5. The Pattern and Implication of the Ouster Laws

In the preceding sections, it is tried to discuss the various laws that stripped courts of their jurisdiction and the constitutional standing of same. Under this part, the pattern of the laws that excluded judicial function as designed by the law maker and interpreted by concerned decision making bodies is addressed. After looking at the pattern of the court stripping laws, the implication of the laws on the power of the judiciary is established. This helps readers to understand how the ouster laws that are progressively promulgated so far may affect judicial power and what future predictions of the impact of these and other potential legislations could be made accordingly.

It is not easy to establish a pattern on the laws that limit or remove court jurisdiction in Ethiopia. This is because of the fact that there is no coherent trend of actions and decisions by concerned government institutions affecting court jurisdiction. To begin with the decision of the CCI,²⁷⁰ it is difficult to come up with single conclusion as to whether it has the stand that narrows or extends judicial power. In some cases, the CCI ruled that disposing the constitutionality of laws other

²⁶⁸ See in general Assefa , supra note 40, p19

²⁶⁹ Decision of the Federal Supreme Court Cassation Bench, file No.30704, decided on March 27, 2008

²⁷⁰ Recalling the decision of the CCI regarding on the laws that foreclose judicial power is needed for they do have an implication in shaping the constitutional legitimacy of same.

than those issued by federal and state legislative organs²⁷¹ does not amount to review of constitutionality of laws, hence courts can assume jurisdiction. In other times, it assumes jurisdiction to see the constitutionality of laws including those other than laws enacted by federal and state legislatures.²⁷² This shows the fact the stand of the CCI in relation to the two laws (proclamation No.251/2001 and ProclamationNo.250/2001) which are considered by some authors as foreclosing the constitutional mandate of courts in Ethiopia as discussed above is not consistent.

Establishing the trend of the laws that are enacted by the parliament is however, difficult. What could be generally drawn is most of the legislations issued in the early parliamentary days removed court jurisdiction partly; i.e. they limit judicial jurisdiction either from reviewing decision of within agency tribunals regarding issues of fact²⁷³ or allowing courts to assume jurisdiction only as to specific cause of action.²⁷⁴ During these times, judicial power was removed by establishing within agency tribunals that follow certain procedures that may ensure minimum due process requirements.²⁷⁵ Later on, however, the pattern of affecting court jurisdiction took different way and legislations continued to be issued with content that totally removes court jurisdiction to review decision of within agency tribunals both as to error of law and fact. In such scenario, it is possible to discern two categories of laws; those laws that established tribunals that exercise judicial function whose decision is final and those which vested administrative agency with decision making power that is not reviewable by courts.²⁷⁶

²⁷¹ See *Ethiopian Blind Persons Association V. Oromia Education Bureau and Jimma College of Teachers Education, Addis Ababa Taxi drivers union V. Addis Ababa City Administration and in Biyadgign Melese et al V. Amhara National Regional state*, (supra note 217).

²⁷² See *CUD V. PM Meles Zenawi and Ashenafi Amare et al V. the Ethiopian Revenues and Customs Authority*, supra note 218

²⁷³ See for instance the Federal Civil Servants Proclamation, the Income Tax Proclamation (supra note 236).

²⁷⁴ The Re-enactment of Urban Land Lease Holding proclamation, supra note 225

²⁷⁵ The Civil Servant Administrative Tribunal is for instance required to apply the civil procedure code in similar way as ordinary courts, see supra note 236, Art.74 (4). Similar procedural requirement is provided under Art.115&116 of the Income Tax Proclamation (supra note 236) regarding the exercise of judicial function by the Tax Appeal Commission.

²⁷⁶ the Social Security Appeal commission can be cited as an example under the first category (Supra note 230) whereas the decision of the Board of the Ethiopian Privatization and Public Enterprises Supervising Agency can be

Under the second category, the power to render decision with the effect finality is given to agencies that are administered by Board. The trend continues with slight difference that laws empower Director Generals of some institutions to pass a decision that affects individual rights without following any procedural requirements.²⁷⁷

The decisions of the Cassation Bench as to “laws that oust judicial power”²⁷⁸ are also important in establishing the pattern of the laws that remove or limit court jurisdiction. Accordingly, in its many decisions, the Bench interprets the laws that provide decisions of agencies and tribunals therein are final as it means their decisions are not subject to review by ordinary courts.²⁷⁹ Being a court of law, it would have been appropriate for the Cassation to defend judicial power from being narrowed down by laws containing finality clauses. It could be argued, for instance, that making the decision of administrative agencies to be final should be construed as appeal is not possible and it shall not be construed to mean review is impossible unless expressly provided in the legislation. This argument could be sound if one adheres to the distinction that exists between appeal and judicial review. Accordingly, appeal is statutory that the parliament can deny or grant to litigants where as judicial review is an inherent power of courts and in the absence of express provision by the law maker that precludes judicial review a law that provides a decision of an agency is final should be understood to mean that appeal is impossible.²⁸⁰

cited as those that are vested with the power to render a final decision which is not reviewable by courts (supra note 237).

²⁷⁷ We can see the proclamation that established the Agency for Government Houses which gives the Director General of the Agency to evict a tenant for on the ground of breach of court or illegality of the occupation without the need to get a warrant from court of law. See supra note 232.

²⁷⁸ The writer wants to consider the decision of the Federal Supreme Court Cassation Bench as one of an equivalent to the many laws that oust judicial power since its decisions have binding effect on other courts in the same way as the ouster laws. See Federal Courts Re-amendment Proclamation, Proclamation No.454/2005, Federal Negarit Gazeta, 11th Year No. 42, Art.2 (4).

²⁷⁹ Many decisions of the Bench can be mentioned in this regard and includes, the *Social Security Agency V. Ato Birthanu Hiruy and Ato Kebede G/Mariam* (Supra Note 231) and *Heirs of Ato Nur Beza Terega V. the Ethiopian Privatization an Public Enterprises Supervising Agency* (supra note 254).

²⁸⁰ There are many literatures that provide courts have an inherent power to review decision of administrative agencies and the fact that a statute expressly provides that an administrative decision shall be “final” does not have

In this regard there was creative decision by the Federal First Instance Court and the Federal High Court that in the case *Heirs of Ato Nur Beza Terega V. the Ethiopian Privatization and Public Enterprises Supervision Agency* held that courts do have an inherent power to review decision of administrative agencies irrespective of the fact that the law provides decision of administrative agency is final.²⁸¹ However, the Cassation Bench reversed the decision by stating “courts in Ethiopia do not have an inherent judicial power, rather their power emanates from law (proclamation).”²⁸² Not only this, the Bench in its decision restricts judicial power by wrongly interpreting the separation of powers principle in a way that broadens executive power. In many cases, the Bench invokes separation of powers to decline court jurisdiction of reviewing agency decisions even in times where agencies do not invoke it as objection to court jurisdiction.²⁸³

Furthermore, the stand of Bench seems to be assisting the executive in broadening its power by restricting courts’ review power. In the interview with Ato Hagos regarding the stand of the Bench on the power of courts in relation to the power of the Agency for Government Houses to evict tenants on its own motion on grounds of breach of contract and illegal occupation, the respondent asserted that “courts can review the decision only regarding breach of contract and it is up to the disposal of the Agency to determine whether the tenant is an illegal occupant, hence courts do not have power to review the legality of occupation by a tenant.”²⁸⁴ This stand of the

the message that “it is not inconsistent for the court to inquire whether the agency has observed procedural requirements.” See for detail Louis L. Jaffe, ‘Judicial Control of Administrative Action’ (1965) 153-154.

²⁸¹ the Federal First Instance Court, civil File No.48/93, March 2001, and decision of the Federal High Court, File No.13021, December 2005.

²⁸² Decision of the Cassation Bench, in the case of *heirs of Ato Nur Beza Terega V. the Ethiopian Privatization and Public Enterprises Supervising Agency*, supra note 254. When the Bench said that judicial power in Ethiopia emanates from law, it was by referring to legislation that provides the decision of the Privatization Agency is final.

²⁸³ Decision of the Cassation Bench, *the Ethiopian Privatization and Public enterprises Supervision Agency V. Zelekawerk Bekele et al*, supra note 269.

²⁸⁴ Interview with Ato Hagos Weldu, supra note 201, the difference between breach of contract and illegality of an occupation is that, breach of contract involves either the failure by the tenant to do his obligation in the contract, such as failure to effect payment of rent, or an act of the tenant that is prohibited in the contract or is not part of the contract such as using a house business purpose while it is agreed to be for residence purpose. Whereas illegality of the occupation emanates when there is no any legal relationship between the Agency and the occupant. For instance, a person who becomes a factual occupant after buying the key of the house from previous tenant that had a legal

Bench is irony that such opinion is reflected while there is no law that provides the decision of the Agency is final regarding legality of the occupation and it is apparently regretting for the Bench to surrender willfully its jurisdiction to review the decision of the Agency regarding the legality or otherwise of the occupation.

The more recent pattern of the court stripping laws is made by making rights non-justiciable there by removing court jurisdiction completely. This argument can easily be deduced from the decision of the CCI and the Cassation Bench that in both cases it is held that it is possible for the legislature to make some rights, in particular those related to administrative grievances, non-justiciable.²⁸⁵ Thus, the legislature comes with new and very dangerous way of foreclosing judicial power which goes against the entrenchment of fundamental rights that is necessary for the rule of law to flourish.

From the above discussion, it is possible to establish at least three patterns regarding the laws that preclude or limit judicial power and decisions of the CCI and the Cassation Bench that have a clear impact on court jurisdiction. The first takes the pattern on limiting judicial power by misinterpreting the separation of powers in a way to restrict judicial power and defending the power of the executive. This is commonly discernable from the decision of the Cassation Bench. The second pattern seems to rely on supremacy of the legislature and accordingly, it is stated both by the CCI and the Cassation Bench that judicial power of courts in Ethiopia emanates from laws, including legislation, and courts cannot claim to have an inherent judicial power. Finally, both the CCI and the Cassation Bench come up with new trend that courts can assume jurisdiction only as to justiciable matters and it is up to the legislature to determine what matters are justiciable.

The combination of all the patterns provides the implication that judicial power in Ethiopia is in the way of being eroded. This implication is firmly confirmed by the CCI and Ato Almaw Wolie,

contract with the agency is an illegal occupant regardless of the fact that he is discharging all the obligations of the previous tenant.

²⁸⁵ See decision of the CCI on *Ato. Ashenafi Amare et al V. the Ethiopian Revenues and Customs Authority* (supra note 220) and decision of the Cassation Bench on *Ato Welday Zeru et al V. Ethiopian Revenues and Customs Authority* (supra note 247). In both cases, it is argued that the parliament can determine which matters are justiciable and which are not.

judge of the Cassation Bench, who concurs with the writer that there is a clear indication of eroding jurisdiction of courts in Ethiopia.²⁸⁶ A survey on decision of the Cassation bench has the implication of the fact that the Bench's main task is becoming helping the executive to aggrandize its power space at the cost of the jurisdiction of the judiciary. In the case of *Agency for Government Houses V. Heirs of Ato Mersie Menberu*, the Bench stated that a claim for the issuance of certificate of possession of an immovable property to administrative agency is not justiciable despite the fact that an objection based on justiciability is not made by the agency to the Bench.²⁸⁷

Not only this, the ouster laws also indicate the fact that the legislature is working to extend and confer the executive unconstrained discretion. The practice of broad delegation coupled by the absence of standards through which the legislature controls the executive regarding delegated powers is one indication that shows the legislature does not want to control the executive. The late promulgated proclamation that empowers the executive branch to demolish and restructure the federal government any time it wishes is concrete evidence that proves the assertion that the legislature is in a clear path of granting the executive with an unconstrained power to do whatever it deems necessary to achieve its momentary policy.²⁸⁸ The jurisdiction stripping laws also imply the fact that there is no clear constitutional or other limit up on the power of the legislature to restrict court jurisdiction and to make rights non-justiciable. Where the power of the legislature to limit or remove judicial power stops? Where is the limit of limiting constitutional rights by making them non-justiciable? The questions clearly imply the fact that the trend puts uncertain future as to the guarantee of the basic rights recognized in our constitution from being derogated by similar measures.

²⁸⁶ Interview with Ato Almaw wolie, (supra not 234) and decision of the CCI, supra note 220.

²⁸⁷ Decision of the Cassation Bench, File No.31906, November 14, 2008. The claim is brought to the court after the applicant has made a resort to all available administrative mechanisms.

²⁸⁸ Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation, Proclamation No.691/2010, Federal Negarit gazeta, 17th Year No. 1, 2010. Art.34 of this proclamation provides that "The Council of Ministers is hereby empowered, where it finds it necessary, to reorganize the federal government executive organs by issuing regulations for the closure, merger or division of an existing executive organ or for change of its accountability or mandates or for the establishment of a new one."

Conclusion

From the survey made in the foregoing discussion, it can be deduced the following important conclusions. Even though judicial power is conventionally vested on ordinary courts, the nature and scope of such power (actually exercised by courts) varies from country to country. Judicial power in general and judicial review in particular may be expressly vested in constitutions or emanate from the actual power that courts exercise. In the later case, courts may assume jurisdiction, not only on areas which are expressly vested to them in constitutions, but also in those areas where constitutions are silent. Still courts may exercise actual jurisdiction which is less than what is expressly accorded to them by constitutions. Not only this, judicial power may be determined by legislations issued by the law maker. Thus, the conventional judicial power may be constrained by constitutions, legislations, or judicial self-constraint.

