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THE OUSTER OF JUDICIAL JURISDICTION BY THE LEGISLATURE IN ETHIOPIA: INVENTORY OF CAUSES AND EFFECTS

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DECLARATION

I, **Melaku Getachew Hailemariam**, hereby declare that this thesis is my own original work and has never been presented in any other institution. I also declare that where sources are used, they are duly acknowledged.

With Regards!

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ACRONYMS

Art	Article
CCI	Council of Constitutional Inquiry
FDRE	Federal Democratic Republic of Ethiopia
FSCCD	Federal Supreme Court Cassation Decision
HoF	House of Federation
HPR	House of People Representative

Abstract

The FDRE Constitution exclusively vests judicial power in courts. The Constitution also enshrines provisions designed to guarantee the institutional as well as personal independence of the judiciary. An independent judiciary is critical in keeping the branches of government within their legal bounds and in safeguarding citizens' rights from abuse. Although the FDRE Constitution confers judicial power on courts, the legislator's various ousting laws have deferred ordinary court jurisdiction to resolve the cases. This seems to have undermined the inherent judicial power and role of courts in adjudicating those cases mostly administrative in nature. Judicial ouster legislation empowers competent tribunals to have judicial power, leading to the creation of many such tribunals. This paper will study the causes and effects of the ouster of judicial jurisdiction by the legislature. It will do so by consulting relevant provisions of the FDRE Constitution, various Federal ouster statutes, FSCCD-decided cases, and relevant literature. In addition, interviews were used to gather information. The findings show that the primary cause for referring cases from ordinary courts to tribunals is the need to adjudicate cases by an organ composed of experts in the field. Different administrative tribunals, of course, are made up of lawyers and experts in other fields, e.g. accountants. Likewise, judicial ouster helps to establish tribunals that adjudicate cases economically and expediently. Although it varies by case, most Administrative Tribunal cases result in a final decision in a shorter time than ordinary courts, ensuring that justice is delivered speedily. The ability of tribunals to render speedy justice is aided by procedural flexibility. Moreover, judicial predictability and consistency, as well as striking a balance between the public and individual interests, are other major justifications for the legislature to strip courts of their judicial jurisdiction. The finding further reveals that those tribunals have neither cleared enough constitutional base, structure, and composition nor institutional competence to exercise judicial power and render an effective final decision. The paper argues that tribunals should be independent in the appointment and removal of judges, as well as financially from the executive, to effectively realize the justifications for their establishment. They should also be easily accessible across the country.

Key words: *judiciary, ousting legislations, administrative tribunals, and constitutional principles*

CHAPTER ONE

INTRODUCTION

1.1 Background

One of the most common features of every written constitution is that the constitution is supreme over the rest of the legislation in the country. The very idea of constitutional supremacy, as its name implies, describes the primacy of the constitution over other sources of laws.¹ In case of any conflict or inconsistency with other laws/norms of the country, the constitution must prevail. The Constitution as a covenant embodies different rules, principles, policies, state structures, power and duties of the government, and rights and freedoms of individuals.

The Ethiopian constitution has established a Federal and Democratic State structure.² As a Federal State, the structure of the State organ comprises the Federal and State governments. Both the Federal government and the States have legislative, executive, and judicial powers.³

Of these three organs of government, the power to legislate or make laws belongs to the legislature. Likewise, the law enforcement and adjudication functions belong to the executive and judicial branches of the government, respectively. In particular, the judiciary performs the function of protecting and enforcing the applicable laws of the country. Aside from the general principle of separation of powers and functions, it is customary to give some power to the legislature which is interrelated with the affairs of the judiciary. For example, the legislators develop rules for the selection or removal of judges, and often it has the budgetary authority to allocate financial and other resources to the judiciary and justice sector. By contrast, an independent judiciary is essential to safeguarding the mandates of other branches of government and, where necessary, holding them to account and preventing executive or legislative initiatives that are outside the bounds of national constitutional frameworks or inconsistent with

¹ Graziella Romeo, “The Conceptualization of Constitutional Supremacy: Global Discourse and Legal Tradition”, *German Law Journal* (2020) p.905.

² The Constitution of Federal Democratic Republic of Ethiopia Proclamation No.1/1995, *Negarit Gazette*, 1st year No. 1, Addis Ababa, July 21st 1995, Art 9.

³ Id, Art 50.

international standards. Further, the separation of powers is a fundamental element of good governance and the rule of law.⁴ In a nutshell, good governance entails the prevalence of the separation of powers and an independent judiciary.⁵

According to Montesquieu, the notion of the principle of separation of power means the three branches of the government must be separated personally, institutionally as well as functionally.⁶ To achieve this kind of separation of power, one person is not allowed to be a member of more than one branch of the government. Likewise, one branch of the government is not allowed to exercise the function of the other branch of the government. In “De l’Esprit des Lois” (“The Spirit of Laws”) Montesquieu noted separation of power has been more than drawing borders between the three tiers of government, it was the distribution of powers and it was the intertwining or joining of powers.⁷ Besides, Alexander Hamilton, in particular, made a principle namely called independence of the judiciary from the two tiers of government. He thought the judicial branch of government is by far the weakest. The judicial branch possesses only the power to judge, not to act, and even its judgments or decisions depend upon the executive branch to carry them out. The independence of the judiciary is vital that each judge can decide cases solely based on the relevant facts and laws presented in court as evidence by the parties to the case.⁸ This is the only way that judges discharge their constitutional responsibility to provide fair and impartial justice.

Looking at the concept of separation of power in Ethiopia the FDRE Constitution recognized the doctrine of separation of power as well.⁹ However, the potential influence of the lower house/legislature (HPR) over the judiciary is predictable. Likewise, the FDRE Constitution establishes an independent judiciary both at the federal and state level and exclusively vests judicial powers in the courts. Of course, in parliamentary systems, there is a blending of

⁴ Maison de la Paix, “Independence of the Judiciary-Why Parliaments Should Care”, Geneva, (2017).

⁵ Ibid.

⁶ Radin, “the doctrine of the separation of powers in seventeenth-century controversies”, *University of Pennsylvania Law Review*, 1938, pp 842-866, Also see Levin, The political doctrine of Montesquieu’s “ESPRIT DES LOIS”: Its classical background (1936) pp 331-359.

⁷ Christoph Grabenwarter, “Separation of Powers and the Independence of Constitutional Courts and Equivalent Bodies”, 2nd Congress of the World Conference on Constitutional Justice, Rio de Janeiro, (2011) p.3.

⁸ Ibid.

⁹ Supra note 2, Arts.55 (1), 72(1), 79(1).

executive and legislative powers. The experience in many legal systems shows this fact. For instance, in the UK where there is 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.¹⁰ The power of courts may also extend up to testing the constitutionality of both acts of the parliament and the executive in constrained parliamentary systems like Canada and Germany.¹¹ 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.¹² Nevertheless, in our case various legislative acts undermine the judiciaries' jurisdiction through the legislation ouster the courts' adjudicatory powers. To this end, there are numerous legislations foreclosed on court jurisdiction.

1.2 Statement of the Problem

The FDRE Constitution adopted the principle of Separation of powers whereby the scope of the powers of the legislative, executive, and judiciary is defined under the constitution. Although the FDRE constitution stipulates that judicial power is vested in courts there are many laws issued by the legislature, which abdicate the constitutional mandate of courts. In relation to this, there are administrative tribunals that review appeals from the decisions of administrative agencies. The Federal Civil Servants Administrative Tribunal, re-established by the amended Civil Servants Proclamation,¹³ is one of the administrative tribunals in the country. On top of this, the Federal Civil Servants Proclamation, Proclamation No 1064/2017 abdicates the ordinary courts' adjudication power. It stated that “orders and decisions of Administrative Tribunal shall be considered as orders and decisions of any civil court.”¹⁴ The decision of the Administrative

¹⁰ Richard Albert, “Presidential Values in Parliamentary Democracies”, *Oxford University Press*, (2010) pp.220-222.

¹¹ Bruce Ackerman, “The New Separation of Powers in Richard Bellamy (ed), *The Rule of Law and Separation of Powers*”, (2005) p.431.

¹² Richard supra note 10.

¹³ Federal Civil Servants Proclamation, Proclamation No 1064/2017, *Negarit Gazette*, 24 Year, No 12, Art 80(2).

¹⁴ Id, Art 80(2).

Tribunal is also considered a final decision.¹⁵ The current proclamation governing the Administrative Tribunal provides similar provisions regarding the tribunal under the repealed Federal Civil Servants Proclamation No.515/2007.¹⁶ Concerning this, tribunals are created by the lawmaker that makes them an organic part of the machinery of the state, and they make legally enforceable decisions.¹⁷ Moreover, the Federal Tax Administration proclamation, which establishes the Federal Tax Appeal Commission,¹⁸ the Federal Urban Lease Holding proclamation,¹⁹ which establish Urban Land Clearance appellate tribunal, and Public Servant Social Security Agency Re-established proclamation²⁰ are some of the known legislations that partly/completely ouster the court's jurisdiction. Similarly, there are numerous cases decided by the Federal Supreme Court Cassation Bench that ouster, and/or affirm the ouster of the judicial jurisdiction of the judiciary.²¹

As part of the issue, different academic writings had done by authors within divergent positions. In his paper titled "Court-Stripping: A Threat to Judicial Independence," Yared Legesse attempts to address the issues of judicial ousting. Similarly, in his LL.M paper titled "the judiciary and its interpretive powers in Ethiopia: A case study of the Ethiopian Revenues and Customs Authority," Yemane Kassa discusses some judicial ousting legislations. He tries to touch up the constitutional basis of court stripping laws while a focus solely on Ethiopian revenue and

¹⁵ Id, Art 81 (5), the only exception that parties to the case may appeal to the Federal Supreme Court is when the decision of Administrative Tribunal has error of law.

¹⁶ Federal Civil Servants Proclamation, No.515/2007, *Negarit Gazette*, 13th Year, No.15, Addis Ababa, 19th February 2007.

¹⁷ Paul Craig, ADMINISTRATIVE LAW 734-738 (Sweet and Maxwell, 7th ed., 2012).

¹⁸ Federal Tax Administration proclamation No.983/2016, *Negarit Gazette*, 22nd Year, No.103, Addis Ababa, 20th August 2016.

¹⁹ Urban Land Lease Holding proclamation No 721/2011, *Negarit Gazette*, 18nd Year, No.6, Addis Ababa, 28th November 2011.

²⁰ Social Security Re-establishment proclamation No.495/2006, *Negarit Gazette*, 12nd Year, No.31, Addis Ababa, 29th June 2006.

²¹ Federal Supreme Court Cassation Division decision on *KK Blanket Factory Trade Union V. KK Garment Industry*, File No.18180, August 5, 2005, Federal Supreme Court Cassation Division decision on *Agency for Government Houses V. Heirs of Ato Mersie Menberu*, File No.31906, November 14, 2008, *Ethiopian Blind Persons Association V. Oromia Education Bureau and Jimma College of Teachers Education*, decision of the Council of Constitutional Inquiry, File No.4/94, decided on December 2003.

customs regulations. Neither work, however, specifically addresses the inventory of causes and effects of judicial ouster laws. There hasn't been enough research done on the causes and effects of Ethiopia's legislative removal of judicial jurisdiction. Therefore, the study's main focus in this thesis is on the issues involved in the causes and effects of the judiciary's jurisdiction being stripped by legislative acts.

1.3 Research Questions

Keeping in mind the general problems that are stated in the statement of the problem, the study focuses on the following general and specific vital questions. Exploring the cause and effect of such ouster laws is the primary subject of this thesis. Moreover, whether it is compatible with different constitutional principles like constitutionality, the principle of separation of power, and judicial independence is another stress for the writer. Thus, the study sets out to raise and address the following specific questions in this study. The first question raised in this study is why the legislature enacts judicial ouster legislations? The study tries to inquire the practical response from the stakeholder of the study? Secondly, whether there are constitutional bases in the ouster of the judicial jurisdiction by the legislature? Thirdly, what are the major downsides of the stripping legislation? These questions will be examined in light of the principle of separation of power and judicial independence. This study tries to inquire whether the legislature acts advancing the legal and practical scheme of separation of power and judicial independence. Fourthly, how does ouster legislation affect the powers of ordinary courts? And how can protect courts from undermining their jurisdictions by ouster legislation? And lastly what implications have been reflected from judicial ouster legislation in the right to access to justice, speedy trial, and achieving the very objective of administrative tribunals; such as securing the interest of the public at large?

1.4 Objective of the Study

The study has the following general and specific objectives.

General objective

The general objective of this study is to critically investigate the cause and effects of the ouster of the judicial jurisdiction by the legislator. In doing so, it examines the practical relevance of the ouster clauses.

Specific objective

The paper will have the following specific objectives to achieve the above general objective;

- ✓ Assessing the justifications for the establishment of other tribunals other than ordinary courts
- ✓ Investigating the practice of those tribunals, other than ordinary courts, in light of assuring the justifications for their establishment
- ✓ Exploring the limits of stripping legislation
- ✓ Analyzing the stripping legislations compatibility with constitutional principles
- ✓ Analyzing the effects of ouster clauses on an individual's right to access to justice and speedy trial

1.5 Significance of the Study

The study will have a significant contribution to articulating and analyzing the causes and effects of ouster the judicial jurisdiction. By thoroughly examining selected legislations that ouster the judicial jurisdiction, this study tries to give insight what are the causes and effects of stripping legislation. Although there has been written on related subject matters, i.e., separation of power and legislative interference in the judiciary, they largely focus on examining the constitutional principle, the separation of power as an entrenched constitutional principle, governing the relationship between legislatures and courts in general and the legislature interference with judicial functions in particular. Though the study has prescribed the scope of the causes and effects of stripping legislation it will examine the causal sequence of ouster clauses. Thus, the study will have a significant contribution to exploring and analyzing the causes of legislative acts ousting the judicial jurisdiction and its aftermath. Moreover, it would serve as a prominent reference for readers interested in the subject.

1.6 Scope of the Study

As the title might suggest, in exploring the causes and effects of the ouster of judicial jurisdiction by the legislature, the scope of the study is limited to assessing the appraisal of the various laws having ouster clauses and their causes and effects. It will be limited on the Federal legislations which include some executive acts which lay down based on delegation power granted by the legislature to the executive. The study, thus, will only focus on the causes and effects of federal legislation which ouster the judicial jurisdiction.

1.7 Research Methodology

To achieve its objective, the study will explore and try to identify the compatibility of the ouster of judicial jurisdiction by the legislature with different constitutional principles like constitutionality, the principle of separation of power, and judicial independence. Thus, the study principally employs a doctrinal approach and qualitative inquiry. In the main, the study will attempt to make an appropriate review of the existing literature on the ouster of judicial jurisdiction by the legislature. Furthering this purpose, it serves as a springboard to determine the causes and effects of stripping laws. The study explores and tries to identify the causes and effects of the federal legislation stripping the inherent judicial jurisdiction of courts and critically analyzes practical cases on the issue. Therefore, its research methodology is a qualitative one. Hence, the FDRE Constitution and some selected Federal laws are considered as the main legal documents upon which this study will be based. Accordingly, Primary sources include laws such as the FDRE Constitution and different proclamations enacted by HPR. Various published and unpublished materials on the topic are also considered secondary sources of the study. Moreover, personal observations and interviews are employed in the study as sources for the understanding of the practical causal sequences of the legislative act, legislations, grab the judicial jurisdiction. Interviews will conduct with judges' work in Administrative Tribunals, Federal courts, and Cassation Bench, Moreover, interviews with the legal experts, legal advisors, and other experts/academicians will consider a primary source of the study. In doing so, an unstructured interview will be employed. To substantiate the practical trends, cases decided by CCI/HoF, and Cassation Bench will analyze as much as possible.

1.8 Ethical Consideration

The writer has taken an important ethical consideration into account. Inter alia, interviewees have been informed of the purpose of the study without any form of deception before securing informed consent from them. The writer has also taken care of the interviewees' responses from unnecessary disclosure in a way abusive to their employment relationship. The writer also provides an accurate account of the information by examining the collected data to build a coherent justification for description, checking by taking the final report, or cross-validate the accuracy of the study.

1.9 Outline of the Study

The study will be organized into four chapters, each of which has its sections and subsections. The first chapter is an introductory part that will deal with the points as to why and how the research is to be conducted. After the introductory part, chapter two will expound on and review the discourse on the notion of the principle of separation of powers and the place of the judiciary. It also deals with the judiciary, its role, and its independence with existing pieces of literature that signify understanding the causes and effects of ouster clauses. Chapter three of the study deals with the legislative ouster of judicial jurisdiction in Ethiopia. It includes the nature, causes, and effects of stripping legislation which is supported by analyzing some selected ouster legislation and decided cases. Finally, the last chapter of the study will give a summary of the findings and conclude the thesis.

CHAPTER TWO

2. SEPARATION OF POWERS AND THE PLACE OF THE JUDICIARY

2.1 Introduction

A democratic state's power and duties are divided among three institutions, or departments of government: the legislative, the executive, and the judiciary. This division of responsibility is referred to as the "principle of the separation of powers." Furthermore, democratic states also adhere to this as one of their core values. Since the advent of the division of powers, several authors have provided various justifications, each drawing on the old natural justice theory. There has been a claim that such a division prevents the government from acting arbitrarily. On the other hand, in particular, the judiciary's position in the system of separation of powers is impacted by its expulsion by legislative actions. The idea of establishing strong, independent institutions that uphold the principles of the separation of powers is introduced in this chapter, along with its relationship to judicial ouster law, and its potential application in Ethiopia.

2.2 Conceptualization of Separation of powers

'When the legislative and executive powers are united in the same person, or the same body of magistrates, there can be no liberty... there is no liberty if the powers of judging is not separated from the legislative and executive... there would be an end to everything, if the same man or the same body... were to exercise those three powers.' Montesquieu²²

In the modern state governments are expected to perform their function by dividing their tasks between their branches, with each branch performing some specific and exclusive functions. There are three commonly accepted organs of government; namely, the legislature, executive, and judiciary. Ideally, these three branches of government are independent of one another. They are also primarily performing their function of lawmaking, law enforcement, and interpreting the

²² Charles de Secondat, and Baron de Montesquieu, "the spirit of the law", (Thomas Nugent trans.), *Batoch Book* (2001) p.173.

law/settling disputes respectively. Thus, the governance of any country requires the making of laws, their execution, and interpretation carried by these three organs of government.²³ Indeed, the original theory of separation of powers concerned divided powers between the executive and legislative branches only.²⁴ However, this does not appear to be in line with what Montesquieu said which excluding the court from the idea of the separation of powers would impair people's freedoms and ultimately lead to a tyrannical type of government. Hence, Montesquieu later supported the tripartite separation of powers among the three branches, though. The modern theory of separation of powers provides for the tripartite division of powers which includes the judicial branch. Over recent decades, the relationship between the three organs has been transformed. In particular, the executive and legislative powers have grown more interdependent, while the power of the legislature to hold the executive to account has decreased.²⁵ At the same time, the role of the judiciary has evolved. That's why the original theory of separation of powers, which leave out the judiciary, was a makeover in the modern separation of powers which advocated for the tripartite separation of powers by enclosing the judicial branches of government.²⁶ As noted, Montesquieu advocated that separation of powers is signifying to deter tyranny. By contrast, the concentration of power in one person or a group of persons results in arbitrariness and tyranny.²⁷ Montesquieu expounds that "there would be an end of everything, were the same man or same body, whether of the nobles or the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."²⁸ In general, the classic formulation of the doctrine of separation of powers is called a "pure" form. It is based on the fundamental idea that three separate, distinct, and independent functions of government should be discharged by three separate and distinct organs. However, like other legal terms, the analysis of pure separation of powers is facing the problem of the absence of an agreed definition of the theory. While, based on its very idea, pure separation of powers has at least three elements. First, there must not be a fusion of members of each

²³ "Institutions and Forms of Government", *IGNOU* (2020) p.17.

²⁴ Gardbaum, "Separation of Powers and the Growths of Judicial Review in Established Democracies", *American Journal of Comparative Law* (2014) p.613.

²⁵ *Ibid.*

²⁶ Consultative Council of European Judges (CCJE) Opinion NO.18, "The position of the judiciary and its relation with the other powers of state in a modern democracy", (2015) p.1.

²⁷ Charles de Secondat, and Baron De Montesquieu *supra* note 22.

²⁸ *Ibid.*

organ.²⁹ Second, each organ shall perform its function within the boundaries of its mandate; rather one organ of government should not usurp or encroach upon the powers or work of another.³⁰ Third, one organ of government should not exercise the functions of another.³¹ Indeed, the second and third element seems to be similar whereas they are quite reflected a related but different idea.

The doctrine of separation of powers attempts to perceive the two major categories of conceptualization, namely the Formal and the Functional approach. The formal approach of separation to powers is a normative approach to preserving the notion of separation of powers, which the model tries to save the distributional integrity of the tripartite. In this approach, the advocates trust entirely the model's inherent veracity. The classification and identification of the tasks of the three distinct branches of government are grounded in the perceived necessity of maintaining the tripartite.³² The formalist approach stands on the very belief of the doctrine of separation of powers requires that each branch of the government authorize and operate with maximum independence. The formalist approach seeks to resolve inter-branch conflicts by drawing sharp boundaries between the branches and defining every act and actor in terms of each branch's assigned responsibility.³³ Apart, for instance, the judiciary overlaps the boundary and exercises the task of other branches it amounts to a constitutional fault in which asserted expansion of its powers at the expense of other branches. In this sense, the U.S Supreme Court decision in the case of *Bowsher V. Synar*,³⁴ has brought to the forefront the issues involved in resolving legislative-executive conflicts and the judiciary's role in this process.

²⁹ E.C.S. Wade & A.W. Bradley, "Constitutional and Administrative Law", 20th ed (2001).

³⁰ Ibid.

³¹ Ibid.

³² Harold H. Bruff, "On the Constitutional Status of the Administrative Agencies", *The American University Law Review*, (1987) p.491.

³³ Suzanne P. Clair, "Separation of Powers: A New Look at the Functionalist Approach", *Case Western Reserve Law Review*, Vol.40, pp.335-336.