In Ethiopia, the scope of the power of the judiciary has continued to be a source of debate. The disagreement principally revolves on an issue that whether courts in Ethiopia have the mandate to decide on the constitutionality of laws and decisions of government other than those issued by federal and state legislative organs. There are diverged opinions that are forwarded by different scholars on the issue and the positions may be generally categorized in to three. First, there are group of authors who argue that courts are ousted from the constitutional mandate to interpret and decide on the constitutionality or otherwise of laws that are issued by the federal or state legislative organs. According to this view, courts do have the power to interpret and settle constitutional dispute involving regulations directives and government decisions. Another argument provides that courts in Ethiopia are totally deprived of interpreting the text of the constitution except to apply a provision of the constitution to a real case before them when it is clear. The other group of authors argue that courts can determine the scope and content of constitutional provisions through interpretation but cannot at any reason decide up on the un/constitutionality of laws; be it proclamation, regulation, and directives. The third view seems to be the extreme position that courts are not constitutionally excluded from setting aside a law, including those issued by the legislature, if it is apparently contrary to the constitution.

Based on the survey made on the Minute of the Constitutional Assembly, decided cases by the CCI and the Cassation Bench, appraisal of relevant laws, and interview with key persons in the relevant government institutions, the writer contends that courts in Ethiopia are constitutionally

constrained from engaging in deciding the unconstitutionality of laws of any type. It is true that there is no express constitutional provision that provides the HoF/CCI has the power to decide on the un/constitutionality of laws other than those issued by federal or state legislative organs. The writer, however, argues that the mere fact that the constitution contains an express stipulation which vests the HoF/CCI to decide the un/constitutionality of laws issued by federal and state legislatures should not be construed to mean that the HoF/CCI is not constitutionally empowered to see the un/constitutionality of other laws. The argument is strongly supported by the separation of powers doctrine as recognized by our constitution. According to which the power to make laws is exclusively vested to the legislature (HoPR). The makers, while dealing with the issue of “who should interpret the constitutionality of laws”, presumably, what should soundly imagined by them is that the un/constitutionality of laws that are issued by the organ which is constitutionally vested to make laws (the legislature), not the constitutionality of other byelaws that are issued by other organs through delegation. This is because the other laws do not have constitutional recognition for their existence and whether there may exist laws issued by other organs is left up to the discretion of the law maker hence, cannot necessarily be considered at constitutional level.

Furthermore, since the authority of other organs to issue laws is derivative of the delegation from the parliament, any issue that challenges the constitutionality or otherwise of such laws can presumably be disposed of by applying the parent legislations provided that they are issued within the scope of delegation. Accordingly, the issue could be about delegation, not necessarily requires the settlement of constitutional issue.

The debate on judicial power in Ethiopia is not limited to the above mentioned issues. Apart from the debate as to the scope of constitutional constraint, judicial power in Ethiopia remains to be subject to arguments on the ground that it is being foreclosed by legislations and executive acts in a way unintended by the constitution. Despite the constitution expressly prohibits the establishment of any organ that takes away judicial power without the need to follow legally prescribed procedures, there are many instances where the legislature and the executive are engaged in divesting of the judiciary from its power. Two important facts may be forwarded to prove the allegation that the legislature is engaged in a task of excluding courts’ jurisdiction of reviewing decisions of administrative agencies. First, there is a trend that shows the legislature is

busy of issuing laws that takes away judicial power and vested it to institutions that are not required to follow legally prescribed procedures. This is against the spirit of the constitution which intends to ensure due process of law by requiring institutions other than ordinary courts can exercise judicial function only if they can follow legally prescribed procedures.

Second, the legislations may be contested on the ground that they incorporate finality clauses. The laws that contain finality clauses negate judicial review of decision of administrative agencies which is hardly easy to conclude that it is in line with the constitution. Making an agency the sole and ultimate determinant of its compliance with its own standards is not only absurd but also reinforces the concentration of executive and judicial powers on the same organ of government. The case become worst when one considers the power to render a final decision is legislatively vested to agencies that are not required to follow legally prescribed procedures. The laws with finality clauses are subject to challenge, not only for the reason that they are exercised by institutions that do not follow legally prescribed procedures as required by the constitution, but also they go contrary to the right of access to justice of individuals which is recognized under our constitution thereby leaves with no remedy for an alleged abuses of power by administrative agencies.

Apart from the parliamentary legislations, the stand of the Cassation Bench seems to advocate the act of the other two branches. In many of its decisions, the Bench confirmed that once a decision of an agency is legislatively made to be final, courts do not have the power to review it. More regrettable is that, the Bench has established a jurisprudence which is a direct threat to courts' power by stating that "courts in Ethiopia do not have an inherent power but a power which emanates from law". When one discovers the term 'law' from which the power of courts emanates, according to the stand of the Bench, includes proclamations, it becomes easy to make a logical deduction that the legislature in Ethiopia is given a blank check to grant or deny court jurisdiction even in a way contrary to the constitution. Moreover, the Cassation Bench seems to prove its alliance with the other branches when it wrongly applied the separation of powers principle to defend the discretion of the executive organ and restrict jurisdiction of ordinary courts. More worrisome, both the CCI the Cassation Bench has come up with an outrageous jurisprudence that encourages the legislature to continue in the task of foreclosing judicial power

that the establish a precedent that the legislature can decide which matters are justiciable and which are not.

From the overall discussion, it can be establish a pattern that the legislature, the CCI, and the Cassation Bench are in the task of eroding judicial power and in contrast, strengthening the unconstrained discretion of the executive. This pattern may have the implication that the Ethiopian constitutional jurisprudence is in the way of establishing de facto legislative and executive supremacy over the supremacy of the constitution. The resultant consequence of this reveals the fact that there are hardly available mechanisms that ensure the judiciary continues with the power it possess right now and ensures the protection of the Bill of Rights listed under our constitution.

CHAPTER FOUR

COURT STRIPPING BY THE EXECUTIVE: THE CASE OF THE ETHIOPIAN REVENUES AND CUSTOMS AUTHORITY

4.1. The Need to Have an Autonomous Authority: An Inquiry on the Institutional Background

The Ethiopian Revenues and Customs Authority (here after the authority) is established by proclamation in 2008 after the merger of three previously independent government institutions; the Ethiopian Inland Revenue Authority, the Ethiopian Customs Authority, and the Ministry of Revenue.²⁸⁹ At least two policy justifications may be forwarded for the merging of the institutions and establishing a single Authority as a result.²⁹⁰ First, the existence of close similarity among the three institutions regarding their purposes and resource utilization as well as organizational structure requires the merger of the institutions in the interest of efficient and expeditious modern tax and customs administration system. Before the merger of the institutions, customers were required to wander through the three institutions to get a service for a single or similar transaction which wastes their time and resource. The other is, it is believed that the merger of the institutions will create better capacity of the authority in collecting enough government revenue that the economy generates. This justification is in fact the consequence of the fulfillment of the above reason.

One of the consequences of the merger of the institutions is that the Authority is established as an autonomous federal entity having its own legal personality.²⁹¹ The fact the Authority is an autonomous entity has the effect of making it independent from interference by other institutions such as the Ministry of Finance and Economic Development. The trend is not unique to Ethiopia rather since the 1990s, many countries of the Sub-Saharan Africa have established semi-autonomous revenue authorities, organizationally distinct from the Ministry of Finance, with

²⁸⁹ Ethiopian Revenues and Customs Authority Establishment Proclamation, supra note 13.

²⁹⁰ Ibid, the preamble

²⁹¹ Id, Art.3 (1)

some degree of real operational autonomy, and with staff paid at rates substantially higher than those in comparable public sector jobs.²⁹²

The grant of autonomy is not without implication. It is necessitated for some reasons of which the two are the most important. First, autonomy for revenue authority is necessitated because of the need to grant political autonomy.²⁹³ The justification is made based on the presumption that both the tax collecting officers and government cannot be trusted with the power on taxation and to rectify this problem the government has to relinquish the power it had on such area and surrender it in a non-reversible (irrespective of regime change) and binding nature to some independent authority.²⁹⁴ This is because of the fact that authority with a vested autonomy reduces the potential for tax abuses among private tax payers based on political ground and this is achievable if the government (political branch) does not have direct control and influence of the key functions of the authority. The second reason that calls for the grant of autonomy to revenue authorities is to create managerial autonomy.²⁹⁵ This is all about granting autonomy for managers of authorities to find their ways of motivating their employees, rewarding them according to performance, and take disciplinary measures when necessary.²⁹⁶ The reason is appealing and considering the fact that officers in revenue authorities are vulnerable to corruption, there is strong reason to advocate the establishment of distinct organizational arrangement that enables the authorities monitor staff behavior and exercise disciplinary measure.

Similar justifications are forwarded for the establishment of the autonomous Revenue and Customs Authority in Ethiopia. According to the interview made with Ato Mekonen Ayele, the Authority is established to collect revenue which the government needs to finance its expenditure

²⁹²C. Clapham Supra note 11. Autonomy is the state of being free from overwhelming influence and interference by the government in the key functions of the authority. It may be reflected in many ways such as having distinct law in the recruitment, promotion, salary and dismissal of its staff; and most important being free of political influence from the ruling party.

²⁹³Ibid p4-5

²⁹⁴ The authority which is vested with such autonomy is expected to be trustworthy that cannot abuse them and to be abide by correct procedure and law.

²⁹⁵ Supra note 11, p7

²⁹⁶ Ibid P8

and is sensitive to ethical abuses by its employees and tax payers. This demands a commitment from the government to grant the authority with the autonomy in relation to its budget, salary and reward of employees, and recruitment and dismissal of employees.²⁹⁷ The same statement is made by the Director General of the authority who told the media that genuine political will/commitment from the government is key for the success of the authority in achieving its goals.²⁹⁸

Accordingly, Ato Mekonen told the writer that there is no problem on part of the government in showing its dedication to the authority. He asserted that the government proved its commitment to the authority through three mechanisms; first, political will to support the authority with convenient policy measures. The policy support is reflected by the will of the government to merge the three institutions, making it an autonomous entity with distinct power of recruiting, dismissal, and salary of employees differently from the Civil Service. It is also reflected by the decision that makes the authority accountable to the Prime Minister²⁹⁹. Second, the government shows its commitment to the authority by creating a legal framework in a manner the authority wants to have. According to the interview, the government by enacting a law that allows the authority to have its own law for the administration of its employees with substantial difference to other civil service areas and, in particular, use summary dismissal for employees who are suspected of ethical problems.³⁰⁰ Finally, the government establishes new institutions within the authority that work on the ethics and behavior of staff members.³⁰¹

²⁹⁷ Interview conducted with Ato Mekonen Ayele, Deputy Prosecutor General of the Authority. July 27, 2011, Addis Ababa, Ethiopia.

²⁹⁸ A speech by Ato Melaku Fenta, Director General of the Ethiopian Revenues and Customs Authority conducted by Fana FM, 10th December, 2010, Addis Ababa, Ethiopia.

²⁹⁹ See the establishment proclamation, *supra* note 13, Art.3(2) Ato Mekonene (*supra* note 297) told the writer in this regard that making the authority accountable to the Prime Minister makes every activity of the authority efficient and prevents potential bureaucratic impediments in its functions had it were accountable to the parliament.

³⁰⁰ See Art.19 (1)b&c, Art.8(2)b of the proclamation (*supra* note,13) and Arts.5-14,18, and 37 of the Regulation (*supra* note 12)

³⁰¹ In fact, there is no clear legislative authorization of the authority to establish the officer of ethics but since the authority is delegated to issue regulations and directives it provides a stipulation on the regulation as to the power of the officer of ethics. See Art.34 of the Regulation, (*supra* note 12) and Directives of the Ethiopian Revenues and Customs Authority, Directive No.02/2002, for detail.

Despite it is evident that the reform is necessary and requires high degree of political commitment from the government, one may still question the practical feasibility of the autonomy of the authority from potential influence of the politics owing to the fact that the authority is accountable to the Prime Minister. Can we think that the authority is autonomous and politically neutral so that it could be trusted not to abuse its powers in relation to tax payers and staff based on political ground? However, for all the other reasons, it could be said that the authority made a reform which is necessary to enhance its capacity in collecting revenue.

4.2. THE AUTHORITY'S POWER UNDER THE REGULATION: LEGITIMATE?

"Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men."

Lord Acton.