³⁴ *Bowsher v. Synar*, 478 U.S. 714, 776 (1986). *Bowsher* involved a challenge to the constitutionality of the Gramm-Rudman-Hollings Act, 2 U.S.C. §§ 901-922 (Supp. V 1987), for deficit reduction. The Act provided that if the federal budget deficit exceeded the maximum amount set by the Act by more than a certain amount, the Comptroller General had the power to authorize across-the-board cuts to reach the prescribed levels. The Court struck down the

By contrast, the functionalist approach acknowledges the impossibility of the formalist conception. It is grounded on the belief that stresses core function and relationship and permits flexibility in the arrangement.³⁵ To ensure the effective exercise of the tasks of tripartite, no single body assumes a disruptive position of excess power, and inter-institutional checking is deliberately echoed the foundational objectives of the doctrine.³⁶ Nonetheless, just as the formalist theory necessarily assumes the ability to accurately define and distinguish the three functions of the state, the functionalist approach similarly rests on the system's chimerical capacity to define, adopt and consistently employ the essentially indefinable notion of institutional balance, whereas the functionalist views the separate powers of the three branches of government as not intended to operate with absolute independence. This notion is expressed in the maxim as, "it enjoins upon its branches separateness but interdependence, autonomy but reciprocity."³⁷ When determining whether the core function of a branch has been impermissibly interfered with, the functionalist test emphasizes flexibility and balancing by examining the entire framework of relationships between the branches.³⁸

2.3 Purposes of Separation of Powers and its Place in Democratic Societies: Making the Nexus

Why the separation of powers? Many legal scholars think differently that the reason for the emergence and development of the concept of separation of powers. Just to illustrate these we can take the thoughts of Montesquieu, he prompted the concept of separation of powers is firmly derived from the very human nature that man naturally or inherently tends to dominate and

Act as an unconstitutional attempt by Congress to retain removal authority, other than impeachment, over an officer entrusted with executive powers.

³⁵ Harold, *supra* note 32.

³⁶ Peter L. Strauss, "The Place of Agencies in Government: Separation of Powers and the Fourth Branch", *Columbia Law Review*, (1984) p.583.

³⁷ Peter L. Strauss, "Formal and Functional Approaches to Separation of Powers Questions A Foolish Inconsistency", *Cornell Law Review*, Vol.72, (1987). Or see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).

³⁸ *Id.*, p.489.

oppress others. If all three powers remain under the control of a person or a group, the ground for despotism and abuse of powers will be much greater.³⁹

On the other hand, separation of powers is one of the fundamental principles of democratic societies.⁴⁰ It is widely accepted that to promote democracy, accountability, and political and socio-economic stability the principle of separation of powers plays a pivotal role. These could be referred to as the rationale for the emergence of the notion of separation of powers. Further, the notion of separation of powers is related to the concept of rule of law because rule of law limits the discretion of each organ within their granted powers and functions.⁴¹ It also strives to keep the judicial powers in the judiciary. It means that rule of law is a political ideal that provides every action of the government should be based on law and every individual aggrieved by an action of a government have to have an avenue to claim a remedy in an impartial and independent institution. About the third arm of the government, the succeeding chapters will disuse this in detail.

Accountability is also another rationale for the principle of separation of powers. The accountability rationale is closely linked to the rule of law. There is a widely known ancient natural justice principle, maxim, *Nemo iudex in causa sua*, a dictum, means “no one shall be a judge in his own case”, which is popularly known as the rule against bias.⁴² This natural justice principle implied that the minimum standard of the organs of government giving decision must be composed of impartiality, fairness, accountable and acting without prejudice and bias. Above all the main rationale of the principle of separation of powers is to ensure the efficiency and effectiveness of government activity. The assumption here is that the different functions of government require different qualities, and must therefore be performed by different organs of the government.⁴³ Not least of all, the principle of separation of powers, by having multiple

³⁹ Charles de Secondat, and Baron de Montesquieu, *supra* note 22.

⁴⁰ Christoph Grabenwarter *Supra* note 7, p.1.

⁴¹ Joseph Raz, „the Rule of Law and Its Virtue“ in Richard Bellamy (ed,) *The Rule of Law and Separation of Powers* (2nd series, 2005) p.80.

⁴² Alexander Hamilton, James Madison and John Jay, “The Federalist Paper”, Federalist No.80, the power of the Judiciary, *Oxford World’s Classic*. Alexander Hamilton "No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias."

⁴³ W.B. Gwyn, “The meaning of the separation of powers”, (1965) p.28.

organs of government and dividing powers up among them, signifies to ensure equality among the branches of the government that is no one branch is more powerful than another. Therefore, the doctrine of separation of power in general and exclusively reserving the judicial power to the judiciary, in particular, is important to prevent the misuse of powers of each organ and ultimately to create democratic societies.

Nonetheless, although separation of powers is a widely accepted principle, owing to the impossibility and/or undesirability of drawing a strict demarcation of functions among them, there is a possible argument that seems too advanced judicial ouster legislations. In the beginning, these three organs of government are a constituent part of a single government. Their functional relatedness and interdependency are unquestionable. Thus, a complete separation of powers cannot be fully used in any system of government. For instance, the function of law-making cannot be entrusted only to the legislature but also to the other two organs. The same is true an adjudication function of the judiciary touch on the interests of the legislature as well as the executive. That's why some argue that stripping legislation derived from the impracticability of pure separation of the legislative and judicial functions. Each branch of government has a role in performing other branch functions, and also one will do the function which has a nature of others branch function.

In addition, the interdependence and inter-related nature of their functions, on the other hand, deterred the complete separation of powers of these three branches of government. Besides the impossibility, a complete separation of powers is not desirable. It is because without mutual coordination they cannot carry out their functions effectively and efficiently. Despite this, pure separation of powers can seriously limit the unity and coordination needed by the three organs. It also can lead to deadlocks and inefficiency in the working of the government. If each organ carries out its function without any corporation with other organs, it can create a situation in which each organ can get engaged in conflict and deadlocks with the other two organs. Therefore, although the theory of separation of powers is mostly accepted in a modern state, it has not escaped criticism. It has been criticized not only as impossible but also as undesirable.

Coming to the concept of check and balance and its implication for judicial ouster legislations which is a particular rationale for the separation of powers, it has less distinct in its relations to the concept of separation of powers. As its name indicates the principle of check and balance is a

means to examine the actions of one branch of government by another and it is by balancing each of these powers against the other two branches. The idea of checks and balances is also an issue of constitution and constitutionalism.⁴⁴ Similar to the idea of separation of powers, the notion of checks and balances has a fundamental importance in tripartite. The role of checks and balances is to control the abuses of government powers and to counter the potential for elite control of government to oppress the masses.⁴⁵ Though, a system of checks and balances requires a separation of powers within the structure of government. But the separation of powers is not the same as checks and balances and by itself can lead to outcomes worse for the masses.⁴⁶ The different branches of government should be designed so that they have conflicting interests, but must reach an agreement to take collective action. If their interests are, all the same, they will act together to accomplish their common ends rather than checking and balancing each other. With conflicting interests, the interests of one branch can then check the interests of another.⁴⁷ Human nature being what it is, any individual or group entrusted with unchecked power will abuse it. As compared to that of, the doctrine of pure separation of powers may not necessarily need the existence of the system of check and balance, while when each branch should be as little dependent as possible on those of the others the principle of check and balance serve to maintain the necessary partition of power among the tripartite as it laid down in the governed law. By contrast, in the case of judicial ousting legislation the legislative branch of government would not limit themselves on the powers it should possess; rather it will try to hold more other powers.⁴⁸ Hence, the system of check and balance signifies to maintain the effectiveness of separation of powers.

In the case at hand, based on the principle of separation of powers, the judiciary is independent in its field and there can be no interference with its judicial functions either by the executive or

⁴⁴ Getachew Begashaw, “Good Governance with Checks and Balances in Ethiopia”, *Michigan State University*, (2019) p.2.

⁴⁵ Alexander Hamilton, James Madison and John Jay, “The Federalist Paper, Federalist No. 51”, *Oxford World’s Classic*, pp.257-260.

⁴⁶ T. Persson et al, “Separation of Power and Political Accountability”, *Research Gate Journal of Economics*, (1997)

⁴⁷ Randall G. Holcomb, “Checks and Balances: Enforcing Constitutional Constraints”, *Florida State University*, (2018) pp.7-9.

⁴⁸ Charles de Secondat, and Baron De Montesquieu supra note 22, pp.157-160. And also see Hamilton Federalist No 51, supra note 45.

the legislature. No doubt, it is also important to form democratic societies. However, currently, the very idea of separation of powers is in a state of crisis. Concerning this, examining the causes and effects of ouster legislation is the main intent of the writer and the purpose of this paper, the succeeding chapters of the paper will discuss the issue in particular. To conclude based on the overall aspect of the principle of separation of power and the role of the judiciary and its nexus with democratic societies conceptually nothing is novel, i.e., to induce democracy in society there should avoid the overlapping of the legislative and judicial functions. Judges are prohibited to interfere in the matter of the legislature and vice versa. However, the practice is quite different. In our case ouster legislations implies that the overlapping of powers and one branch admixture the powers of others.

2.4 The Inherent Powers of the Judiciary in the Context of Power Separation: Theoretical Considerations

The judiciary decides cases solely on the facts and laws presented, as well as their legitimate references. The judiciary discovers the grounds for a decision in the rule authoritatively made, or in the traditional legal precepts embodied in previous judicial decisions, precedent, or logical development of the historically discovered universal. In either case, the judicial function was one of discoverers of the appointed existing precepts or development of such a precept, already existing potentially in historically discoverable universals, by an absolute method allowing no scope for anything other than logical identification of the actual, or deduction of the potential, legal precept and mechanical application thereof.⁴⁹ According to the mechanical theory of the judicial function,⁵⁰ 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.⁵¹ This theory states that the judiciary should not be given the authority to invalidate laws passed by the legislature. The argument is

⁴⁹ Roscoe Pound, “theory of judicial decision”, *the Canadian bar review*, p.341. available at https://www.canlii.org/en/commentary/doc/1924CanLIIDocs71#!fragment/zoupio_Tocpdf_bk_1/BQCwhgziBcwYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zhoBMAzZgl1TMAjAEoANMmylCEAIqJCuAJ7QA5KrERCYXAnmKV6zdt0gAynlIAhFQCUAogBl7ANQCCAQQDC9saTB80KTsljJAA (accessed on 07 February 2022).

⁵⁰ Vincent M. Barnett, “Constitutional Interpretation and Judicial Self-restraint” (1940) *Michigan Law Review*, p.219.

⁵¹ *Ibid.*

advanced in light of the separation of powers theory, and it also complies with Montesquieu's statement that "the judges are but the mouth that pronounces the words of the law."⁵² The theory does not prohibit judicial interpretation; for the application of laws necessarily involves interpretation of same; rather, it is meant to say that under the guise of preserving the rule of law, the interpretation power of courts shall not be made in any way a law making activity, because the nature of judicial power is not law-making. The mechanical theory, on the other hand, faces a counter-argument because it provides nothing when determining the legislature's intention is difficult. It is acknowledged that interpretation is required only when determining the clear intention of the legislature is difficult or when there is a need to fill a gap in the law. Thus, strict adherence to the mechanical theory of judicial function is said to be hardly plausible in the presence of such facts. Critics of this theory argued that if judges are merely mouths through which the law is to be pronounced, their function is administrative rather than judicial.⁵³

By contrast, the doctrine of inherent judicial power allows courts to take actions necessary to carry out their constitutional responsibilities, even if those actions are not expressly authorized by either the Constitution or a legislative statute. Inherent judicial power functions as an implicit "necessary and proper" clause to the judiciary's establishment as an independent and equal branch of government.⁵⁴ In its most basic form, the doctrine even gives judges the authority to control and manage their own courtrooms. In its more robust form, the doctrine empowers judges to defend themselves and their functions against the neglect or interference of the other branches of government. Thus, it serves as both an implication and a guarantee of judicial independence. As an institution, the inherent power doctrine has been extended to budgetary matters in this more robust form, as a positive safeguard of judicial independence.⁵⁵ Therefore, while the legislative and executive branches of government have legislative and executive power, respectively, the judiciary has an exclusive judicial power, which is to entertain cases without interference from the other two branches of government. This is an inherent power of the judiciary.

⁵² Id, p.161.

⁵³ Id, p.166.

⁵⁴ G. Gregg Webb And Keith E. Whittington, "Judicial Independence, The Power of the Purse, and Inherent Judicial Powers" *Judicature*, Vol.88, No 1, (2004), P.14.

⁵⁵ Ibid.

2.5 Separation of Powers in case of Ethiopia

In modern Ethiopian history, the first written constitution was adopted and the parliamentary system was established in 1931.⁵⁶ This was also another move in the direction of adopting the concept of separation of powers. The 1931 constitution's predominant novel aspect is the establishment of the two houses and encompasses the judicial jurisdiction of courts.⁵⁷ Indeed, this Constitution was nothing less or more than mere confirmation of the powers and prerogatives of the Emperor, while in theory, the Constitution was the supreme law of the land governing even the Emperor. Nevertheless, the 1931 constitution had a unique feature; such as the Emperor had prerogative rights and the right recognized and the duty incumbent by the Emperor as belongs to the Nation/the people of Ethiopia.⁵⁸ However, as a historical document it was a base for the later constitutions that redefine the power and functions of each branch of government in advance of. Apart from the Emperor's position at the pinnacle of power being so pervasive that he was the sole arbiter and source of governmental action, this constitution provided for a Bicameral House, they were called the Chamber of Deputies and the Senate. Article 7 of the constitution explicitly introduces these two houses; namely the Chamber of Senate (*Yeheggue Mewosseigna Meker Beth*) and the Chamber of Deputies (*Yeheggue Memriya Meker Beth*).⁵⁹ The powers and duties of the various branches of government were articulated and administrative unit's powers and functions were defined in this constitution too, thereby, the writer contends, the 1931 constitution enshrined the principle of separation of powers by stipulating that legislative, executive, and judicial powers were vested to the Chamber, the Emperor himself and the judiciary. The later 1955 and 1987 constitutions were also in the same vein, which tries to define the power and functions of the legislative, executive, and judicial branches of government.

Bear on the 1995 FDRE Constitution; it enshrined the principle of separation of powers irrespective of a specific clause dealing with the separation of powers. Finding a constitution that provides a specific clause dealing with the separation of powers is exceptional like the constitution of Massachusetts. The 1780 Constitution of Massachusetts is the world's oldest

⁵⁶ Ethiopian Constitution of 1931, 16th July 1931, the Government of Ethiopia, London (1969).

⁵⁷ Sileshi Zeyohannes and Dagnachew Asrat, "Constitutional Law", *Justice and Legal System Institute* (2009) p.79.

⁵⁸ Ethiopian Constitution, supra note 56, chapter III.

⁵⁹ Id, art 30.

functioning written constitution and it served as a model for unusually providing a specific clause dealing with the separation of powers.⁶⁰

While the FDRE Constitution enshrined the principle of separation of powers by allotting the legislative, executive, and judicial powers to the legislature (HPR), executive arm (Council of Ministers and P.M), and the judiciary (courts) respectively. Owing to this we can say that the FDRE constitution recognizes the separation of powers principle regardless of a specific clause dealing with the separation of powers. In relation to this, although the FDRE constitution recognizes the separation of powers principle, in particular, the fusion of legislative and executive powers is even under article 56 of the constitution diminishes the place of separation of powers between the legislature and the executive. Likewise, through ouster legislation enacted by parliament, the judiciary cannot exclusively secure its inherent adjudication power. This synthesis of the legislative and judicial power leads us to say in our country strict separation of powers doesn't exist between the legislature and judiciary too, because in this case, the judiciary is subject to the will of the legislature, and in this connection, the judiciary cannot defend its exclusive inherent adjudicatory power against the interference by the legislature.

Of course, unlike the nexus between of legislative and executive branches, there is no fusion of membership between the judiciary and the legislature and also the judiciary is not accountable to the legislature and vice versa. However, it is important to know that absence of fusion of membership and accountability of one to another is not enough to say there is a separation of powers. The doctrine requires that each branch must be given the “necessary constitutional means and personal motives, to resist encroachments of the others” and not to rely on the other branch.⁶¹ In the case at hand, the judiciary is subject to the indirect control of the legislature and in this connection the judiciary cannot defend its institutional independence by itself against encroachment by the legislature.

2.6 The Judiciary and its Relation with other Branches of Government: General Overview of the Independence of the Judiciary

⁶⁰ Massachusetts Constitution 1780, First Principle Serious, the American Founding, art XXX.

⁶¹ James Madison, Federalist No 47, supra note 42, pp.348-349.

In presenting his argument for the independence of the judiciary, Hamilton claimed that the judiciary was by far the weakest of the three branches, which it lack "power of the purse or of the sword."⁶² As a result, Hamilton defends the independence of the judiciary because it is the least dangerous branch.⁶³ In relation to this in today's world, various domestic and international instruments establishing the principle of judicial independence have been enacted. The UDHR,⁶⁴ and ICCPR,⁶⁵ are among those international instruments that have declared the importance of independence and the impartial judiciary as a means of achieving the right to access to justice and fair trial. Furthermore, article 4 of the UN basic principles on the independence of the judiciary state that the judiciary should be independent of unnecessary interference in their affairs.⁶⁶ Further, "the judicial independence is a pre-condition of the impartiality of the judge, which is essential to the credibility of the judicial system and the confidence that it should inspire in a democratic society."⁶⁷ Indeed, the basic concept of judicial independence exists to benefit all citizens, not just judges. Accordingly, both the internal and external independence judiciary is a necessary premise of the rule of law, fair trial, democracy, and so on.⁶⁸ In this regard, it is no surprise, that the ouster of judicial jurisdiction by the legislature in one way or another immensely affects this very principle.

2.7 Independence of the Judiciary under the Ethiopian setup

The FDRE Constitution grants judicial powers to the courts without specifically mentioning the subject matter that is handled by a regular or other competent body. While preventing courts

⁶² Federalist Papers, Federalist No. 78 and the Power of the Judiciary, available at <https://law.jrank.org/pages/6820/Federalist-Papers-Federalist-No-78-Power-Judiciary.html> (accessed on 27 February 2022).

⁶³ Ibid.

⁶⁴ Universal Declaration of Human Rights, United Nations, (1948), art 10.

⁶⁵ International Covenant on Civil and Political Rights, United Nations, General Assembly Resolution 2200A (XXI) (1967) Art 14 (1).

⁶⁶ Basic Principles on the Independence of the Judiciary, 17th UN Congress on the Prevention of Crime and the Treatment of Offender, General Assembly Resolution 40/32, (1985) Art 4.

⁶⁷ Mag. Nina Betetto, "Judicial Ethics and Enforcement Mechanisms. European Court for Human Rights Practice", OECD (2012) p.47.

⁶⁸ Daniel C. Préfontaine, Q.C. & Joanne Lee, "The Rule of Law and the Independence of the Judiciary, The International Centre for Criminal Law Reform and Criminal Justice Policy", 1998, p.23.

from losing their judicial power and function is critical to give meaning to the actual courts' judicial power. No doubt, preserving sufficient power for the courts is critical. To carry out the role of the judiciary in the tripartite, the judiciary must be given sufficient powers. Independence of the judiciary, in particular, is meaningless in the absence of sufficient powers. Aside from any other established competent organ with judicial powers should consider as an exceptionally formed and specialized body with very limited jurisdictions. Unless we return to the imperial regime's experience, which is the regular court's remaining power and jurisdiction, it prejudices others. According to what had been stated “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.”⁶⁹ Moreover, we can argue the importance of narrow interpretation of article 37 and 78 of the constitution that gives a space for the establishment of other institutions that have adjudicatory power by raising a possible question which is what will happen if all conceivable judicial powers are curtailed by ouster legislation? The answer is very clear; those establishing institutions that could take away judicial power according to the constitution must be practically justifiable in addition to legality. The issue is discussed in detail in Chapter 3 of this paper.

Coming to the independence and impartiality of the judiciary, the FDRE Constitution guarantees both institutions as well as individual independence of the judiciary. To this end, the Constitution states that “courts of any level shall be free from any interference of influence of any government body, government official or any other source.”⁷⁰ Similarly, judges must carry out their duties independently and impartially.⁷¹ The constitution specifies the judicial appointment procedure, tenure security, and personal independence of judges in general. More importantly, the constitution establishes a stringent procedure that must be followed before any judge can be removed from office before reaching retirement age. This all demonstrates how hard the constitution worked to ensure the independence of the judiciary on both an internal and external level. Judicial independence is not only guaranteed by the constitution, but it is also explicitly

⁶⁹ The civil procedure code of the empire of Ethiopia, Extraordinary Decree, (1965), Art.4, and See Yemane Kassa, *The Judiciary and its Interpretive Power in Ethiopia: A Case Study of the Ethiopian Revenues and Customs Authority*, LLM. Thesis Submitted to Addis Ababa University School of Graduate Studies School of Law, (2011) p.80.

⁷⁰ FDRE Constitution Supra note 2, Art 79(2).

⁷¹ Id, Art 79(3).

stated in the legislation. The preambular paragraphs of the Federal Judicial Administration proclamation, to this end, recorded the degree and importance of institutional and personal independence.⁷² Nevertheless, in our experience, a mere constitutional guarantee of judicial independence does not result in an independent judiciary. For example, the constitutional provisions governing the appointment and removal of judges are frequently disregarded by other branches of government. Assefa has compiled a long list of violations of constitutional provisions in which the executive and legislative branches wielded enormous power over the appointment, dismissal, and transfer of judges.⁷³

⁷² Federal Judicial Administration proclamation No.1233/2021, *Negarit Gazette*, 27th Year, No.18, Addis Ababa, 20th May 2021

⁷³ Assefa Fiseha (2011), “Separation of powers and its implications for the judiciary in Ethiopia”, *Journal of Eastern African Studies*, Vol. 5, No. 4, p .704

CHAPTER THREE

LEGISLATIVE OUSTER OF JUDICIAL JURISDICTION IN ETHIOPIA: NATURE, CAUSES AND EFFECTS

3.1 Introduction

The place of judicial ouster legislations varies by country and it is determined by the type of system established in the country. The legislature precludes judicial jurisdiction by enacting statutes that purport to deprive courts of their jurisdiction. The trend in Ethiopia appears to show that there is an increasing practice of enacting laws that contain court stripping clauses that establish tribunals within administrative agencies, thereby removing judicial power. Many of the laws containing ouster clauses have been thoroughly disclosed and discussed by different writers and thus, here these and other laws will be addressed in this section briefly. In the following sections, I will concentrate on a few selected statutory ouster legislations and stripping decisions. Of course, the examination of the judiciary's ouster by the legislature does not limit itself to legislations derived solely from the HPRs' constitutional lawmaking responsibility. Rather, it incorporates some subsidiary legislative acts, such as regulations and directives.