To deal with the issue of whether or not the power of the Ethiopian Revenues and Customs Authority under the regulation is legitimate, it is mandatory first to make a look at its parent legislation which is said to be the source of the controversial provision under the regulation. Then after, the validity of the parent legislation in light of relevant constitutional provisions and values becomes a must. As it is pointed out in the preceding section, the Ethiopian Revenues and Customs Authority is established by a proclamation as an autonomous government entity being accountable to the Prime Minister. As key persons of the authority asserted, what makes the authority different from other public service offices is that it secures key government commitment to have its own and separate law regarding administration of its staff.³⁰² Accordingly, the legislature issued a law with a provision that delegated law making power to the Council of Ministers as to administration of its employees which says:

The administration of the employees of the Authority shall be governed by regulation to be issued by the Council of Ministers.³⁰³

Based on the legislation the Council of Ministers issued a regulation that gives a broad discretion to the Director General to dismiss its employees on suspicion of corruption with no need of

³⁰² Interview with Ato Mekonen, Supra note 297

³⁰³The Establishment Proclamation, supra note 13, Art.19 (1) b.

following the formal disciplinary procedures. Not only this, the Authority is entrusted [by the regulation] to limit judicial power of reviewing its decisions made according to the regulation. The relevant provision, Art.37 of the regulation, provides that:

1. Notwithstanding any provision to the contrary, the Director General may, without adhering to the formal disciplinary procedures dismiss an employee from duty whenever he has suspected him of involving in corruption and lost confidence in him.
2. An employee who has been dismissed from duty in accordance with sub article 1 of this Article may not have the right to reinstatement by the decision of any judicial body.³⁰⁴

The reading of the preceding two paragraphs of the regulation clearly reveals many consequences which includes; first, it denies the procedural justice of employees since it provides no chance for them to be informed about the allegation made against them by the authority and their right to defend against the allegation which is an important aspect of the due process of law. Second, a mere suspicion of corruption and loss of confidence by the Director General suffice for the authority to exercise this power which has huge consequence on right of individuals. Third, it totally removes the remedy option that aggrieved employees could have against the authority. Finally, it limits the jurisdiction of courts to review its decision. What is worthy to note in this connection is that all this power is vested on a single man, the Director General, not on board or group of committees; and such power is granted by an executive act quoted above, (here after the regulation).

From the facts mentioned above, the following issues necessarily ponder up on the mind of every man with ordinary legal knowledge. The issues may be framed from both sub-articles of the law. However, since the main theme of the paper revolves on judicial power, an emphasis is given to the second paragraph of the provision. Accordingly, the issues include, first, what necessitates the authority to have such broad power? Is it possible to establish a rational connection between the power of the authority to have such power and the legitimate purpose it strives to achieve? Second, is there any authority, constitutional or legislative, for the executive to make a law with such content? To make the issue specific is it constitutionally appropriate for the executive to

³⁰⁴ Regulation, No.155/2008, supra note 12

determine the jurisdiction of courts in Ethiopia? , Thirdly, can the constitutionally vested right of access to justice of citizens be limited or denied by primary or subordinate laws? Fourth, is it not true that such broad discretion may expose the authority to abuses? These are not the only issues that may be framed from the regulation; instead it is only the issues that have direct relevance to judicial power that are addressed here.

Rights recognized by constitution or other laws are not always absolute rather they are subject to lawful violation, which is usually called limitation of rights.³⁰⁵ The rights may be subject to limitation for the better utilization of other rights or to achieve greater social good. The problem is however the way the limitation is exercised by concerned authorities and the limitation may become irrational. This becomes an apparent problem in case a constitution does not contain basic standards through which the power to limit the exercise of a given right may be justifiably exercised, which is also known as “general limitation clause.”³⁰⁶ There are jurisdictions which provide general limitation clause so that rights will not be unreasonably suspended, restricted, or derogated. The Constitution of the Republic of South Africa is illustrative that any limitation on the exercised of fundamental rights should be made to the extent it is reasonable and justifiable in an open democratic society based on human dignity, equality, and freedom and based on consideration of other relevant facts.³⁰⁷ The overall spirit of the South African constitution reflects that there should be a legitimate government purpose and rational connection between the measure that restricts the right and its purpose.³⁰⁸

³⁰⁵ Limitations are “lawful infringement of rights” also called “justifiable violations” which are imposed on the exercise of certain rights for some policy and practical reasons. The limitations may take many forms such as suspension, restriction, or derogations. See for additional Tsegaye Regassa, ‘Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia’ (2009) 3 (2) *Mizan Law Review* 313-314.

³⁰⁶ Id, p314, general limitation clauses are “limits to limitations” that requires the fulfillment of certain prescribed standards before exercising the power to limit rights.

³⁰⁷ Constitution of the Republic of South Africa (1996) Section 36, The constitution also provides that limitation on rights can only be exercised by taking in to account the extent of the right to be limited, the importance of the purpose of limitation, the nature and extent of the limitation, the relation between the limitation and the purpose, and less restrictive means to achieve the purpose.

³⁰⁸ See for detail De Waal, et al supra note 41, p11-14, 144-161

If the first issue raised above is seen in light of the discussion in the preceding paragraph, it is not easy to confirm the legitimacy of the regulation. The regulation restricts the procedural due process of law which is recognized by our constitution under Art.78 (4). It also imposed a limitation on jurisdiction of courts and other organs vested with judicial function. Not only this, it also abridges the right to access to justice of citizens as recognized in the constitution. To see the legitimacy of such restrictions necessarily requires examining how and why such restrictive law is issued.

An interview with Ato Mekonen Ayele reveals that the authority wants to have such law because of the fact that the authority is a financial institution exposed to corruption scandals. According to his words, “the institution is corruption sensitive and to prove beyond reasonable doubt of the commission of corruption by an employee is very difficult, thus a resort to such law (the regulation) becomes necessary”.³⁰⁹ The same justification is forwarded by Fasil Nahom who argues that requiring the authority to follow the formal procedure that requires proving the commission of corruption by staff of the authority is very burdensome and may amount to letting corrupters stay in the authority because of inadequacy of evidence.³¹⁰ It is therefore to curb the crime of corruption and other related ethical deviations by staff of the authority that a regulation with such content is issued.

It is true that the authority is very open to corruption and ethical abuses and given its relevance to the whole economy of the country, it may be rational for the authority to have a distinct law from other civil service jobs. However, the writer contends that the practical challenges of the authority do not really require having such unconstrained power of a single man within the authority. If one considers whether there is a rational connection between the limitation posed on rights and court jurisdiction by the regulation and the purpose that the authority wants to achieve, the limitation is beyond the reasonable limit.

For one thing, the argument by the authority and other advocates of the regulation that the problem of proving corruption beyond reasonable doubt as one justification for the authority to make a resort to such law is both exaggerated and misleading. This is because there is no law

³⁰⁹ Interview with Ato Mekonen, supra note 297

³¹⁰ Interview with Fasil Nahom (DR.), supra note 201

that requires the authority to prove beyond reasonable doubt of the commission of corruption and other ethical deviations in order to dismiss an employee. The authority is required to prove beyond reasonable doubt only if it wants to file a criminal charge before a court of law against a suspected employee. For disciplinary measures (which includes dismissal) taken by administrative agencies there is no such requirement. Instead, administrative agencies are vested to take any disciplinary measures up to dismissal after following certain procedural requirements. This is apparently provided in the Federal Civil Servants law which says “disciplinary measures may be taken irrespective of any court proceedings or decisions”.³¹¹ This statutory stipulation clearly connotes that the fact any employee is free of a criminal charge before a court of law may not be invoked to challenge the disciplinary measure taken by agencies after following the formal disciplinary procedures. Thus, the argument, not only is hardly convincing, but is absurd.

For another thing, the restriction on rights of employees of the authority as a measure to curb the problem of corruption and other ethical abuses is made without making resort to other, at least side by side, more effective measures to reduce the challenges of the authority. There are recommended policy standards that governments should employ to prevent corruption and other ethical problems in revenue authorities. This includes the arrangement of bonus and incentive payments to staff members and this structural arrangement is considered to be one of the most efficient ways of fighting corruption.³¹² However, the authority does not have the experience to provide bonus and incentive payments to its employees despite it publicly declares that it achieves its goals beyond its plan.³¹³ Thus, the measure/policy decision taken by the government according to the regulation seems to be outrageous and is beyond the necessary discretion that should be vested to the authority to achieve its purpose. It is in this connection that one author who wrote on methods to solve corruption soundly dictate “...if the government [in choice of

³¹¹ Federal Civil Servant Proclamation, supra note 236, Art.69 (2). The Civil Servant Proclamation is Applicable to employees of the authority as well in matters that are not covered by the regulation as it can be seen from Art.44 (1) of the regulation (supra note 12).

³¹² Pranab Bardhan, ‘Corruption and Development: A Review of Issues’(1997) 35 *Journal of Economic Literature* in Hans-Bernd Schafer and Angara V. Raja (ed), ‘*Law and Economic Development*’(2006)167.

³¹³ For the last two fiscal years, the authority, through the media, announced that it succeeded its plan beyond expected but no incentive or bonus is paid to the staff.

policy to fight corruption] has erred in its decision, the course made possible through corruption may well be the better one.”³¹⁴

Despite the regulation [thus the authority’s power] may be challenged for the above mentioned reasons, the CCI, however, decided the case in favour of the authority stating that from the available alternatives that the legislature may have in order to solve a problem, it may choose whatever it wants and the CCI does not have the power to decide which alternative is better. It goes to say:

“...the HoPR is the highest legislative organ in our constitution; and *within the constitutional boundary*, it has an absolute power to do whatever it deems necessary. Yet, the power to decide as to what type of laws it should adopt is *within its discretion*; and so far as it *does not exceed the constitutional limit*, it can adopt any type of policy choice from among available alternatives when issuing legislations. To decide whether or not the adopted law is appropriate is *not the mandate of the Council*” (emphasis added).³¹⁵

Two important issues necessarily follow from the statements in the preceding paragraph. First, where is the constitutional limit of the legislature? To put the question otherwise, when is possible to say that the legislature (HoPR) exceeds its constitutional limit while issuing legislations? This was the central issue that the CCI ought to have addressed in the case but unfortunately not. Second, if deciding on the appropriateness or other wise of a law adopted by the legislature is not the mandate of the CCI, who can therefore exercise this function? This is a very strange statement forwarded by such a body with a power to engage constitutional adjudication which is put at the pick of hierarchy of power³¹⁶ to foresee that the supremacy of the constitution is being upheld by all acts of government branches. The jurisprudence on constitutional adjudication reveals that, one of the core standards that a constitutional adjudicator should do regarding legislations that limit or remove rights is that whether or not there are other better policy choices for the legislature that

³¹⁴ P. Bardhan, supra note 312, p150

³¹⁵ Decision of the CCI on *Ashenafi Amare et al V. the Ethiopian Revenues and Customs Authority*, supra note 220.

³¹⁶ This to mean that, even though the CCI is not considered to be any of the power division in the constitutional structure, its functions are of important and it is only its rulings and decisions (subject to approval by the HoF) that the act of the supreme legislature can be kept constrained.

have the least impact on the enjoyment of right other than the already adopted laws. Accordingly, legislative limitation of rights, as discussed above, must employ less restrictive means to achieve the objectives that the laws are designed for.³¹⁷ However, in the presence of less restrictive means on fundamental rights, it is contrary to the rule of law to give the legislature a blank cheque to adopt any means of limiting fundamental rights and this is what is preferred by the CCI. It failed to make about a delicate balance between the two competing interests, limiting rights and jurisdiction of courts, and achieving the goals of the authority.

Even though there is no clear constitutional limitation on the power of the legislature to limit rights, such as the less restrictive means criteria, the CCI should have relied on those implied limitations that our constitution enshrined of which the rule of law is one. It is easily inferable from the preamble of our constitution that the makers of the constitution had the intention of ensuring the rule of law. In this connection, it is said that if the constitution is to be the highest law, a law that controls state actions, its interpretations must be constrained by the rule of law.³¹⁸ However, the reasoning in the preceding paragraph can be taken as clear evidence of the fact that the CCI did not develop or adhere to any of the standards or theories of constitutional interpretation. There is no statement in the decision which shows that the CCI employs any of the theories of interpretation, for instance, it did not try to invoke intention of the makers as the “originalism” theory of interpretation requires.³¹⁹ Nor did it attempt to reflect the “responsive”

³¹⁷If limitations on fundamental rights are to be legitimate, such limitations must achieve a benefit that is proportional to the costs of the limitation. However, if there are less restrictive, but equally effective, alternative other than the chosen methods exist to achieve the purpose of the limitation, the limitation is not proportionate. This standard is widely used by the South African Constitutional Court. See for additional De Waal et al, supra note 41, p144-162

³¹⁸ Robert Post ‘Theories of Constitutional Interpretation’ (1990) *Special Issue: Law and the Order of Culture* 19

³¹⁹ Originalism theory of constitutional interpretation provides that the meaning of a constitutional document should be understood as intended by the original makers of the constitution. In fact, there are fractured understandings of this theory of which semantic originalism and expectations originalism are some of them. Accordingly, Semantic originalism contends that constitutional clauses should be understood to mean what those who made them intended to say (what the a makers intended to say) whereas expectations originalism argues that a clause in a constitution should be construed to have the “consequence that those who made them expected them to have.” See for detail, Kieth Whittington, ‘Dworkin’s “Originalism”’: The Role of Intentions in Constitutional Interpretation’ (2000) *the Review of Politics* 204-205

theory of interpretation demands; yet, there is no specific text of the constitution that the CCI based for its decision.³²⁰

Taking the presumption that the regulation is issued as intended by the parent legislation, the stand of CCI indicates the fact that the legislature is at no duty to see and choose better solution from among available alternatives. This may go against the rule of law to which our constitution aspires because the rule of law can better be ensured if all government organs strive to employ better policy options that causes least damage on rights while dealing with rights. In this regard, Tsegaye Regassa's, statement spoken in a lecture is valuable which says "a government must be strong enough to govern but weak enough to be accountable."

The power of the authority under the regulation is also subject to challenge on the ground of its authority. As it is mentioned elsewhere, the regulation is issued by the Council of Ministers (executive). What follows is therefore, is there any authority to the Council of Ministers to issue a law with such content? It is without doubt that the executive does not have an inherent power under the constitution to make law. Any law making power that the executive is vested with is delegated power and such power cannot at any time exceed the scope of the delegation. The presumption is therefore, the Council of Ministers is delegated by the law maker to issue the regulation. It is true that the Council of Ministers is delegated by Ethiopian Revenues and Customs Authority Establishment proclamation (here after the parent law/legislation) to issue a regulation regarding the administration of employees of the authority which provides that "the *administration* of the employees of the Authority shall be governed by regulation to be issued by the Council of Ministers (emphasis added).³²¹

The question is rather, is the content of Art.37 of the regulation within the intended scope of delegation under the parent legislation? In particular, is there any logical inference from the

³²⁰ R. Post, supra note 318, p 314, 319. Responsive theory of interpretation contends that a constitutional text should be considered as a living document having the character of "inherent adaptability" to contemporary changes instead of understanding it as a static document. There is also textualist theory of interpretation, also called plain meaning interpretation, which provides that any organ involving in the interpretation of a constitution has only the duty to see the text of the constitution beside the laws that are challenged and decide whether the latter complies with the former.

³²¹ The Establishment Proclamation, supra note 13, Art.19 (1)(b). see also Art.8(2)b

regulation which indicates the power to issue a law on the administration of employees also includes the power to pose a limit on the jurisdiction of courts? This is another crucial issue that the CCI ought to have dealt in depth in its decision at the same time very crucial to the paper because sub-article 2 of Art.37 of the regulation limits judicial power. The CCI however does not seem to be interested to confront the real issue directly. That is to say, the CCI, from the very beginning, seems to be less courageous to resolve the main issue in *Ato Ashenafi Amare et al V. the Ethiopian Revenues and Customs Authority* case as asked by the complainant. The claim by the complainant says “Art.37 (2) of the regulation is contrary to the constitutional right of access to justice which provides that everyone has the right to access to justice...”³²² a critical look at the decision of the case however revealed that the CCI has escaped, intentionally or otherwise, the real issue in dispute and it gave emphasis to subsidiary issues. A genuine look at the regulation and the claim by the complainant however calls at least three interrelated issues. These are: a) is it correct for the legislature to limit rights in general and the right to access to court in particular? If yes, to what extent? b) If it is said that the legislature has the power to do so, is it appropriate for it to delegate such power to the executive? c) Finally, if the answer in (b) is yes, is there any authority for the executive (Council of Ministers) to issue a law with such content?

A glance at the decision shows that the CCI as canvassed in the foregoing discussion,³²³ better addressed the first issue though the reasoning is hardly plausible. Even here, it did not address where the power of the legislature to limit rights ends. The second issue is however totally untouched by the CCI while the third issue is passed on presumptive conclusion stating that the regulation is issued by the Council of Ministers based on the power it acquired under the parent legislation.³²⁴ Accordingly, the Council of Ministers has posed a limit on jurisdiction of courts based on legitimate legal ground. It did not made any attempt even to cite the name and number of the proclamation based on which the regulation is said to be issued, let alone to discuss on the specific provision that delegates ‘some’ legislative power to the executive.

³²² Decision of the CCI, supra note 220

³²³ See supra note 313-318

³²⁴ See decision of the CCI, supra note 220

Similarly, in the case, *Welday Zeru et al V. the Ethiopian Revenues and Customs Authority*, the Cassation Bench confirms the decision of the CCI though the former seems to go one step forward in employing a kind of purposive interpretation to the issue. The Bench stated that there is strong indication in the parent legislation that the Council of Ministers is delegated to issues a regulation regarding administration of employees of the authority which can include limiting courts' jurisdiction.³²⁵ The bench's ruling on the issue is that the regulation is enacted within the intended scope of delegation by the law maker.

Apart from the case study, an interview with Ato Hagos Weldu confirms the rulings mentioned in the preceding paragraph. He asserted that considering the very purposes the authority is wishing to achieve, the challenges it is faced with, and the spirit of Art.19 (1) b of the parent legislation, the content of Art.37 of the regulation is not in excess of the delegated power under the parent legislation.³²⁶ The justification given by Ato Mekonen Ayele to justify the content of the regulation is however an absurd one. He firmly told the writer that "so long as the legislature, while delegating the law making power, does not specify the areas regarding which the power is delegated, or provides restrictions regarding which the Council of Ministers may not issue a law, it is appropriate for the Council of ministers to issue a law with '*any content*' that helps the authority achieving its purposes (emphasis added).³²⁷ The writer regarded the response as ill reasoned because power acquired through delegation cannot be exercised in any way the delegated wishes rather is limited to the extent of delegation. If a given area of law making power is not delegated, the Council of Ministers cannot issue a law irrespective of whether there is restriction in the parent legislation. Thus, it is not necessary for the parent legislation to provide areas regarding which the regulation should not touch.

However, if one looks the regulation in light of the parent legislation to determine whether or not it is within the scope of delegation, the response does not seem to be as positive as the interviewees and the decided cases revealed. It is hardly easy to infer from the parent legislation

³²⁵ See Federal Supreme Court Cassation Division, supra note 247. The bench gave much emphasis to Art. 19(1) b of proclamation No.587/2008 to justify Art.37 (2) of regulation No.155/2008 and it concludes that the regulation is issued within the appropriate of delegation under the parent proclamation.

³²⁶ Interview with Ato Hagos weldu, supra note 201

³²⁷ Interview with Ato Mekonen Ayele supra note 297

that the legislature delegated the Council of Ministers to issue a law that ousts the judiciary from reviewing the decision of the authority. Two important points can be mentioned to support this argument. First, there is no clear or implied statement in the parent legislation that authorizes the Council of Ministers to issue a law with a content that stripped the judiciary from its power. What is expressly delegated is the power to issue a regulation regarding administration of employees of the authority and to argue that administration of employees includes determination of jurisdiction of courts is at any rate unsound.

Second, it is generally held view that the executive is with no power to act in derogation of fundamental principles and rights without explicit legislative authorization.³²⁸ This argument is forwarded from the perspective of the doctrine of separation of powers. In this regard, the German Constitutional Court has established an important doctrine which says “it is unconstitutional for the legislature to delegate its legislative authority in crucial principles to Federal Ministers, in particular, where the rights protected by the Basic Law are at issue.”³²⁹ If we see the regulation in this connection, not only it abdicates judicial power, but also puts the fundamental right of access to courts of every person at risk. What is important to remind here is that the fact that the executive is authorized by the legislature to act in derogation of fundamental rights is not always constitutionally valid for the legislative authorization itself may run contrary to the constitution.

Coming to our system, the constitution in fact allows the legislature to delegate some of its powers to the Council of Ministers.³³⁰ This shall not however be construed that the legislature is at absolute discretion to delegate the whole regime of its power whenever it wishes. In a constitution where it promises to the rule of law and adheres to the separation of powers, delegating all or core legislative powers to the executive is aggrandizing the power of the later and may amount to putting the democratic representative of the people on an inferior position though it is constitutionally declared to be superior. Thus, it would be within the appropriate mandate of the CCI to provide a limit on the possible areas where legislative power can be/cannot be delegated.

³²⁸ B. Neuborne, supra note 105, 420

³²⁹ E. Brandet, supra note 108, 282

³³⁰ The constitution, supra note 7, Art .77(13)

The core source of the problem is the absence of standards and an oversight on part of the parliament while delegating its legislative power. The rule of law generally requires the legislature to incorporate legislative standards to guide and control the administration of laws. In general, standardless law violates the rule of law because it lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented. In particular, standardless delegation of legislative power to the executive is claimed to be against the functional separation of powers principle in two ways; first, it vests real legislative power in structurally unsuited body (the executive). Second, it impedes the court from its interpretation function for there is no general rule/standard for the court to determine the scope of the delegated power.³³¹

Standardless delegation is common in Ethiopia and the problem with the regulation is the direct consequence of such practice. There are laws issued by the executive in Ethiopia but many of them are not required by the parliament to comply with certain prescribed legislative standards. Because of this, courts are faced with the difficulty of deciding the appropriate scope of delegation.³³² However, the absence of standards cannot be invoked as a defense for courts reluctance in reviewing the executive acts on delegation ground. Apart from the case mentioned in the preceding section, the Cassation Bench in its previous decision has had established a bad precedent for itself and for other lower courts on the one hand and a good precedent for the executive on the other hand. In the case *the Ethiopian Customs Authority V. Ato Abero Ergano et al*, the Cassation Bench has reversed decision of the Federal Supreme Court by broadly interpreting the scope of delegation to the Ministry of Federal Revenues.³³³ The case was about the legality of a directive issued by the Ministry of Federal Revenues which provides that employees dismissed by the authority will not have the right to bring their cases before the civil Service Tribunal. The law which delegates the legislative power to the Ministry provides that “Notwithstanding the provision of Federal Civil services proclamation. No. 262/2002 with

³³¹ B. Neuborne, *supra* note 105, p411-419

³³² The decision Cassation Bench, *supra* note 247

³³³ *Ethiopian Customs Authority V. Ato Abero Ergano et al*, Federal Supreme Court Cassation Bench, Civil File No.23339/2007, March22, 2007.

regard to Administration of Employees of the Authority shall be determined by the Regulation issued by the Minister."³³⁴

In the case, the Cassation Bench stated that the Ministry of Federal Revenues is delegated to issue a directive regarding administration of employees which may include, according to the stand of the Bench, determination of jurisdiction of courts or other organs that exercise judicial function.³³⁵ It could be this decision of the Bench that encourages the executive to come up with the new regulation with almost similar content later after the merger of the Ethiopian Customs Authority with the other two institutions. Thus, the common practice of unrestricted delegation of legislative power to the executive and the absence of parliamentary oversight coupled by judicial reluctance to overrule executive acts issued in excess of the power delegated to them are the main source of unconstrained executive discretion which is ultimately a threat to the rule of law. Looking at the regulation, decisions of the CCI and the Federal Supreme Court Cassation Bench discussed above, employees of the authority are left with the absolutely uncontrolled and arbitrary action of the authority (the Director General), whose action is unauthorized by the constitution, and is in violation of the rights of the individual protected by the constitution. According to the official Newspaper of the authority, 75 employees are dismissed in the 2010/11 budget year by the Director General and are left with no remedy for possible abuse of power.³³⁶

The conferral of unconstrained discretion to the executive in general and the Ethiopian Revenues and Customs Authority in particular may also be attributed to the absence of administrative procedure code. This is because, had administrative procedure code was issued, it would be less difficult to control administrative decisions and acts both by the parliament and the judiciary through oversight and judicial scrutiny of the agencies' compliance with the procedure code. Ato Hagos Weldu asserted that the absence of administrative procedure code is one of the main problems that the system faced to control the power of the administrative agencies.³³⁷ He

³³⁴Re-establishment and Modernization of Customs Authority (amendment) Proclamation, proclamation No.368/2003, Fedral Negarit Gazeta, 9th Year No. 93, Art.6 (2) b

³³⁵The Federal Supreme Court, however, has decided convincingly that the Ministry may issue directives regarding administration of employees of the authority but the delegation does not include determination of judicial jurisdiction. See Federal Supreme Court decision File No.20709, December 23, 2005.

³³⁶ 'Egna Legna', internal newspaper of the Ethiopian Revenues and Customs Authority, Vol.3 No.1, July 2011, p4

³³⁷ Interview with Ato Hagos Weldu, supra note 201

revealed that the final draft of the administrative procedure code has been forwarded to the parliament three years ago but it has not yet been promulgated. The parliament is reluctant to promulgate the draft administrative code because of, according to Ato Hagos, the fact that its promulgation may result strong constraint on actions of administrative agencies, which the government does not want.³³⁸

In general, the writer contends, not only the regulation is beyond the intended scope of delegation, but also lacks constitutional basis. What one can infer from the reading of the FDRE constitution is that both the executive and the judiciary are set at equal level since there is no provision which provides for the superiority of the executive over the judiciary. Thus, there is no constitutionally vested power of the executive to deny or grant jurisdiction of courts. Yet, the regulation cannot be justified based on delegation by the law maker. The law maker can delegate a power which is vested by the constitution, and in any case a delegation of legislative power contrary to the constitution is illegitimate. Therefore, since the power that the legislature itself claims to have can be constitutionally contestable, there is a similar possibility that powers delegated to the executive by the legislature could as well be debatable. Arguably, the parliament may limit judicial power but this power subject to constitutional restrictions. The legislature, though it is constitutionally declared to be superior to the other branches is subject to constitutional supremacy. Thus, to argue that the legislature can employ and issue any law that limits or removes judicial power and rights of individuals as it deems necessary without providing the corollary limitations on such power seems to be far beyond the very spirit and intent of the constitution.