3.2 Statutory Judicial Ouster Legislations

i. Judicial Ouster by Ethiopian Ministry of Revenue

One of the most known statutory judicial ouster is the regulation of the Ethiopian Ministry of Revenues, which inherited the powers and duties of the former Ethiopian Revenue and Customs Authority.⁷⁴ Following the amendment of the Ethiopian government's executive organs by Proclamation No. 1097/2018, the former Revenue and Customs Authority has been renamed the Ethiopian Ministry of Revenues. This is the most outrageous law in the various perspectives that included stripping the judicial jurisdiction. The Council of Ministers was given the authority to issue regulations as a result of this proclamation, and it did so with Council of Ministers Regulation No. 155/2008 on the administration of the Authority's employees. Accordingly,

⁷⁴ Definition of Powers and Duties of the Executive Organ of the Federal Democratic Republic of Ethiopia Proclamation No.1097/2018, *Negarit Gazette*, 25th Year, No.8, Addis Ababa, 29th November 2018, Art 31.

disciplinary matters involving any employee are governed by Articles 34 and 35 of the Regulation, and there are prescribed procedures including securing the right to be heard to be followed before deciding on the authority's employees. While, if the Director General of the Authority suspects an employee of corruption, he can dismiss the employee without having to go through the entire procedure of taking disciplinary measures, and what's worse, an employee dismissed under these circumstances, i.e., in summary dismissal procedure, has no right to be reinstated by any judicial decision.⁷⁵ This is a typical case of completely removing the regular court's judicial power.

ii. Federal Tax Appeals Commission Establishment

Another piece of legislation that limits the judicial power of regular courts and refers to an administrative organ is the Federal Tax Administration proclamation, which establishes the Federal Tax Appeal Commission.⁷⁶ More importantly, in the cumulative reading of article 56 (1) and article 2 (1) (b) of the proclamation,⁷⁷ which regulates the appellate power of the commission, provides that a taxpayer dissatisfied with an appealable decision or any other decision made by the tax authority can file a notice of appeal with the commission.

The proclamation divides decisions made by the Authority into two categories: tax decisions and appealable decisions. A tax decision is subject to objection and an “appealable decision” can be appealed to the Commission. The definition of “appealable decision” has two inclusions. First, sub-article (2) (a) treats an objection decision as an appealable decision. Second, sub-article (2) (b) treats any other decision made by the Authority under a tax law other than a tax decision and a decision made by the authority in the course of making a tax decision tantamount to an appealable decision. Article 2 (b) in particular, the phrase “any other decisions made by the tax authority...” was a source of heated debates on what messages were conveyed by this phrase. Based on this phrase it may be validly argued that the commission may have the power to accept and entertain any other non-tax assessment appeal lodged against the decision of the tax authority. While it does not seem tenable to conclude the commission has the power to

⁷⁵ Administration of Employees of the Ethiopian Revenues and Customs Authority Council of Ministers Regulation, Regulation No.155/2008, *Federal Negarit Gazette*, 14th year No.49, 2008, Art. 37.

⁷⁶ Supra note 18, Art 81.

⁷⁷ Ibid.

adjudicate any kind of decision made by of tax authority. Whatever the case, as far as factual issues are concerned, the decision of the Commission is final and conclusive. Therefore, the writer again concludes that the proclamation is limited to judicial power, and thus it is called another statutory judicial ousting.

iii. Urban Land Clearance Appeals Commission

“Decision of the Tribunal, except relating to compensation, on issues of law and facts including claims for substitute land shall be final.”⁷⁸ This is yet another piece of legislation that clearly limits the regular courts' judicial powers over urban lease holding. This proclamation suggests that the state may take privately owned land property for public use without the owner's consent. While proclamation No 1161/2019⁷⁹ states that the state must compensate the leasehold possessor for the property on the land if the leasehold right is taken away for public purposes. The proclamation states that anyone who is dissatisfied with an expropriation decision may appeal to both the agency's tribunal and the High Court, but only on the issue of compensation. Nonetheless, both the Tribunal and regular courts were unable to hear questions about factual disputes and the legality of the expropriation. As a result, the proclamation prohibits individuals from challenging tribunal decisions and the legality of measures taken by the tribunal other than the issue of compensation, effectively depriving regular courts of the power to entertain the case.

iv. Public Servants Social Security Agency

Social Security Agency Re-established Proclamation No 495/2006 established the Social Security Agency because it was necessary to reorganize the Agency in order to perform its duties efficiently.⁸⁰ The proclamation lists a number of the Agency's powers and duties, including the authority to decide on claims relating to social security rights and benefits.⁸¹ Besides, the proclamation established an appeal tribunal to hear cases brought against the agency's decisions.⁸² The tribunal has the authority to reverse, vary, or confirm the Agency's decisions in

⁷⁸ Supra note 19, Art 29 (3).

⁷⁹ Expropriation of Land Holdings for Public Purposes, Payments of Compensation and Resettlement of Displaced People proclamation No.1161/2019, *Negarit Gazette*, 25th Year, No.90, Addis Ababa, 23rd September 2019.

⁸⁰ Supra note 20, preamble.

⁸¹ Id, Art 5 (7).

⁸² Id, Art 11 (1).

its appellate jurisdiction. More importantly, the appeal tribunal's decision is final and conclusive.⁸³ This is an absolute denial of regular courts' jurisdiction over factual and legal issues relating to social security rights and benefits.

v. Proscribing a Terrorist under the Prevention and Suppression of Terrorism Crime Proclamation

The powers of proscription, broadly defined, refer to a set of legal instruments that allow a government or other authoritative actor to prohibit the presence of, or support for, a specific organization within its jurisdiction.⁸⁴ The authority to ban terrorist organizations has been delegated to various bodies with varying jurisdictions. In some countries, outlawing terrorism has been a source of congressional concern. For example, in the United States, the Secretary of State creates a list of Terrorist Organizations. Similarly, in the United Kingdom, with Parliament's approval, the Home Secretary has the authority to proscribe an organization suspected of engaging in terrorism.⁸⁵ On the other hand, power is vested in the executive and judicial branches of government in some countries.⁸⁶ Some countries, such as Australia, the executive's near unilateral designation of particular groups as terrorist. Others, on the other hand, rely on a jury's determination that a specific organization meets the relevant criteria for being classified as a terrorist organization.⁸⁷ In contrast to all of the preceding, Canada has two paths for listing terrorist entities: identification as such by the executive on the one hand, and assessment as meeting the definition of terrorism by a court on the other, typically in the context of a prosecution.⁸⁸ In our case, the legislature (HPR) has the power to proscribe under the Prevention and Suppression of Terrorism Crime Proclamation.⁸⁹ Even the legislature may take action to proscribe a terrorist without requiring the prosecution or punishment of an Organization

⁸³ Id, Art 11 (5).

⁸⁴ Lee Jarvis and Tim Legrand, "The Proscription or Listing of Terrorist Organisations: Understanding, Assessment, and International Comparisons, Terrorism and Political Violence", *Routledge Taylor & Francis Group*, (2018), Vol.30, NO.2, p.201.

⁸⁵ Ibid.

⁸⁶ Id, p.202.

⁸⁷ Ibid.

⁸⁸ Id, p.204.

⁸⁹ Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020, *Negarit Gazette*, 26th Year, No.20, Addis Ababa, 25th March 2020, Art 18 (1).

in a court of law.⁹⁰ The writer strongly contends that the power to proscribe vested in the legislature appears to run counter to the Latin principle of "*Nemo Judex in Causa Sua*," which means "no one should be made a judge in his or her own case." Hence, the proclamation barred regular courts from proscribing organizations, whether terrorist or not, based on the conditions stated in the proclamation.

vi. The Civil Servant Administrative Tribunal

The last but not the least statutory ouster of judicial jurisdiction is the Civil Servant Administrative Tribunal establishment.⁹¹ According to article 81 of the proclamation, the Administrative Tribunal shall have the power to hear and decide on appeals relating to; unlawful suspension or termination of service, rigorous disciplinary penalty, unlawful attachment or deduction of salary or other payments, infringement of rights arising from employment injury, request for termination letters and certificate of service. In addition to the proclamation, as per article 98 (2) although the regulation was issued in accordance with the repealed laws, the Federal Civil Servants Disciplinary and Grievance Procedure Regulation No 77/2002 is applicable so long as it confirms the provisions of the new/existing proclamation.⁹² The proclamation lays down substantive rights and duties upon the civil service institutions and the civil servants in their employment relationship. On top of that, to make the system more effective, the Civil Servants Disciplinary and Grievance Procedure Regulation,⁹³ was to be followed by the Tribunal when reviewing administrative agencies' decisions. It is discernible that the subject matter to be dealt with by the Civil Service Administrative Tribunal relates to employment relations and corresponding disputes between the civil servant and administrative agencies.⁹⁴ It should also be noted that the Tribunal's decisions on factual issues are final.⁹⁵ Ordinary courts can only review its decision if there is an error of law.

⁹⁰ Id, Art 18 (3).

⁹¹ Supra note 13, Art 79.

⁹² Id, Art 98 (2).

⁹³ Federal Civil Servants Disciplinary and Grievance Procedure Regulations, Regulation No.77/2002, *Negarit Gazette*, 8th Year, No.29, Addis Ababa, 3rd July 2002.

⁹⁴ Ibid.

⁹⁵ Ibid.

To summarize, this list of judicial ouster legislation is not exhaustive, but it serves as an illustration because other legislation with similar effects may exist, while it is sufficient to prove the extent of judicial jurisdiction ouster by the legislature.

3.3 Judicial Ouster Decisions as Stripping Legislation Equivalent

Although most legal histories of Ethiopia testify that it follows a civil law system, this does not imply that Ethiopia has no experience with judicial precedents. Currently, in our case, article 10 (2) of Proclamation No. 1234/2021 declares that decisions of the Federal Supreme Court Cassation Division are binding on all Regional and Federal courts.⁹⁶ It is the legal context to introduce the doctrine of precedents. So far, the FSCCD has published 24 volumes/books of unremitting judgments, which are now complied with by all courts of law.

Starting with the FSCCD decisions, there is a general prohibition on regular court hearing cases that are reserved for administrative bodies. To this, for instance, in the case of *Kotebe College of Teacher Education (Yekotbe Memiheran Timihert College) V. Ato Biniyam Alemayehu* the FSCCD decides that regular courts lack jurisdiction to review the privatization agency's decision or the agency's executive board's decision on appellate jurisdiction.⁹⁷ Similarly, in the case, *Amhara Mass Media Agency V. Ato Daniel Kefale*,⁹⁸ and *Welday Zeru et al V. the Ethiopian Revenues and Customs Authority*,⁹⁹ the Cassation Bench confirms the regular court does not have jurisdiction to entertain the case that entertained by any institution including the Tribunal established under the administrative body.

In particular, for instance, in the case between *Social Security Agency (Maheberawi Wastina Agency) V. W/ro Wubayehu Abebe* the Federal Supreme Court Cassation Bench decided that the only option for the party complaining about the agency's decision is to take the case to the

⁹⁶ Supra note 2, art 79(2), and Federal Courts Proclamation No. 1234/2021, *Negarit Gazette*, 27th Year, No.26, art 33.

⁹⁷ Federal Supreme Court Cassation Division decision, *Yekotbe Memiheran Timihert College V. Ato Biniyam Alemayehu*, file no.26480, decided on October 25, 2007.

⁹⁸ Federal Supreme Court Cassation Division decision, *Amhara Mass Media Agency V. Ato Daniel Kefale*, file no. 119704, decided on July 29, 2016.

⁹⁹ Federal Supreme Court Cassation Division decision, *Welday Zeru et al V. the Ethiopian Revenues and Customs Authority*, file no. 51790, decided on May 24, 2011.

agency's appellate tribunal, rather than to regular courts.¹⁰⁰ Likewise, in the case *Ato Abera Kidane V. Gamo Gofa Zone Ariba Minch Maheberawi Wastina Agency*,¹⁰¹ *Yemengiste Serategnoch Maheberawi Wastina Agency V. Ato Abere Bokne et al*,¹⁰² and *Maheberawi Wastina Balesiltan V. Ato Berhanu Hiruy and Kebede G/Mariam*,¹⁰³ the Social Security Agency is the sole authority with jurisdiction over pension claims, and a party who is dissatisfied with the agency's decision may only file a complaint with the Agency Appellate Tribunal.