4.3. Access to Court and the Border of Justiciability

Access to court and the issue of justiciability are interlinked and usually inseparable. Access to court is one aspect of access to justice. Access to justice is not a one end concept instead it is a continuum which starts with the recognition of rights in substantive laws up to the different forms and stages of enforcement. It is a broad concept which may be manifested not only

³³⁸ Ibid, Ato Hagos has told the writer that he chaired the Drafting committee and the draft was issued containing many concepts that could have important value in constraining discretion of administrative agencies. He added that had the code was issued, it would be very easy where the limits of the powers of administrative agencies vis-à-vis the judiciary.

through the physical accessibility of judicial institutions but also cultural and legal fairness of the process, appropriateness and expectability of outcomes, enforceability of those ascertained rights, as well as timely disposition of cases.³³⁹ Access to justice is expressly recognized under our constitution as one of the fundamental human rights.³⁴⁰ One may be tempted to question the relevance of including a separate and express constitutional provision on access to justice since the rights protected in the constitution necessarily require enforcement by the judiciary. The issue was raised by the Constitutional Assembly that access to justice is independently provided in the constitution to safeguard human rights from the possible violation by the administrative organs using their power as instrument. The Assembly firmly asserted that:

Despite democratic government is established by the constitution, owing to the low culture of protection and enforcement of democratic and human rights or considering the constitutionally provided rights may be violated because of ideological and other differences, enshrining the right of access to justice of every individual of justiciable matter is found to be mandatory.³⁴¹

It is easily discernable from the preceding paragraph that the Constitutional Assembly had forecasted the possible violation of human rights by governments and access to justice is independently provided as additional guarantee of the various rights protected under chapter three of the constitution. Thus, access to court as one aspect of access to justice is constitutionally recognized to provide protection against actions by a state or other persons which deny access to a court or other appropriate tribunal. However, it is clearly provided by the constitution and in the discussion of the Assembly that the right to access to justice [thus access to court] is a right that can be exercised when the matters are justiciable. Therefore, justiciability is one constitutional constraint upon the right of access to court and judicial power. What is justiciability? Which matters are justiciable and which are not; and who determines it? These are some issues that need to be addressed at this junction.

³³⁹ Connie Ngondi-Houghton, 'Access to Justice and the Rule of Law in Kenya' (A Paper Developed for the Commission for the Empowerment of the Poor Nov.2006) 33

³⁴⁰ Art.37 of the Constitution, supra note 7, access to justice may include both institutional and physical availability of courts, the linguistic, cultural and numerical accessibility of laws, and access to legal counsel.

³⁴¹ See Discussion of the Constitutional Assembly on Art.37, supra note 130 (translation from Amharic is mine)

Justiciability is a term which is used many times but continued to be debatable for its scope is not definitely known over legal systems. It is a condition that a person needs to comply with in order to access a court or other similar institution. It can also be considered as a doctrine which imposes a series limit on judicial power to entertain case and usually varies from country to country. In the United States of America, justiciability is a doctrine that may develop in two ways. Some of justiciability limits are declared to be “constitutional” that the congress cannot by statute override them where as some of the doctrines are “prudential” that are developed through prudent judicial determination and can be overridden by the Congress.³⁴² To be specific, five major justiciability doctrines are developed in the United States includes, the prohibition of advisory opinion, standing, ripeness, mootness, and the political question doctrine.³⁴³ In South Africa, all rights recognized as bill of rights are made to be justiciable.³⁴⁴

More Succinctly, Daly argues that justiciability has two major components: the jurisdiction of a court to hear a case and the “political question” doctrine.³⁴⁵ No matter how the concept justiciability is perceived by many legal systems, it could generally be said that justiciability/nonjusticiability is determined based on two standards; on the status of the decision maker and the nature of the subject matter.³⁴⁶ According to the first standard, some cases may be made to be outside the jurisdiction of courts because the constitutional status given to courts is insignificant whereas in the second case the character and nature of some subject matters necessarily requires the foreclosure of judicial power to review them.³⁴⁷ In the latter category

³⁴² In the US system determination of Cases and controversies are called as constitutionally provided doctrine of justiciability where as the political question Doctrine is self-imposed constraint established through judicial practices. See Chemerinsky, *supra* note 146, 30

³⁴³ *Ibid.*

³⁴⁴ Constitution of the Republic of South Africa, section 38

³⁴⁵ Paul Daly, ‘Justiciability and the "Political Question" Doctrine’, (2010) *Public Law*1, Prerogative powers such as those relating to the making of treaties, defense of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are considered as non-justiciable, I think susceptible because their nature and subject matter are such as not to be amenable to the judicial process.

³⁴⁶ Chris Finn, ‘the Justiciability of Administrative Decisions: a Redundant Concept’ (2002) 30 *Federal Law Review* 239-263

³⁴⁷ See *ibid* for detail.

some prerogative rights of the executive (such as war, security, and treaty agreements), political questions and complex policy issues are included.

In Ethiopia, the scenario is beyond clarity and raises series issues. The constitution only provides justiciability as one limit on judicial function and it does not provide which matters are justiciable and which are not.³⁴⁸ There is also no constitutional provision which deals with the issue of who determines the issue of justiciability. The issue was raised during the making of the constitution by the Assembly. Some members of the Assembly stated that the phrase “justiciable matter” should be excluded from the provision since it raise the issue of who determines it but the idea did not get the majority support.³⁴⁹ The Assembly adopted the current version of the provision on the reason that since there must be some administrative matters that may not be seen by courts, the phrase “justiciable matters” is necessary.³⁵⁰ However, it is not addressed by the Assembly that what types of administrative matters are not justiciable and who determines the question.

If we see the practice, it seems that the House of Peoples Representatives (HoPR) is vested to determine the issue of which matters are justiciable and which are not. In the case *Ato Ashenafi Amare et al V. the Ethiopian Revenues and Customs Authority*, the CCI firmly ruled that since the judiciary is established within parliamentary system, it is within the parliament to decide “these issues are justiciable and others are not, provided that it is within the constitutional limit. Accordingly, a claim for reinstatement to previous work is made nonjusticiable.”³⁵¹ It further stated that “regarding the issue of whether or not the matter (reinstatement to a job in the quthority) is justiciable, the decision of the legislature made *according to the constitution* saying this matter is justiciable and that is not, is correct even though it could be said that it narrows

³⁴⁸ Art.37 (1) of the FDRE constitution provides that everyone has the right to bring any justiciable matter to a court or other organs entrusted to exercise judicial power.

³⁴⁹ See discussion of the Assembly Art.37(1), supra note 130,

³⁵⁰ Ibid

³⁵¹ The CCI did not deny the fact that such empowerment of the parliament limits/narrows judicial power. The writer contends that the CCI did not seem to be series on the case when one discovers the fact that one of its the presiding members, Ato Eshetu W/semayat, is a Prosecutor General of the Authority against which the case was referred to it. The fact he gave his vote in the decision may erode the legitimacy of the decision and is against the very principle of farness, rule against bias.

judicial power” (emphasis added). An important deficiency of the CCI in this regard is that, apart from saying that the legislature (HoPR) has made the matter nonjusticiable according to the constitution, it failed to flesh out its reasons justifying the fact that the legislature is acted in line with the constitution. Furthermore, the CCI did not stipulate the possible constitutional limit on the power of the HoPR to determine which matters are justiciable and which are not. Nor does the constitution contain a clause that helps to address the issue. In similar vein, the Cassation Bench confirms the Decision by the CCI saying it is up to the legislature to decide the issue of justiciability.³⁵²

Coming back to the main theme, when one looks Art.37 (2) of the regulation in relation to the justiciability issues, both the CCI and the Cassation Bench have decided in similar way that the regulation is legitimately issued by the council of ministers as authorized by the legislature and accordingly, claim for reinstatement or the right to be heard of employees of the authority is made to be non-justiciable.³⁵³ The writer however argues that the decision of the CCI and the Cassation Bench is subject to challenge at least for two reasons. First, the regulation itself does not have clear and direct implication that it is issued to make the right to claim for reinstatement non-justiciable. The regulation does not directly prohibit courts from assuming jurisdiction for claims of reinstatement rather it rejects possible decisions of courts ordering reinstatement of an employee dismissed according to Art.37 of the regulation.

In fact, It could be said that when the regulation says decision of a court ordering reinstatement of an employee is not acceptable, it may have the same effect of making the claim non-justiciable, for access to a court the decision of which is not enforceable is meaningless. This is however different from saying that the right/claim is non-justiciable. An interview with Ato Mekonen Ayele also confirms this argument. He told the writer that “we are not prohibiting courts from assuming jurisdiction on the issue; rather we are saying that the decision of a court that orders reinstatement of an employee is not acceptable by the authority.”³⁵⁴ Thus, the CCI

³⁵² See decision of the Bench, supra note 247

³⁵³ See decisions of the CCI (supra note 220) and decision the Federal Supreme Court Cassation Bench (supra note 247) respectively. In both cases, it is stated that what is made to be non-justiciable is claim of reinstatement, and not other claims that employees of the authority may have as a result of dismissal.

³⁵⁴ Interview with Ato Mekonen supra note 297

and the Bench have failed to make distinction between making judicial decision unenforceable (which the content of Art.37 (2) of the regulation clearly indicates) and making rights non-justiciable. If it was within the intention of the regulation to preclude judicial review of decisions of the authority, why it does not contain a clause which says that ‘such decision of the authority cannot be reviewed by any judicial organ or other institutions vested with judicial function’?

The stand of the CCI and the Cassation Bench does not also seem to be compatible with the intended spirit of the constitution. Let alone in our country where there is constitutional supremacy, there is an established presumption on the UK, where the parliament is absolutely supreme, that the legislature intends to legislate in line with the rule of law.³⁵⁵ There is no any legal or moral justification for the CCI and the Cassation Bench that impedes them to take the presumption that the HoPR while delegating its power to the executive intends to be consistent with the rule of law; for the rule of law is a founding principle that our constitution is based. Thus, in the absence of clear legislative authorization to make the right to reinstatement non-justiciable, it is contrary to the intended scope of the legislature [thus the rule of law] for the executive to issue a regulation that makes access to court nonjusticiable. This is true because the rule of law as discussed in chapter two requires the recognition of basic rights together with an independent tribunal capable of giving redress to an alleged violation of rights. When the constitution provides justiciability as one limit on judicial power, it does not seem to make any administrative issue that the legislature wishes can be outside the jurisdiction of courts. In fact, there is a statement in the discussion of Assembly which says, as discussed above, some administrative issues may not be seen by courts.

However, a reading of the late document which provides brief explanation for the finally approved draft of the constitution proves the otherwise intention of the makers. While giving explanation on access to justice, it provides two scenarios by saying “there are matters that are to be decided by courts. There are also other matters that require administrative decisions; *though these administrative decisions may be brought to courts* (emphasis added).”³⁵⁶ Furthermore, the discussion by the Assembly on the issue provides that “...generally a person should not be left

³⁵⁵ Douglas E., supra note 204, p68.

³⁵⁶ A Brief Explanation of the Final Draft approved by the Constitutional Assembly, October 28, 1995, an explanation on Art.37 of the final Draft.

without a say when he/she is aggrieved by a decision of government institution; rather he is entitled to bring his grievance to another government institution and get remedy.”³⁵⁷ Besides, the CCI need to have fleshed out its reasoning on the constitutional space and concrete constitutional justification, regardless of which principle of constitutional interpretation it used, when it declares that the right is made non-justiciable.

From the Discussion of the Assembly, it is easily discernable that the legislature is not constitutionally empowered to decide what matters are justiciable and which are not. Apart from the minute of the constitution, the whole spirit of the constitution does not support the empowerment of the legislature to decide issues of justiciability without limit. Even though the legislature is supreme to the other branches; it is subordinate to the constitution. However, if the legislature is said to be vested with the power to determine issues of justiciability, what is the guarantee that the remaining fundamental rights will not be made non-justiciable by legislations in the near future? Where is the limit of legislative power of making rights non-justiciable? If the legislature can limit the enforceability of fundamental human rights, why is the entrenchment of such rights is needed under our constitution as it is reflected in their amendment procedure?

The trend shows that claims against administrative agencies can be made non-justiciable any time the parliament wishes. This is true since there is no clear border of administrative issues that could not be made non-justiciable by legislations. The absence of separate administrative clause in the constitution may be one reason for making administrative issues subject to conditional protection by the judiciary in Ethiopia. The South African Constitution provides an express provision which states that everyone has the right to ‘just administrative action’ and requires the legislature to issue legislation to such end.³⁵⁸ Similar Administrative justice clause in the original draft constitution was submitted to the Transitional Government of Ethiopia.³⁵⁹ However, it was not submitted for discussion in the Constitutional Assembly and the reason for this is not

³⁵⁷See discussion of the Assembly on Art.37, supra note 130

³⁵⁸ Section 33 of the South African Constitution provides for just administrative action for everyone. It stipulates that everyone has the right to just administrative action that is lawful, reasonable and procedurally fair. Important of this section it also puts an immediate obligation on the state to make national legislations to give effect to the right under section 33 of the constitution.

³⁵⁹ A Draft Constitution Submitted to the Representative Council of the Transitional Government Ethiopia, April 29, 1994, Art.34.

provided in the Minute as well. Could it be said that the administrative justice clause is excluded in the final draft because the makers had rationally foreseen the possibility of making administrative issues non-justiciable? If the answer is in the affirmative, why, then the Assembly failed to state such justification in the Minute? The writer leaves the issue for further and separate inquiry.

Substantive limitation of power by establishing a Bill of Rights regime in a constitution alone serves nothing in preventing government tyranny and ensuring the rule of law; rather constitutional supremacy, making fundamental rights justiciable, and entrenchment of same are equally important.³⁶⁰ Recognizing rights in the constitution is meaningless unless they are made to be implemented by making them justiciable. Furthermore, to argue that the legislature is with the discretion to limit rights based on justiciability ground amounts to amending the entrenched human rights chapter in a procedure which is very simple than the one provided in the constitution.³⁶¹ In a system where Ethiopian citizens do not have any constitutional avenue to challenge laws issued by the parliament on the ground that they are against the constitutionally vested rights and freedoms, making the parliament the ultimate decision maker of issues of justiciability may end up to be a source of tyranny. In such case, there is no any mechanism that prevents laws from becoming an instrument of oppression.

When one sees the regulation in light of the above discussed points, it is apparently open to potential abuses by the power holder. It is not untenable, for instance, to argue that the regulation may be used to eliminate some group of employees from the authority based on their political outlook. Similarly, an employee may become victim of the Director General based on personal disagreements. This is apparently true if one is cognizant of the fact that the Director General of the Authority is empowered not to follow the formal disciplinary procedures and is not required to explain the reason of dismissal at all. In fact, the CCI in the *Case Ato Ashenafi Amare et al V. the Ethiopian Revenues and Customs Authority* stated that “there are directives that the Director General is required to follow while dismissing employees” though the practice as well as Art.37

³⁶⁰ De Waal et al, supra note 41, p8

³⁶¹ See Art.105 (1) of the Constitution which provides a rigorous amendment of the fundamental rights under chapter three of the constitution which in turn shows the makers did not intend to limit such right easily by the legislature.

(1) of the regulation proves contrary fact to the reasoning of the CCI.³⁶² The Director General may adhere to some procedures provided in directives regarding dismissal of employees on grounds other than those under Art.37 of the regulation.³⁶³ Thus, who controls the potential abuses of power by the Director General? It is said that the authority is accountable to the Prime Minister. Is it rationally convincing for the Prime Minister to oversee all these detail grievances of employees against the authority? The writer doubts a lot.

4.4. The Judicial Response

In the foregoing discussions, it is established that the power of courts in Ethiopia is being eroded by the issuance of legislations and regulation as well as decision of the CCI in a way that has substantial damage on the protection of rights vested in the constitution. The government may have its own policy reasons that justify the promulgation of laws that imposes restrictions on judicial power and enjoyment of some rights. However, the policy justifications that may be forwarded by the government cannot be used by the judiciary for the same purpose. This is because under the rule of law, rights should not be subjected to limitations to achieve the momentary policy purposes of a government and citizens are not required to be instruments of government policy at the cost of their basic rights and freedoms. This could be realized if there is strong and independent judiciary or other similar institution that could defend its power and rights of citizens against encroachment by the government. Thus, under this section two important points are addressed; a) how ordinary courts respond to decisions of the CCI which say “it [the issue] does not give rise to constitutional interpretation”? b) How courts are dealing with the laws that contain ouster clauses?

³⁶²The assertion of the CCI is completely out of fact. Art.37 of the regulation is clear in this respect that it does not required to follow formal disciplinary procedures to dismiss an employee. This is also what is being practiced in the authority. In many letters of dismissal that the writer observed, there is no statement that tells the reason of dismissal rather a more general statement which says “...your service is terminated based on Art 37 of the regulation starting from...[date]”. There is no distinction among the letters of dismissal served to employees except name of the employees. See the annex.

³⁶³ Formal disciplinary procedures may be required regarding other grounds of disciplinary problems as provided under Art.35 and 36 of the regulation, supra note 12

Regarding the first issue, the CCI in many of its decisions states that “the case does not give rise to constitutional interpretation” and remands the cases to the court from where it is referred.³⁶⁴ The point is therefore what this expression meant to the courts? Is there anything that the courts can do after receiving the decision of the CCI containing the expression? The writer tried to see some cases and conducted an interview with key person. Accordingly, the interview with Dr. Fasil responded that when the CCI says “it does not give rise to constitutional interpretation”, it is meant that the issue which is before the CCI is ‘not unconstitutional’ and hence courts can proceed with the remaining issues in the real case at their docket.³⁶⁵ This view, however, seems to be in deviation with the view of the CCI on the issue. In the case of *Ethiopian Blind Persons National Association V. Oromia Education Bureau and Jimma College of Teachers Education*, the CCI remanded the case to the court saying that it does not give rise to constitutional interpretation even though the issue before it was apparently contrary to the constitution.³⁶⁶ What the CCI clearly put in the decision is that “the court can decide the case as it deems appropriate.”³⁶⁷ Accordingly, what one may safely conclude from this is that when the CCI says that ‘the case does not give rise to constitutional interpretation, it may mean that courts should continue to dispose the issues exist in the case by looking at other appropriate options, such as their compatibility with primary legislations or based on factual merits.

In the case of *Ato Haile Demissie V. the Ethiopian Revenues and Customs Authority*, however, the Civil Service Administrative Tribunal seems to approach the expression of the CCI differently.³⁶⁸ After receiving the remand which says “the case does not need constitutional interpretation” the tribunal closed the file on the ground that the CCI decide that the case does not need constitutional interpretation. The expression does not seem to connote that the court to

³⁶⁴ *Ethiopian Blind Persons National Association V. Oromia Education Bureau and Jimma College of Teachers Education* (supra note 217), and *Ashenafi Amare et al V. the Ethiopian Revenues and Customs Authority* (supra note 220) are some of the cases where the CCI used the same expression to remand a case brought before it.

³⁶⁵ Interview with Dr. Fasil, supra note 201

³⁶⁶ Decision of the CCI, supra note 217, the issue was that Jimma Teachers College has issued a criteria for admission of students of which visually impaired persons were decided to be unqualified for the reason that visual disability is provided as one criteria that prevents the persons from joining the college. This is clearly unconstitutional since it goes contrary to Art.25 of the FDRE constitution.

³⁶⁷ Ibid

³⁶⁸ Decision of the Civil Service Administrative Tribunal, File No.00862/2002, March 5, 2010.

which the decision is remanded should close the file. Instead, what is sound to argue is that the court to which a case is remanded can proceed with the case on other grounds. Thus, what the tribunal ought have to do is to continue with the case on other grounds, for instance to see whether the regulation (which is contested to be unconstitutional) is compatible with the parent legislation, or whether or not the factual grounds on which the authority is based for its decision really exist. However, what the writer wants to remind at this point is that the decision of the tribunal in closing the file is correct, not for the reason the tribunal provides, but because of the fact that the matter (claim for reinstatement) is decided by the CCI to be nonjusticiable.

To see the response of the judiciary regarding the laws that divest it of its jurisdiction, judicial response is not consistent. In fact, courts can challenge the laws that limit or remove its jurisdiction to the extent their power limit permits. However, even within the power limit there is diverged court experience so far. To begin with the Federal Civil Servants Administrative Tribunal,³⁶⁹ it declined jurisdiction to hear cases brought before it from employees of the Ethiopian Revenues and Customs Authority for the reason that its power is taken away by the regulation.³⁷⁰ In its decisions, the tribunal rejected to entertain the claims brought by dismissed employees of the authority saying that the claim do not have legal basis to be heard because the action by the authority is taken based on the regulation.

The tribunal did not make any sort of scrutiny as to whether the grounds which are to be used by the Director General of the authority to dismiss employees exist or not. The grounds for the Director General are two; suspicion of corruption and loss of confidence by the Director

³⁶⁹ The Federal Civil Servant Administrative Tribunal is made to be part of the discussion for the reason that it is established to exercise judicial function in similar procedure as ordinary courts. See the Federal Civil Servant proclamation, supra note 236, Art.74

³⁷⁰ There are many cases that show the Tribunal has surrendered to assume jurisdiction of dismissal cases brought before it. To mention some, the *Ato Tewodros yilma V. the Ethiopian Revenues and Customs Authority* File No.00828/2001 E.C, decided August 19, 2009, *Ato Amare Terfe V. the Ethiopian Revenues and Customs Authority*, File No.00826/2001, decided on August 27, 2009, *Ato Jemal Mehamed et al V. the Ethiopian Revenues and Customs Authority*, File No. 00833, September 01, 2008. In all these cases there is dissenting opinion on the ground that the authority should at least provide it's reasoning showing at least prima facie evidences to the allegation to use Art.37 of the regulation.

General.³⁷¹ Thus, it could be expected from the tribunal to see whether these grounds exist. In this regard, in the case of *Ato Jemal Ahmed V. the Ethiopian Revenues and Customs Authority*, the dissenting judge in his opinion provides that saying that the Director General has Suspected an employee for corruption alone cannot suffice, rather some grounds of suspicion, real or circumstantial, should be submitted to the court.³⁷²

Coming to the ordinary courts, the Federal First Instance Court has showed inconsistent determination of cases regarding laws that restrain judicial power. In some cases, the court made an attempt to assume jurisdiction of reviewing decision of administrative agencies including those the decision of which is said to be final by legislations. In the case of *heirs of Nur Beza Terega V. the Ethiopian Privatization and Public Enterprises Supervising Agency*, the court held that courts do have an inherent power to review decision of administrative agencies regardless of whether the decision of the agency is made to be final by a statute.³⁷³ In other cases, the court adopted a different scenario of interpreting ouster laws. In the case *Ato Mogninet Tiruneh V. Agency for Government Houses*, however, the court declined to see the case on the ground that it does not have jurisdiction to see the case since the decision of the Board in the agency is made to be final by a legislation.³⁷⁴

Case study shows that the Federal High Court has similar experience regarding laws that limit or remove court jurisdiction. In the case *W/o Zeleka Werk Bekele V. Agency For Government Houses*, the court assume jurisdiction to hear appeal brought before it despite the agency argued that courts do not have the power to determine whether or not a house is taken by proclamation No.47/1975.³⁷⁵ Similarly, the court, in the case *W/o Mogninet Tiruneh V. Agency for government*

³⁷¹ Art.37 (1) of the regulation, supra note 12

³⁷² Decision of the Tribunal, File No.00833, supra note 370

³⁷³ See decision of the Federal First instance court, File No.48/93, March25, 2002.

³⁷⁴ See supra note 233, the ruling was made against the preliminary objection made by the agency saying the decision of the Board within the authority is not reviewable by courts. However, a cursory look at the proclamation does not provide a clause that provides the decision of the Agency is final. See additionally Agency for Government Houses Establishment Proclamation, Art.6 (3) supra note 232

³⁷⁵ See the Federal High Court civil file No.41668, May2, 2002

Houses, ruled that it has jurisdiction to review the decision of the agency on a house the ownership of which is contested by a party.³⁷⁶

Cases decided by the Federal Supreme Court shows different trend. In the case *Ato jemal Mehamed V. The Ethiopian Revenues and Customs Authority*, the court upheld the decision of the Federal Civil Servant Administrative Tribunal on the ground that the court does not have the power to review decision of the Authority made based on Art.37 of the regulation.³⁷⁷ The same stand was revealed in other decisions of the court regarding dismissal cases brought from the Civil Servant Tribunal.³⁷⁸ The experience of the Cassation Bench, as it is repeatedly discussed in the preceding discussions, is however restrictive of judicial power. In many of its decisions, the Bench interprets the laws that vest a final decision making power as not reviewable by ordinary courts.³⁷⁹ In its recent decision, the Bench strengthens its stand of restrictive interpretation of judicial power and generous recognition of broad discretionary power of administrative agencies. The court established that judicial power in Ethiopia emanates from laws, thus the legislature can limit or remove court jurisdiction.³⁸⁰

In general, the response by the judiciary, in particular the Federal Supreme Cassation Bench, to the laws that limit or remove court jurisdiction seems to be contestable for at least three reasons. First, there is misinterpretation of the separation of powers in a way that removes courts from their constitutional mandate. This is clearly reflected, for instance, in the decision of the Bench which provides that the power given to the Ethiopian Revenues and Customs Authority under Art.37 of the regulation is within the spirit of the parent legislation and is in line with the appropriate “executive prerogative”.³⁸¹ Second, there is misconception of the concepts of making rights non-justiciable on the one hand and giving the right to dispose some claims to other institutions other than ordinary courts on the other hand. In *Ato Welday Zeru et al V. the*

³⁷⁶ See the Federal High Court, File No.74148, October 20, 2009

³⁷⁷The Federal Supreme Court Civil File No.48872, October 20, 2009,

³⁷⁸See also decisions of the Federal Supreme Court *Ato. Amare Terefe et al V. the Ethiopian Revenues and Customs Authority*, Civil File No.48870, October 20, 2009, and *Ato Tewodros Yilma et al V. the Ethiopian Revenues and Customs Authority*, File no.48873, October 20, 2009.

³⁷⁹ See chapter three for detail.

³⁸⁰ See decision of the Bench, *supra* notes 254 and 247.

³⁸¹ See decision of the Bench, *supra* note 247

Ethiopian Revenues and Customs Authority, the Bench stated that “an issue is justiciable only when the power to decide that case is not given by law to another institution.”³⁸² Here is the confusion that the Bench made. Our constitution provides that judicial power may be taken away from ordinary courts and given to other institutions that follow legally prescribed procedures.³⁸³ This should not however be construed to mean that those matters vested to other institutions exercising judicial power are made non-justiciable. Rather, it was meant that for some policy and practical reasons, it was made that some judicial powers should be given to other institutions. If a matter is non-justiciable before ordinary courts, it is also non-justiciable in other institutions that exercise judicial power. For instance, the Civil Servants Administrative Tribunal is established to exercise judicial functions in relation to claims of administrative grievance in the Civil Service area. The tribunal is entitled to heard administrative claims only if such claims are justiciable. On the same token, it is not non-justiciable for courts to assume jurisdiction of administrative claims for the mere fact that the power is given to the tribunal.