On the other hand, the FSCCD decision alleged that similarly to the statutory ousting, the tribunal had foreclosed the regular courts' judicial powers over urban lease holding. The FSCCD decision in the case of *Southern Region Hawassa City Manucipality v. Hawassa Debre Genet St. Gabriel Church*,¹⁰⁴ unequivocally confirms the judicial ousting of regular courts. A complaint alleging misappropriation of urban land by another person must be filed with the administrative tribunal in advance, and any aggrieved party must file an appeal to the appellate tribunal, whose decision is final.¹⁰⁵ As has been stated, this is also supported by the subsequent amending proclamation.¹⁰⁶

A glance at the decisions shown above, as well as the statutory ousting, are not exhaustive, but for this study, it is sufficient to address that the regular courts' judicial power has been ousted by various administrative tribunals whose power is derived from legislative acts and FSCCD decisions that tantamount to law.

¹⁰⁰ Federal Supreme Court Cassation Division decision, *Maheberawi Wastina Agency V. W/ro Wubayehu Abebe*, file no. 27623, decided on December 04, 2007.

¹⁰¹ Federal Supreme Court Cassation Division decision, *Ato Abera Kidane V. Gamo Gofa Zone Ariba Minch Maheberawi Wastina Agency*, file no. 72928, decided on October 19, 2012.

¹⁰² Federal Supreme Court Cassation Division decision, *Yemengiste Serategnoch Maheberawi Wastina Agency V. Ato Abere Bokne et al*, file no. 80964, decided on November 02, 2012.

¹⁰³ Federal Supreme Court Cassation Division decision, *Maheberawi Wastina Balesiltan V. Ato Berhanu Hiruy et al*, file no. 18342, decided on December 26, 2005.

¹⁰⁴ Federal Supreme Court Cassation Division decision, *Southern Region Hawassa City Manucipality v. Hawassa Debre Genet St. Gabriel Church*, file no. 46220, decided on January 27, 2010.

¹⁰⁵ Ibid.

¹⁰⁶ Supra note 19 and Supra note 79.

3.4 Quest of the Constitutionality of Judicial ousting vis-à-vis the Inherent Judicial Power of Ordinary Courts

Indeed, the constitutional standing of legislative judicial ousting tribunals is controversial. The FDRE Constitution does not make it clear whether the inherent judicial power of regular courts has been taken away by ouster legislation. In Ethiopia, based on statutory judicial ousting, various administrative tribunals have been established. Regarding their constitutionality, as we infer from article 79 (1) of the constitution, the inherent judicial power of courts at the federal and state levels is derived from the constitution and it is not subject to the will of the other branches. Nevertheless, as per article 78 (4) of the constitution, we can understand that other institutions can be established to exercise judicial functions, as long as they are established by legally prescribed procedures. Hence, the constitution seems clear in this respect, and establishing an organ or institution vested with judicial function but that does not follow legally prescribed procedures is unconstitutional. As we can see from the minutes of the constitutional assembly article 78(4) of the constitution was not intended to prohibit the formation of administrative tribunals.¹⁰⁷ Likewise, article 37 (1) of the constitution states that “everyone has the right to bring a justifiable matter to and to obtain a decision or judgment by a court of law or any other competent body with judicial power,” the phrase “any other competent body with judicial power” that was a source of heated debates on what messages were conveyed by this phrase. However, the constitution's drafting history indicates that administrative tribunals were duly recognized by the constitution's authors, even though the constitution does not expressly declare the status of administrative tribunals. Reference to the legislative intent thus shows that the word “any other competent body with judicial power” in article 37 (1) can be interpreted as administrative tribunals.¹⁰⁸ Therefore, it is reasonable to conclude that the FDRE Constitution recognized administrative tribunals with respect to the inherent powers of regular courts are unaffected by the existence of specific administrative tribunals. Yared Legese, on the other hand, claims that the establishment of various administrative tribunals that are not under the control of

¹⁰⁷ Aschalew Ashagre, “Tax Appeal Proceedings before the Federal Tax Appeal Commission in Ethiopia: Critical Reflections”, *Mizan Law Review*, Vol.14, No.2, (2020) pp.209-210.

¹⁰⁸ Ibid.

the judiciary is an act of court stripping.¹⁰⁹ Assefa Fisseha also stated in this regard: “Judicial powers are being taken away from the regular judiciary to special other tribunals whose constitutional status is controversial.”¹¹⁰

The federal Supreme Court is established with the highest judicial power of the federal government. Among others, it has “a power of cassation over any final court decision containing a basic error of law”.¹¹¹ This helps to keep the inherent judicial powers with regular courts and avoid inconsistent interpretation of the law, and establishes another level of protection for individuals’ right. Furthermore, the Federal Supreme Court has the power of cassation over any lower court decisions that contain a fundamental error of law. In particular, as per sub-article 1 (g) of article 10 of the Federal Courts proclamation, the Supreme Court has cassation power on final decisions rendered by organs vested with judicial power or other bodies.¹¹² Hence, the legislator's power to establish other bodies with judicial power cannot be construed as an ouster of the overall courts' constitutional inherent judicial power. As has been stated, the Supreme Court has the authority to review lower court decisions, including those of administrative tribunals, when they have made a fundamental error of law, conclusively implying that the legislative act/ouster legislation has not totally limited the power of courts. In this connection, the Federal Supreme Court Cassation Bench confirms that ordinary courts retain their inherent power. In the case *Abijata Sola Sodo Share Company V. Abijata Sodo Ash Meseretawi Serategna Mahiber* the FSCCD render a binding decision which state that the Cassation bench has the power and responsibility to ensure that any competent organ with judicial power, such as tribunals, handles cases brought before them/renders a final decision in accordance with the law.¹¹³ Generally, the FDRE constitution indicates that competent bodies other than courts can exercise judicial power, despite the fact that it does not make clear enough about the structure,

¹⁰⁹ Yared Legesse, “Court-Stripping: A Threat to Judicial independence”, Gedion Thimothewos and Helen Fikre (Eds), *The FDRE Constitution: Some perspectives on the institutional dimension*, Ethiopian Constitutional Law Series, Vol. VI, College of Law and Governance, School of Law, AAU, p. 104.

¹¹⁰ Assefa Fiseha, “Federalism and the Accommodation of Diversity in Ethiopia”, *Wolf Legal Publishers*, the Netherlands, (2006) pp.412-413.

¹¹¹ FDRE Constitution Supra note 2, Art 80.

¹¹² Supra note 96, Art 10.

¹¹³ Federal Supreme Court Cassation Division decision, *Abijata Sola Sodo Share Company V. Abijata Sodo Ash Meseretawi Serategna Mahiber*, file no. 83425, decided on January 10, 2013.

procedure, power limit, and so on,¹¹⁴ and thus, the Federal Administrative Procedure proclamation was enacted in 2020 and it attempts to fill the gap.

The ability to interpret the law and resolve conflicts is, in theory, the inherent power of the court, as has been emphasized numerous times. However, some tribunals are accepted as competent entities with judicial authority and they make conclusive judgments. Indeed, there is a difference among countries in the scope and application of the finality of administrative tribunal decisions. Laws governing judicial ouster, for instance, do not permit ordinary courts in the United Kingdom to examine tribunals' final judgments.¹¹⁵ This indicates that regular courts cannot review the decision of such tribunals because it is binding and final. In Ethiopia, the pattern is different in part.

All administrative decisions are subject to judicial review, with the ability to do so delegated to the high court in accordance with article 48 (2) of the Federal Administrative Procedure Proclamation. However, this does not imply that the proclamation permitted review by appeal. Instead, it just introduced judicial review. When a tribunal decision is overturned because of a procedural irregularity or a breach of due process of law, it signifies that the tribunal violated the principles set forth in the proclamation.¹¹⁶ In conclusion, administrative judgments are exempt from review by ordinary courts, with the exception of judicial review, despite the narrow scope of the area reserved for those tribunals. The finality of their decisions is also justified by a variety of reasons.

3.5 Causes of the Ouster of Judicial Jurisdiction by the Legislature

There is a consensus that all schemes of governmental arrangement have been formed to obtain benefits that protect the rights of individuals and effectively perform the tasks of the government. Inevitably, different justifications exist for statutory referral of judicial powers to administrative

¹¹⁴ Tamrat Malefiya, “Judicial Review and Competence of Administrative Tribunals to give Final Decision in Ethiopia: a Comparative Study with South Africa and the UK”, LL.M Short Thesis on the Course; Constitution Building in Africa, Central European University, (2013).

¹¹⁵ Mads Andenas, ed., “Judicial Review in International Perspective”, *Kulwar Law International*, p.384.

¹¹⁶ Federal Administrative Procedure Proclamation No.1183/2020, *Negarit Gazette*, 26th Year, No.32, Addis Ababa, 7th April 2020, Art 21 (1).

tribunals which are involved in the process of exercising judicial or quasi-judicial powers.¹¹⁷ In general, judicial ousting justified for the reasons discuss as follow.

3.5.1 The Need to Fill the Gap Left by the Lack of a Specialized Adjudicator in Ordinary Courts

One of the reasons for statutory judicial ousting is the desire to have specific issues entertained by the organs composed of the employees who have intimate knowledge and experience with the issues involved. Administrative tribunals are better suited than regular courts to give effect to individual specific claims within the context of a larger policy framework.¹¹⁸ They have more technical knowledge/expertise than ordinary courts and, thereby, can effectively deal with technical issues arising from administrative action.¹¹⁹ No doubt, sometimes, disputes may have technical nature. It is not expected of the judicial system to preside over and decide such technicalities. It does seem that proficiency in or knowledge of a related field would assist someone in rendering an appropriate legal decision. In addition to this general overview, the administrative tribunal's establishment proclamations and regulations attempt to touch on the reasons for forming tribunals as part of its objective. From this perspective, interviews with different tribunals reveal that¹²⁰ mostly the composition of judges must not be from legal backgrounds only and the structures of administrative tribunals depend on the nature of the tribunal. Owing to administrative tribunals having a specific jurisdiction, most of the time they are composed of professionals and lawyers who have special knowledge/expertise in that specific area.

¹¹⁷ Michael Asimov, "Five Models of Administrative Adjudication", *Presentation at the University of Cambridge Faculty of Law Public Law Conference "the Unity of Public Law?"* (2016).

¹¹⁸ Gillian Claire, "Administrative Justice and Tribunals in South Africa: A Common Wealth Comparison", (LLM Thesis, University of Stellenbosch, (2011), p.67.

¹¹⁹ Ayana Simachew, "Administrative Tribunals in Ethiopia: Exploring the Accessibility and Independence of the Federal Civil Servants Administrative Tribunal", *Haramaya Law Review*, Vol.8, (2019), p.60.

¹²⁰ Interview with Ato Belay Wedisha, Judge of the Federal Tax Appeal Commission, April 16, 2022, Addis Ababa Ethiopia. Interview with w/ro Fitsum Matiyas, Judge, and chairperson of judges of the Federal Civil Servant Commission, April 16, 2022, Addis Ababa Ethiopia. Interview with Ato Byene Yemanebrehan, judge, and chairperson of the Urban Land Cleaning Tribunal, April 17, 2022, Addis Abeba, Ethiopia. Interview with Ato Tsegaw Abebe, judge of the Urban Land Cleaning Tribunal, April 28, 2022, Dire Dawa Ethiopia. interview with the unnamed judge of the Federal Tax Commission, April 28, 2022, Dire Dawa Ethiopia.