Therefore, judicial power vested to other institutions other than ordinary courts are necessarily justiciable matters. If not, the institutions are not exercising judicial power and are not institutions which are referred under Art.78 (4) and 37(1) of the constitution. After all, the bench should have been aware of the fact that the institutions that are stipulated under Art.37 of the constitution are those which are established to exercise judicial function, not any administrative institution as the Bench provides in its reasoning of the case.³⁸⁴ Therefore, the Ethiopian Revenues and Customs Authority is not the kind of institution established to exercise judicial function as provided in the constitution. Accordingly, it was not necessary and appropriate for the Cassation Bench to rely on Art.37 of the constitution and consider the authority’s power under the regulation corresponds to the constitutionally stipulated institutions established to exercise judicial function.

Finally, there is the practice of willful relinquishment of jurisdiction by courts to see some claims brought before them. In the Case *Ato Ashenafi Amare et al V. the Ethiopian Revenues and Customs Authority*, the Civil Service Tribunal has failed to see the case based on the issue

³⁸² Ibid, see also Assefa Supra note 40, p19&27

³⁸³ Art. 78(4) of the Constitution, supra note 7

³⁸⁴ This is easily inferable from the cumulative reading of Art. 37 (1) and Art.78 (4) of the constitution.

whether the Art.37 of the regulation is compatible with the parent legislation.³⁸⁵ Instead, the Tribunal simply relinquished the possibility of deciding the case by itself and referred it to the CCI for the mere fact that the provision is said to be contrary to Art.37 of the constitution even though it could have been disposed of by looking against the parent legislation. The Federal Supreme Court has also made similar mistake of surrendering its jurisdiction to the compatibility of the regulation with its parent legislation.

To sum up, Given that Parliament can safely and reasonably be assumed to have legislated laws in accordance with the rule of law (absent any explicit declaration to the contrary), the courts must ensure that the rule of law is followed in all administrative decisions for their compatibility with the parliamentary intention. By doing so, the courts are, not only restraining discretions of administrative agencies, but also are effectively helping to realize those intentions and to reaffirm parliamentary sovereignty by ensuring that administrative actors observe the parameters of authority established by Parliament. However, the writer wants to remind readers at this point that, the criticism in this section regarding response of the courts concerning the regulation of the authority is valid only for those court decisions made before the CCI passed its decision on the issue. Then after, there is nothing that courts can do but to reject any claim of reinstatement by employees of the authority for lack of jurisdiction because the claim is no more justiciable.

4.5. What is Left With the Judiciary?

As it is discussed in the preceding sections, court jurisdiction in Ethiopia is limited and constrained both by the constitution and other laws. Constitutionally speaking, courts are mandated to hear any justiciable matter brought before them provided that such matters are not expressly given to the HoF or to other institutions that are established to exercises judicial function according to the constitution.³⁸⁶ However, the jurisdiction of courts these days is being removed and given to other institutions that do not constitutionally qualify to have judicial

³⁸⁵See decision of the Federal Civil Service Tribunal, file no.00830, supra note 370

³⁸⁶Supra note 7, Art. 78(4), 37(1), 62(1), 83, and 84 of the constitution are relevant in this respect.

power.³⁸⁷ Not only this, the decision of most these organs is made to be final and non appealable before ordinary courts.

Moreover, court jurisdiction in Ethiopia is being foreclosed by proclamations and regulations making some cases as non-justiciable in a way unintended by the constitution. What is more worrisome is courts' power is further stripped by the consistent and repeated decision of the Federal Supreme Court Cassation Bench confirming the legality and appropriateness of the laws that stripped the judiciary of its power. This is done in two ways; first, by interpreting the laws that contain finality clause as it is meant to preclude appeal to ordinary courts confirms the general trend of foreclosing judicial power through legislations. Second, the Cassation Bench limits court jurisdiction by interpreting the delegation issue so broadly so that any conceivable executive act will be within the scope of delegation though it is apparently beyond the intended delegation under the parent law.³⁸⁸

Judicial jurisdiction in Ethiopia is further restricted by self-relinquishment of jurisdiction by courts including the Cassation bench.³⁸⁹ This does not mean that judicial self-restraint is not relevant. Judicial self-restraint is common in many jurisdictions and there are instances where by self-imposed limitations up on the power of courts become legitimate.³⁹⁰ However, there are many instances which show courts restraining themselves for legally ungrounded reasons. For instance, while they can dispose an issue involving the legality of a regulation by looking its compatibility with the parent legislation, they are observed to refer it to the CCI/HoF for the

³⁸⁷ The constitution recognizes the fact that institutions other than ordinary courts may be established provided that they follow legally prescribed procedures. However, there are many institutions that are vested with judicial power but do not follow legally prescribed procedures. See supra note.....

³⁸⁸ This is clear in the in the decision of the Cassation Bench in the case *Ato Welday Zeru et al V. the Ethiopian Revenues and Customs Authority* (supra note 247) ruled that claims of reinstatement for dismissal by the authority according to Art.37 of the regulation cannot be brought before courts or other organs that exercise judicial function.

³⁸⁹ See Assefa, supra note 40, p23

³⁹⁰ The political question doctrine, though it is not implemented consistently, is among the well know self-imposed limitations up on the power of courts in the United States. Similar cases may not be seen by Ethiopian courts, not only for the same reason, but also because of the fact that such power is constitutionally vested to other organs (the HoF/CCI). Besides, courts in Ethiopia may restrain themselves from entertaining cases that are appropriate to be handled by another department based on the separation of powers.

mere fact that the regulation is contested for its violation of a constitutional right.³⁹¹ In the absence of jurisdiction to decide on constitutional issues, the silence of the courts at least to solve the case by looking the contested law in light of the parent legislation, the only alternative left to the court, is regrettable.

According to an interview with Dr. Fasil, there is no means to guarantee the fact that courts' jurisdiction to protect individual rights from arbitrary action of government from being usurped or encroached by the other branches except democracy.³⁹² To him, which matters are justiciable and which are not (an important issue regarding court jurisdiction) is to be determined by 'law' and he accepts that some cases are held to be non-justiciable for social and economic reasons.³⁹³ He adds that there is no clear standard to determine which matters are justiciable and which are not, and no indication is available where the power of the legislature to make some cases non-justiciable [thus restricting court jurisdiction] stops. However, the writer contends the assertion made by Dr. Fasil for at least two reasons.

First, the various human rights recognized under chapter three and entrenched under our constitution are intended to serve as one mechanisms of constraining the political branches from overruling them by an ordinary legislation passed in ordinary democratic process. Ensuring the protection of such rights is necessary for the realization of the supremacy of the constitution. Thus, the human rights regime under our constitution is a guarantee of jurisdiction of courts to protect individuals from being usurped by the other branches provided that the body vested with the responsibility to upheld the supremacy of the constitution, the HoF/CCI, discharges its

³⁹¹ This is clearly observed in the decision of the Supreme Court which escaped the possibility of looking the contested regulation in light of the parent legislation and simply confirm the decision of the Civil Service Administrative tribunal which declares that an appeal on the decision of the Authority is not acceptable see supra note 378.

³⁹² Interview with Dr. Fasil, supra note 201, he said that the ultimate guarantee that the fundamental rights are not made to be non-justiciable by legislations and other laws which are argued to be made through delegation is nothing but democracy. This is to say that if the laws issued are inappropriate and restrictive of rights, voters may consequently punish the legislature in election.

³⁹³ When he says law, it includes the constitution and all other laws that are issued following the normal procedure (like the proclamation, regulation and directives.) he cited Administration of the Ethiopian Revenues and Customs Authority Council of Ministers Regulation No.155/2008 as one of the laws that affects rights of employees but necessitated for economic reasons; for the area is corruption sensitive.

function properly. Second, to rely on democracy to protect the judicial power of enforcing human rights is hardly plausible for democracy in our country is in its infant stage. His opinion however reveals that our constitution is short of its own worthy custodian.³⁹⁴

An interview with Ato. Hagos confirms the above assertion. He said “under the Ethiopian constitutional system the jurisdiction of courts is determined by the constitution and other laws issued accordingly. In case the legislature promulgates a law that strips courts’ jurisdiction, even contrary to the constitution, it is not for the courts to challenge the legislation or other laws enacted by delegation for their compatibility with the constitution; instead it is up to the HoF to face with the legality of such laws.”³⁹⁵ He adds that “when we deal with the power of courts in Ethiopia, we should first see the system under which our courts are established, and the system does not allow courts to challenge legislations even if they encroach up on their constitutional mandate.”³⁹⁶

From the preceding discussion, what could soundly be argued is that unless and until the HoF/CCI stands to guard court jurisdiction from being usurped or encroached by the other organs, there is no another mechanism to ensure that the already limited courts’ power is not further overtaken. This argument becomes apparently convincing if one discovers the fact that, unlike the other two branches, the judiciary branch is not made to be the beneficiary of the complaint procedure before the CCI which would help it to challenge any law that potentially affects its constitutional mandate on the ground of separation of powers.³⁹⁷ Nor does democracy

³⁹⁴ The argument is true because while the HoF/CCI is vested to foresee the supremacy of the constitution by invalidating any law or act of the government that is contrary to it, to hear an assertion that it is democracy that is the only option to guard judicial power and individual rights from unwarranted action of the other branches from a member of the CCI, Dr.Fasil, may connote that the role of the HoF/CCI is overlooked.

³⁹⁵ Interview with Ato Hagos, supra note 201.

³⁹⁶ Ibid, this view is forwarded as a result of the belief that the power of courts in Ethiopia emanates from law, not an inherent power.

³⁹⁷ See supra note 215, Art.24 which provides “A case requiring constitutional interpretation which may not be handled by courts may be submitted to the Council of Inquiry by, at least, one-thirds of members of the *Federal or State Councils, or the Federal or State executive bodies*” (*emphasis added*). Issues of separation of powers are among the non-justiciable matters before ordinary courts since the issue is more of political. The provision can therefore be construed as it also refers to separation of powers. See in this regard Assefa, supra note 156, p17-18. However, it is only the legislative and executive organs that are made to be the beneficiaries of the law while the

could provide effective guard to judicial power considering democracy in Ethiopia is contested and in its infant stage. Thus, ‘what is left to the judiciary’ is practically speaking, the writer would say, what is permitted to the judiciary by the other branches. This is evident if one looks the reality witnessed in the last two decades that despite the fact that many laws that stripped court jurisdiction are promulgated, it is difficult to get a case decided by the Cassation bench or the HoF/CCI that nullifies a law on the ground that it usurps or encroaches up on the power of the judiciary. Instead, many of the cases appeared before these organs revealed that judicial power is narrowly construed while the power of the other branches is extended.³⁹⁸

Conclusion

Revenue authorities are key institutions in the economic and social development of every country. The efficiency and capacity of the authority have paramount influence on, not only domestic transaction, but also affects Foreign Direct Investment. It is to ensure the empowerment of revenue authorities in collecting government revenues from the income the economy generates that the authorities are vested with relative autonomy from other public service offices. The autonomy vested to revenue authorities is believed to be effective mechanism of guarding the authority from potential interference of the politics and enabling the same to have better autonomy in the recruitment, promotion salary, and dismissal of its staff.

The Ethiopian Revenues and Customs Authority is established as autonomous government institution accountable to the Prime Minister for similar justification as discussed above. It is the successor of the former three government institutions; the Ethiopian Customs Authority, the Ministry of Revenue, and the Federal Inland Revenues Authority. Despite the establishment of the authority as an autonomous entity is rationally legitimate, the power it has acquired by the regulation is strongly contestable. The authority is granted with unconstrained power to dismiss any employee who is suspected by the Director General for corruption or loses confidence by same without the need to follow minimum due process requirements. Not only this, the

judiciary is left to use the complaint procedure before the CCI only in relation to cases that are handled by courts as provided under Art.Art.21 of the proclamation.

³⁹⁸ The decision of the CCI on the case *Ato Ashenafi Amare et al V. the Ethiopia Revenues and Customs Authority* (supra note 220) and the decision of the Cassation bench (supra note 247) and other cases, such as the *Mahberawi Wastina Bale Siltan V. Ato Birhanu Hiruy and Ato Kebede G/Mariam* (supra note 231) confirm the fact.

Regulation removes jurisdiction of courts to review the decision of the authority which leaves the authority without any check.

The promulgation of the regulation with a content having adverse effect on jurisdiction of courts and individual rights is mainly justified by the need to control corruption scandals which is believed to be the major challenge of the authority. The authority is sensitive to corruption and similar behavioral deviations of employees and to control such problem through ordinary disciplinary procedures is said to be hardly achievable. Thus, the authority resorted to such regulation which has a devastating effect on power of courts and individual rights protected in the constitution.

The content of the regulation is defended not only by the authority, but also by other institutions that have an important role in testing its validity with pertinent higher laws. Both the CCI and the Federal Supreme Court Cassation Bench decided that the regulation is legitimate and its contents are made as intended by the parent legislation. Most worrisome, both the CCI and the Cassation Bench established a precedent in the judicial and constitutional system that the legislature is vested with the power to determine which matters are justiciable and which are not, accordingly claims of reinstatement by dismissed employees of the authority is held to be non-justiciable. The implication of such precedent is, at least until the CCI/HoF comes with different decision on the issue, that the legislature and the executive are with no concrete constraint from involving in making laws that limit on judicial power and rights of individuals. Other levels of courts, including the Civil Service Tribunal, has voluntarily relinquished their legitimate power to review the compliance of the regulation with the parent legislation rather they refer to the CCI merely because the regulation is alleged to be contrary to the constitution.

The promulgation of the regulation with such content and the confirming decision by the CCI and the Cassation Bench may be attributed to the absence of express constitutional limit on the power of the legislature to issue laws that has adverse effect on power of courts and rights of persons. The absence of the administrative justice clause and general limitation clause may be considered as a comfortable legal gap for the legislature and executive to issue laws that make rights recognized in the constitution subject to unjustified limitations. However, this should not be construed to mean that there is no constraint in the constitution up on the power of the legislature and the executive. In a country where the rule of law is firmly established government

power is limited not only an express constitutional stipulation but also by an implied limitations that the constitution is enshrined.

It could be said that to ensure the rule of law, our constitution enshrine some principles that pose an implied restrictions on the power of all government branches in general and the legislature in particular. The first is the separation of powers which vests each government branch should not interfere in the functions of the other. Accordingly, there is an implied limitation for the Council of Ministers not to interfere in the constitutionally vested power of the judiciary. Even if the regulation is said to be necessary, it would be appropriate, owing to legislative supremacy over the judiciary, if it were issued by the parliament. Another implied limitation that posed to the legislature is the due process of law which obligates the government to give adversely affected persons some type of hearing in which they can present factual and legal arguments. This is provided in the constitution which says that judicial power should not be vested to institutions that do not follow legally prescribed procedures. But the authority is vested by the regulation to determine its compliance against its own standards without the need to follow at least procedural justice.

The rule of law is also ultimately disregarded by the power of the authority under the regulation. This is because the power of the authority runs contrary to the procedural and substantive rights of individuals as well as removes courts' jurisdiction. The regulation removed the remedies that employees of the authority could have claimed since a claim for remedy is barred by making the right non-justiciable. The regulation though has strong policy justification, seeks to remedy the problems that the Authority is faced with in a way that is apparently and profoundly more damaging than the problems themselves. Not only this, the regulation and the decisions that confirm its constitutionality and further empowerment of the legislature to be the ultimate determinant of rights to be or not to be justiciable is contrary to the supremacy of the constitution.

In the absence of strict separation of powers between the legislature and the executive, granting the legislature with ultimate power to determine justiciability issues [thus jurisdiction of courts] is obviously against the separation of powers, at least between the judiciary and the other branches in concert. In a country with parliamentary system where executive and legislative powers are blended together, the only guarantee to the rights and freedoms protected in the

constitution is the existence of strong judiciary that can challenge administrative decisions through review power.

Generally, from now on there is no remedy available, both within and outside the authority, to employees even if they are dismissed for gross and clear abuse of power for everything is in the hand of the Director General, not on a law. Nor does a guarantee that the jurisdiction courts have right now will not be completely taken away by similar process is available.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

It is the aspiration of our constitution to see the rule of law is prevailed in Ethiopia. Not a mere aspiration, the constitution designed mechanisms that are necessary to ensure the ambitions which includes broad recognition of human rights together with their entrenchment, incorporating the separation of powers, and establishing an independent judiciary vested with all judicial functions. Such substantive and structure arrangements that the constitution employed are intended to have at least three major objectives; proving that rights will not be restrained by ordinary action of government, ensuring that power is not concentrated in a single branch or man, and making citizens available with remedy for alleged infringement of their rights by the government. To realize these values, the constitutional established distinct institutions as its ‘guardian’, the HoF/CCI, that is vested to play a watch dog role in realizing that its values and principles are complied by government organs thereby upholding the supremacy of the constitution.

However, the constitution has continued to be a source of contention for many reasons especially regarding the role of the judiciary in constitutional interpretation vis-à-vis the HoF/CCI and many literatures have been witnessed so far in this regard. Some argue that courts in Ethiopia cannot interpret the constitution either to determine the scope, content and meaning of a constitutional provision or to review the constitutionality of laws save for direct application when the text is clear. Others argue that courts are only divested of the power to review the constitutionality of laws issued by federal and state legislative organs, not laws issued by the executive. Considering the Minute of the Constitutional Assembly, relevant provisions of the constitution and interviews with key persons, the writer found that Ethiopian courts are not precluded from interpreting provisions of the constitution to determine the scope, content and meaning of same provided that the matter is justiciable but cannot review the constitutionality of laws, be it proclamation, regulation or directive. Giving the fact that the power to make law is constitutionally vested with the legislature, any law other than the constitution is presumed to be issued by the legislature or other organ (executive) as authorized by it. Thus, if courts cannot review the constitutionality of laws issued federal and state legislative organs, the same should

apply to those laws that are issued by other organs authorized/delegated by the legislature; for what the other organs exercising is not their inherent power but the power of the legislature.

Apart from the constitutional limits, courts jurisdiction is also being challenged by legislations and other subsidiary laws that are issued contrary to the constitution. Just in the aftermath of the constitution and until now, many laws having ouster clause (that remove or limit court jurisdiction) are issued by the House of Peoples Representatives and the executive. The laws provide that courts will not have jurisdiction to hear some claims arising from decision of administrative agencies that are known to be final by a law. At bottom, these "ouster clauses" raise serious questions about relationships among organs of government, judicial independence, and constitutionalism. They are against the constitutionally entrenched rights particularly the right to access to justice. By making rights nonjusticiable, the court stripping laws deny both the judicial power to review administrative decisions and the right of persons to go to court for remedy against infringement of their rights by the executive.

In fact, the constitution provides the possibility where by judicial power may be taken from ordinary courts by legislations. Accordingly, judicial function may be taken from ordinary courts and vested to other institutions only if they are required to follow legally prescribed procedures. Such constitutional stipulation is not without implication rather the constitution is providing a shield on judicial power [thus rights] against arbitrary usurpation by other branches and strives to ensure some degree of due process. However, the legislature seems to forget this very principle of the constitution and simply takes judicial function from courts and vested it to agencies whose decision is final no matter whether such agencies are required to follow legally prescribed procedures. The effect is clear that the laws make an agency the sole and ultimate determinant of its compliance with its own standards which is, not only irrational, but also reinforces the concentration of executive and judicial powers on the same organ of government.

The ouster clauses are clear indicatives of the fact that the other two branches are conspired to aggrandize their power against the judiciary which is a direct threat and violation of separation of powers. Any threat on separation of powers can, therefore, be regarded as a threat posed on the independence of the judiciary the resultant effect of which is the deterioration of the judicial function in reviewing acts of other branches of government. It is important to note here that it is the constitutionally mandated independence that makes the choice of the judiciary to hold the

Executive Branch in check (through review) legitimate than the appellate tribunals within the executive. Thus, to make decision of the agencies final is against the rule of law. Most important is that the HoPR proved its support in the conferral of unconstrained executive discretion by being reluctant to issue administrative procedure code that would help in constraining the unfettered discretion of administrative agencies.

Apart from the legislative restraints, the decisions of the CCI and of the Cassation Bench, particularly on the issue of the constitutionality of the regulation are neither morally defensible nor legally justifiable. The CCI and the Cassation Bench has developed a precedent which provides that it is up to the legislature to decide which matters are justiciable and which are not. Both give emphasis on the fact that the constitution established parliamentary system and upheld the supremacy of the parliament while they failed to vindicate it in light of the supremacy of the constitution. A strange decision of the Cassation Bench which says that the power of the judiciary emanates from a law (which includes legislations and regulations) may call the confusion whether these bodies understood the rule of law as “government of the constitution” or “government of legislations”.

The absence of clear constitutional stipulation as to the right to administrative justice, the scope of delegation of legislative power to the executive and general limitation clause on the power of the legislature to limit court jurisdiction may be considered as a comfortable legal lacuna for the legislature and executive to issue laws that make rights recognized in the constitution nonjusticiable. However, It is discovered that government power is not only restricted by an express legal principles rather there are an implied restrictions that our constitution enshrined, such as separation of powers, rule of law, human rights and justiciability. Unfortunately, the CCI failed to test the constitutional validity of ouster clauses from these angles and as a result it failed to dispose its responsibility to preserve the supremacy of the constitution.

The ouster laws, decision of the CCI and the Cassation Bench indeed proved that the parliament is left at absolute power to authorize an agency to violate the law with impunity and without judicial oversight of any kind. This becomes true if one considers that the CCI failed to articulate whether removing court jurisdiction by the executive is constitutionally appropriate. The Cassation Bench similarly upheld that the executive removes court jurisdiction to hear claims reinstatement based on the power delegated from the legislature. The legislature is left

with no limit regarding imposing limitations on rights and delegating its powers to the executive. The overall trend shows that in Ethiopia, the rule of law in general and the fundamental rights in particular goes only so far as the parliament permits.

Furthermore, the practice of voluntary relinquishment of jurisdiction by courts (including the civil service administrative tribunal) magnifies the fact that judicial power is being eroded in Ethiopia. In most case, courts relinquished jurisdiction to hear a case merely because a given constitutional provision/right is said to be violated.

However, if we look at the Ethiopian Revenues and Customs Authority regulation, the writer contends that it is constitutionally illegitimate. First, from the very beginning, there is no clear constitutional authority that justifies the legislature to remove judicial power. This is because, for one thing, removing court jurisdiction to hear cases of administrative grievances by making them non-justiciable is contrary to the entrenchment of the bill of rights in our constitution. To argue that the legislature can make rights non-justiciable any time it wants makes the entrenchment of the rights under the constitution purposeless since the legislature in such case is with easy way to limit on the rights than to amend same. For another thing, the legislature can take away judicial power from courts and vested to other institutions only if the institutions are required to follow legally prescribed procedures. In the case at hand however, the authority is not one of the institutions that are intended to be established to exercise judicial function since there is no procedure it is required to follow.

Second, even if it is said that there is constitutional authorization to remove court jurisdiction the way it does, the delegation of such power is unjustifiable because it is irrational for the legislature to relegate such core function to the executive especially when fundamental rights (such as access to justice) are at issue. The assertion becomes stronger when one recalls the fact that the legislature does not provide standards when delegating its power. Third, even in the assumption that the legislature has the authority to do so, there is no legislative authorization for the executive to issue a law with a content that removes court jurisdiction. What is delegated to the executive is to issue a regulation regarding administration of its employees and by no means such authorization be construed to include the power to limit court jurisdiction.

The CCI did not make any attempt to balance the various competing claims in the regulation. Leaving the decision of the CCI aside, the writer found that the regulation, though has strong policy justification, seeks to remedy the problems that the Authority is faced with in a way that is apparently and profoundly more damaging than the problems it seeks to rectify. This is true not only for the mere fact that the regulation limits court jurisdiction, but also for the fact that the power under the contested regulation is to be exercised by a single man, the Director General. Thanks to the CCI and the Cassation Bench, the authority has already secured untouched discretion and no more (at least for unknown time span) hearing right or the pursuit of justice is available for employees of the authority against decision of the Director General.

5.2. Recommendations

Based on the above mentioned findings, the writer forwards the following points as his brief recommendations.

- Considering the fact that there is no express constitutional limitation on the power of the legislature to limit the enjoyment of rights, constitutional amendment shall be made regarding such legislative powers so that restrictions over rights will be subject to predetermined general constitutional standards.
- Cognizant of the fact that the constitutionally provided justiciability limit on judicial power is being used by the legislature, the CCI and the Cassation Bench to deprive courts of their jurisdiction and impose restrictions on individual rights, constitutional amendment shall be made so that the issues as to which matters are justiciable and which are not, and who determines it will be plainly settled. Furthermore, taking in to account that it is claims of administrative grievances that are made to be precluded from courts' jurisdiction, constitutional amendment shall be made to make clear the scope of the right to administrative justice.
- Reminding that the House of Peoples Representatives is elected to represent the electorate on major policy decisions, it shall not relegate its power to the executive where basic rights and interests of citizens are at issue.
- Acknowledging the fact that unrestricted delegation contravenes the separation of powers and causes executive abuses of the delegated power, the House of Peoples

Representatives shall provide a standard when delegating its law making power to the executive so that the abuses by the later will be easily discerned by courts.

- Reminding the fact that it is the only organ that can protect rights and jurisdiction of courts from being limited or deprived by the legislature, the CCI shall strive to develop an interpretive limit on the power of the legislature so that legislative power is exercised within the implied and express restrictions that are enshrined in the constitution. It shall also make its decisions based on consistent, acceptable, and concrete reasoning that are morally defensible and constitutionally justifiable.
- Recognizing that its main duty is to assist the HoF in ensuring the observance of the constitution, the CCI shall strive and make sure, while deciding cases, that parliamentary supremacy in Ethiopia is subject to constitutional supremacy.
- Accepting the fact that its decision has a binding effect against all courts on subsequent cases, the Federal Supreme Court Cassation Bench shall approach to laws that have adverse impact on judicial power in caution and shall not side the other branches. It shall employ general principles such as the separation of powers to guard judicial power as it did in defending the other branches.
- Recalling that they have the constitutional responsibility to enforce chapter three of the constitution, ordinary courts shall assume jurisdiction to interpret a given constitutional provision to determine its scope, content and meaning for the purpose of applying it in a real case before them. They shall not make referral to the CCI/HoF for the mere fact that a given constitutional provision is said to be violated.
- Underlining that they do not have the power to review the constitutionality of laws of any type, courts shall play an activist role in reviewing the compatibility of executive acts with parent legislations, for this is the only way that courts can put the executive in check, and employ all sort of effort to realize that cases are disposed without the need for constitutional referral.

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APPENDIX