In light of the foregoing, tax disputes are common in all states, and tax administration tribunals occur when there is a disagreement between the taxpayer and the tax authority.¹²¹ Accordingly, the establishment of administrative tribunals is required because ordinary courts are unsuitable for resolving every dispute arising from the works and functions of modern government in general and tax administration in particular. Hence, the primary reason for this is the need to apply specialized knowledge to the fair and economical resolution of disputes.¹²² According to the Federal Tax Administration Proclamation, individuals may be appointed as a member of the Commission if they are a lawyer with a significant experience in tax or commercial matters, a member of Institute of Certified Public Accountants with significant experience in tax matters, and if the individual has previously been engaged as a tax officer with significant technical and administrative experience in tax matters or has special knowledge, experience, or skills relevant to the function of the Commission.¹²³ This is evident from the fact that, according to Belay Wedisha, a judge on the Federal Tax Appeal Commission, the commission's judges is not only from legal backgrounds, but there is also a judge who is an expert in accounting. He confirms that the proclamation is the basis for the appointment of a judge with an accounting background. He also firmly asserted that because tax claims are so sensitive by nature, and because it is a primary source of revenue for the government, tax-related cases/claims should be adjudicated by tribunals comprised of well-trained judges and experts in the field.¹²⁴ Even in some tribunals, for instance, the Federal Civil Servant Commission and Urban Land Cleaning Tribunal, all judges are from a legal background, but they are better trained on the area than judges in regular courts through various programs such as seminar and training.¹²⁵

Likewise, administrative tribunals are established in full expertise composition to achieve the policymakers' goals. In this regard, the State, for instance, pursues urban land policy objectives,

¹²¹ Melinda Jone, "Tax Dispute Systems Design: International Comparison and the Development of Guidance from a New Zealand Perspective", Ph.D. thesis, unpublished, Department of Accounting and Information System in the University of Canterbury, (2016) p.19.

¹²² A W Bradley and K D Ewing, "Constitutional and Administrative Law", *Pearson Longman*, (2007) p.695

¹²³ *Supra* note 18, Art 87 (2).

¹²⁴ Interview with Ato Belay Wedisha, Judge of the Federal Tax Appeal Commission, April 16, 2022, Addis Ababa Ethiopia.

¹²⁵ Interview with w/ro Fitsum Matiyas, Judge, and chairperson of judges of the Federal Civil Servant Commission, April 16, 2022, Addis Ababa Ethiopia.

relying on a wide range of policy tools and institutions to do so. Expropriation of Landholding for Public Purpose, Payments of Compensation, and Resettlement of Displaced People proclamation forbid individuals from contesting tribunal decisions and the legality of measures taken by the tribunal, except for the issue of compensation, which is derived from the general policy framework on the subject. Giving the power to settle the case on the field to the compliant hearing body/Council as an administrative tribunal is intended to achieve the policy's stated goal.¹²⁶ In the case at hand, expropriation of land holdings for public purposes, the government can expropriate land holdings for public purposes if it believes they should be used for a better development project to be carried out by public entities, private investors, or other organs in exchange for payment compensation.¹²⁷ To achieve these goals, any complaint should be heard by a compliant hearing body or council in the case of an appeal. In this regard, those interviewees¹²⁸ opined that the main purpose for referring cases to administrative tribunals or other institutions with judicial power is to fill the gap of regular courts, which have a generic standard for all types of case adjudication. There is also consensus among advocates and scholars that likely opined the necessity of specialization that lead to the referral of cases from ordinary courts to other tribunals.

3.5.2 The Impacts on the Economical and Expediency of Cases Adjudication

As we observed, the ordinary court has a caseload and thus they take much time and costs to entertain cases. It means that cost is, in particular, one of the most pressing reasons for ousting some jurisdictions from ordinary courts, and, thus, administrative tribunals are being established to replace ordinary courts.¹²⁹ Administrative tribunals are inexpensive and provide quick justice. It is well known that the procedures in ordinary courts are lengthy and time-consuming, thereby; the payment of exorbitant court fees and the engagement of lawyers is a common features of ordinary courts. Despite this, most administrative tribunals do not charge exorbitant fees.¹³⁰

¹²⁶ See Supra note 88 and Interview with Ato Byene Yemanebrehan, judge, and chairperson of the Urban Land Cleaning Tribunal, April 17, 2022, Addis Ababa, Ethiopia and interview with Ato Tsegaw Abebe, judge of the Urban Land Cleaning Tribunal, April 28, 2022, Dire Dawa Ethiopia.

¹²⁷ Ibid.

¹²⁸ Supra note 120.

¹²⁹ Harold H. Bruff, "Specialized Courts in Administrative Law", *Administrative Law Review* ,(1991) pp.356-366.

¹³⁰ Ibid.

Their procedures are simple and informal, and even a layperson can understand them. As such, the aggrieved party does not need to hire a lawyer because he can easily represent himself at the tribunal.¹³¹

There will indeed be costs associated with establishing a new tribunal system; however, these costs should be balanced against the potential benefits that tribunals could provide in the future.¹³² Concerning this, the interviewees,¹³³ opined that the costs incurred by the parties to the case are comparatively low, and even the majority are free. In the proceedings, neither a court fee nor a lawyer fee is to be paid.¹³⁴

Likewise, the need to achieve speedy justice is another driving force of judicial ousting. According to Ato Belay in the Federal Tax Appellate Tribunal on average, one case adjudicates and finalizes in a maximum of four months, with more than ninety percent of cases being finalized in less than four months. For example, empirically, in 2014 E.C, there were 1,069 active cases which have been filed before the tax appellate tribunal, out of which 715 cases had received a final decision.¹³⁵ On the other hand, tax is paid based on its schedule in a specified period, so trying to entertain tax complaints in ordinary courts may be time-consuming, and as a result, it will significantly affect both parties in the case in one way or another. The effect is intense on the government's side because, as previously stated; tax is the primary source of state revenue.¹³⁶ Similarly, although it depends on the type of case, most cases at the Federal Civil Servant Commission receive a final decision within two months. W/ro Fistum asserted that the majority of cases brought to this tribunal are complaints about the employees' fundamental rights, such as wages, which are also necessary for the employees' survival that is why this commission strives to provide speedy justice.¹³⁷ Furthermore, W/ro Fistum informed the writer that the Federal Civil Servant Administrative Tribunal operates from September to September

¹³¹ Ibid.

¹³² Carol Harlow & Richard Rawlings, "Law and Administration", *Cambridge University Press*, 2nd ed. (1997) PP.491-493.

¹³³ Supra note 120.

¹³⁴ Ibid.

¹³⁵ Supra note 124.

¹³⁶ Ibid.

¹³⁷ Supra note 125.

throughout the year, unlike regular courts, which close during the summer.¹³⁸ The tribunal's working time, which spans the entire year, has a significant impact on the cost-effectiveness and expediency of case resolution.

3.5.3 The Traditional Conservative and Rigid Judicial System

The conventional judicial system is outdated, stern, and rigid. By contrast, administrative tribunals are not held by stern rules of evidence and procedure.¹³⁹ They make use of practical aspects to settle practical issues.¹⁴⁰ Moreover, tribunals can adopt more informal methods and procedures that are more in tune with the common law man's idea of the dispensation of justice, as those appearing before tribunals are less likely to be intimidated by their proceedings.¹⁴¹ Tribunals, unlike ordinary courts, are not bound by strict judicial rules or laws of evidence and procedure when hearing cases. Historically, for example, in the common law legal system, the law of evidence was developed by the courts in response to the requirements of the jury system.¹⁴² Because jurors were untrained, the courts determined that the evidence presented needed to be pre-purified before jurors could be trusted to hear it. Administrative courts lack this requirement because they do not have juries. Questions of evidence admissibility are thus unrelated to administrative work, and a preliminary purification of the evidence, followed by a later consideration of it, is unnecessary. Both functions can be carried out at the same time.¹⁴³ Although the trend differs in our legal system which is the judge responds to both legal and factual issues, the test of evidence before an administrative tribunal is solely that of relevance and legal effect, and this is usually taken up in a layman fashion, as the parties are frequently not trained in the law. Moreover, other features of the freedom from the law of procedure enjoyed by administrative tribunals are the simplification or elimination of the conservative and rigid, and quietly formal pleadings.

¹³⁸ Ibid.

¹³⁹ Ayana Supra note 119.

¹⁴⁰ Michael Allen and Brian Thomson, "Cases and Materials on Constitutional and Administrative Law", *Oxford University Press*, 11th ed., (2014) PP.756-760.

¹⁴¹ Ibid.

¹⁴² Warren H. Pillsbury, "Administrative Tribunals", *Harvard Law Review*, Vol.36, No.5, P.585.

¹⁴³ Ibid.

The procedures of the administrative tribunals are far more flexible than that of the courts where the individuals have to adhere to rigid procedures.¹⁴⁴ To this evidence, for instance, “an application for administrative decision shall be made in writing and may be submitted in person, a registered postal address or electronic means.”¹⁴⁵ It means, unlike to ordinary courts the filing of the suit not limited only written and personal, rather it is possible to file via postal or other electronic means. This is a clear indicator of the procedural flexibility of administrative adjudication. The reasoning of flexibility as a cause of judicial stripping legislation repeats itself in the interview made with all interviews in this study.¹⁴⁶ In particular, Ato Belay stated that the tribunal is not bound to strictly follow the procedures outlined in the 1960 civil procedure code; rather, we try to entertain cases by using procedures that are more flexible than those used by ordinary courts; however, this does not mean that the commission is not required to follow any procedures.¹⁴⁷ In the case of civil servants, in addition to the establishment regulation No 77/2002, the commission has its own rule of procedure that is more flexible than the procedure stated in the civil procedure code.¹⁴⁸ Hence, another reason for judicial ousting is that avoid the rigidity of the judicial system, which is overly formal and procedurally dominated.

3.5.4 Effectiveness

No doubt, the administrative tribunals come as a respite to the ordinary courts which are overburdened by numerous pending lawsuits. Owing to the tribunals providing sufficient administrative action and fair justice to all, we can argue that administrative tribunals are effective to ensure justice. Administrative Tribunals are the most appropriate and effective means of providing justice to individuals as well as the public at large. For instance, the tribunals dispense justice and benefits to the employees who rightfully belong to them. On the other hand, according to scholastic notes on the area, administrative tribunals were established by the legislature as instruments of public policy. These tribunals flourished as the perceived difficulties

¹⁴⁴ Assefa Fiseha, (ed.Charles M. Fombad), “Separation of Powers in African Constitutionalism”, *Oxford University Press*, (2016) p.278.

¹⁴⁵ Federal Administrative Procedure Proclamation Supra note 127.

¹⁴⁶ Supra note 120.

¹⁴⁷ Supra note 124.

¹⁴⁸ Supra note 125.

in the justice system lead to the creation of administrative tribunals.¹⁴⁹ These tribunals were established to avoid the drawbacks of ordinary courts, which have been described as costly, rigid, lacking in expertise, unable to handle a high volume of cases, and so on. In this regard, administrative tribunals are effective in overcoming the drawbacks of regular courts. However, the writer has reservations about the aforementioned reason for the need for administrative tribunals as arguments that rely on the effectiveness of administrative tribunals. I will discuss the question of whether administrative tribunals are effective in delivering justice subsequently. While the interviewees in this study strongly believe that each tribunal is effective, they argue that judicial ouster legislations create a template for cases heard by independent tribunals in the area, and thus decisions rendered by those tribunals are more effective than those rendered by ordinary courts.¹⁵⁰ Even in some cases, parties to the case may bring an appeal to ordinary courts if they genuinely think the tribunal committed an error of law; however, most of the time, regular courts overruled the appeal lodged based on an error of law. It means that regular courts affirm the decision of tribunals even when an appeal brought based on an error of law refers that the tribunal's decision is unquestionably effective.¹⁵¹

3.5.5 The Imperative of Predictability and Consistency

Predictability and consistency in decision-making before any level of Court or the administrative tribunal is a necessary and fundamental component of the rule of law. “It is obvious that coherence in decision making must be fostered.”¹⁵² The tools used to achieve predictability and consistency in administrative justice is now understood to address the entire range of tribunal adjudication and conduct, from the appointment of adjudicators to the hearing and decision-making process.¹⁵³ In relation to this, the federal administrative procedure proclamation state that “in matters involving similar facts, the person rendering an administrative

¹⁴⁹ The Honourable Mr. Justice William J. Vancise, “Are Administrative Tribunals Effective in Rendering Justice?”, p.43.

¹⁵⁰ Supra note 120.

¹⁵¹ Ibid.

¹⁵² Kevin Whitaker, Michael Gottheil and Michael Uhlmann, “Consistency in Tribunal Decision Making: What Really Goes On Behind Closed Doors”, *Essays in Administrative Law and Justice* (2001–2007) p.353.

¹⁵³ Ibid.

decision shall decide in the same manner.”¹⁵⁴ Accordingly, this implication is firmly confirmed by those tribunal’s judges, they stated that the main purpose of the establishment of administrative tribunals is predictability and consistency, because in administrative adjudication, litigants with comparable disputes experience a similar range of procedural treatment, implying that their decision will be consistent and predictable.¹⁵⁵ Despite the fact, ordinary courts face their own challenges, such as adjudicating a large number of cases in different verities, in the pursuit of consistency.

3.5.6 Individual Vs Public Interests: Striking the Balance

The scale of the balance between public and private interests may be toward each part in a particular circumstance. These two interests are inextricably linked in some way. The public interest must respect the private interest, and vice versa. In the case at hand, the Federal Administrative Procedure proclamation 1183/2020 in the second preambular paragraph state that “it is necessary to regulate Administrative Agencies to refrain their intervention against people rights and interests.”¹⁵⁶ More clearly, “a person rendering an administrative decision shall balance the individual interest of the person regarding whom an administrative decision is being considered with that of the public interest identified in the objectives of the agency.”¹⁵⁷ It is a general guideline for administrative tribunals to strike a balance between the public/the agency, and the individual’s interest in their adjudication. Of course, it is not unique to us, but different countries have found that administrative adjudication requires striking a proper balance between social objectives and individual interests involved in the controversy.¹⁵⁸ And in order to do so, these adjudicators must be experts in their respective fields of administration. Thus, because tribunals are mostly made up of legal and non-legal experts, they are in a better position to strike the optimal balance between social objectives and individual interests.

To recapitulate, there can be a list of other related causes that are equivalent to the effect of the ouster of judicial jurisdiction, such as the cause of Tribunal accessibility in rendering justice,

¹⁵⁴ Supra note 116, Art 34.

¹⁵⁵ Supra note 120.

¹⁵⁶ Supra note 116.

¹⁵⁷ Id, art 25.

¹⁵⁸ Peter Cane, “Administrative Tribunals and Adjudication”, *United States: Hart Publishing*, (2009) p.40.

which is also stated as an effect later on. The next section of this paper explores the effects of ousting on the other hand.

3.6 Effects of the Ouster of Judicial Jurisdiction by the Legislature

Statutory ouster clauses present different challenges by their purport to deprive the judiciary of adjudicatory power. As noted, administrative tribunals combine the benefits of both the judicial and executive branches in a way that best suits for the specific needs of adjudicating administrative cases. As I previously explored, the causes of administrative tribunals' establishment are likely to be as follows, with some of the major effects of the tribunals' establishment listed below.

3.6.1 Constitutionality Claim

It is unnecessary to repeat the constitutionality argument on the statutory judicial ousting and the formation of administrative tribunals that partly and/or totally stripe the inherent adjudicatory powers of ordinary courts. The constitutionality claim of the tribunals, which is the determination of whether the tribunals are established by following the prescribed procedure, and what kind of structure and composition it should have to render an independent and impartial decision, is not stated in the Constitution and appears to leave the issue to the legislator's discretion. However, as we can see from the institutional structure, composition, and procedure of administrative tribunals established by legislators so far most of them are not clear enough as to what the prescribed procedures stated in the constitution, and even the Federal Administrative Procedure proclamation says nothing about the issue. Therefore, it lacks clarity on the legality of the establishment procedure, its institutional structure, and composition.

3.6.2 Accessibility of the Tribunals

Compared to that ordinary court, administrative tribunals are seems easily accessible to aggrieved parties, both institutionally and procedurally. Accessibility, by definition, necessitates resources, whether, in the form of more and better facilities, more and better information for parties, or more and better representation services, and the resource implications may be quite

significant.¹⁵⁹ Access, in addition to resources, may be determined by how a tribunal accommodates the unequal power and resources of the parties.¹⁶⁰ Despite this, courts stripping legislation seems to limit an individual's right to access to justice, because the aggrieved party may only file a claim with tribunals that are not easily accessible. It means that one of the most serious consequences of court-stripping legislation is that tribunals are in some cases inaccessible. The Ethiopian Revenue Authority, for example, makes the final decision on both factual and legal issues, while the appellate tribunal is found in Addis Ababa, the capital city.¹⁶¹ This is one of the most significant gaps that limit the accessibility of tribunals for the aggrieved party who needs to file an appeal; the same is true for the Tax Appeal Commission.¹⁶²

3.6.3 Contravention with the Constitutional Principles: The Principle of Separation of Powers and Independence of the Judiciary

Adjudication is the primary business and inherent powers of ordinary courts. While the legislature enacts various judicial ouster legislation, such legislative authority unambiguously narrows the judicial powers of ordinary courts. Transferring judicial power to other institutions, i.e., administrative tribunals, is argued to be a violation of constitutional principles.

First, it contravenes the principle of independence of the judiciary from other arms of government. In this instance, even though tribunals have similar power to courts, they don't enjoy the same amount of independence. Indeed, while there is a constitutional provision stating that Administrative Tribunals are empowered to provide justice on an equal footing with regular courts,¹⁶³ there is no express constitutional provision for the independence of Administrative Tribunals.¹⁶⁴ Indeed, as long as the tribunals are established on an equal footing with ordinary courts, they should be institutionally independent of the interference from the legislative and executive bodies of the government, as a judicial body. However, administrative tribunals do not

¹⁵⁹ Lorne Sossin, "From Neutrality to Compassion: The Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion", *University Of Toronto Law Journal*, (2005) pp.440-447.

¹⁶⁰ Ibid.

¹⁶¹ Supra note 120.

¹⁶² Ibid.

¹⁶³ FDRE Constitution Supra note 2, Art 37 and 78(4).

¹⁶⁴ Id, Art 78(1).

have financial independence from the other branches of government. To carry out its adjudicatory functions, the Tribunal needs a sufficient budget. But Administrative Tribunal is established as one department under the executive branch. Hence, the Tribunal does not have its budget; it is allocated by the executive organ. Those executive branches consider the Tribunal's roles while it prepares its budget. Whatever the case may be, the tribunal's independence and impartiality are jeopardized by this situation.¹⁶⁵

Furthermore, the nature of the appointment, term of office, and removal of judges are different from that of ordinary courts. Most tribunal judges serve for a fixed period. With a short fixed-term appointment and expectation of reappointment, the judges will understandably be concerned with maintaining connections with their personal interests.¹⁶⁶ Because the personal independence of tribunal judges, ultimately affects the competence of administrative tribunals in rendering a qualified decision solely based on the presented laws and facts.

As alluded to earlier, there is no comprehensive law governing the qualification of tribunal judges in our case. Even those administrative tribunals that issue proclamations and regulations either do not regulate the issue properly or do not say anything at all. Similarly, nothing in the Federal Administrative Procedure proclamation established a framework for the appointment, tenure, and removal of administrative tribunal judges as a guiding rule. Consequently, the qualifications required to serve as a tribunal judge differ from one administrative tribunal to the other. If we look at the requirements in some administrative tribunals that have judicial power by established proclamations, for instance, the urban land clearing and compensation case appellate tribunal, revenue appellate tribunal, and the social security appeal tribunals that establish proclamations leave the entire issue to the executive.¹⁶⁷ Even according to Ato Tsegaw and Ato Beyene told to the writer, although judges of urban land clearing and compensation cases appellate tribunal and the social security appellate tribunal establishing proclamations confer the power of determining the manner of appointment, term of office and ground of removal to the respective government authorities, e.g. in social security tribunal judges in particular and the staff in general, including the registrar, were hired through vacancies, not by appointment.

¹⁶⁵ Supra note 120.

¹⁶⁶ Kevin Whitaker Supra note 152, p.356.

¹⁶⁷ Taddese Lencho, "The Ethiopian Tax System: Excesses and Gaps," *Michigan State International Law Review*, (2012) p.377.

Moreover, according to w/ro Fitsum, a Federal Civil Servant Administrative Tribunal has two benches, each with three judges, and the tribunal has two registrar officers, all of whom are lawyers who are not appointed but rather hired after qualifying for the prohibition period. This is a notable departure from the current trend of tribunal judge appointments.¹⁶⁸

To clarify one point about the qualification of tribunal judges, as previously stated, tribunal judges can be classified into three major groups: legal professionals, experts in related professions other than law, and others appointed for other reasons. The legal expert and the other expert assist in the interpretation of the law and the consideration of professional issues. While the third lay judge contributes to the tribunal's informality and friendliness. Nevertheless, in the case at hand, in both the social security and civil servant tribunals all of the staff members are lawyers, and none of them are experts or professionals in the field, so the writer strongly contests the need for these tribunals as long as they are a typical copy of ordinary courts.

A minor distinction can be found in the tax appeal commission establishing proclamation, which empowers the Ministry of Justice to establish detailed qualification criteria. However, the Ministry does not issue a regulation or directive governing the qualifications of judges in the tribunals so far.¹⁶⁹ This has resulted in a violation of the independence of the judiciary which is one of the fundamental principles of the constitution and has also significantly harmed the quality of tribunal's judgments.

In general, the referral of judicial powers to other institutions with judicial power and/or the functioning of the administrative tribunals are not autonomous per se, as they are dependent on the Executive for the aspects such as funding and appointments. In addition, in terms of tribunal partiality, the fear is that because judges of the tribunals are also considered employees of the administrative bodies or agencies, they may be biased and partial to the agency. This is evident in many cases entertained by those administrative tribunals, where the decision is challenged by the quest for effectiveness.

¹⁶⁸ Supra note 125.

¹⁶⁹ Taddese Lencho, "The Ethiopian Tax System: Excesses and Gaps," *Michigan State International Law Review*, (2012) p.377.

Secondly, it violates the principle of separation of powers and rule of law. As repeatedly stated the ouster of judicial jurisdiction by the legislature is a tricky concept in terms of the principle of separation of power because it corresponds to the principle of separation of powers in its original form. What I am describing here, in brief, is the judicial ouster legislation results in the two branches of the government, more precisely, the executive and the judiciary overstepping each other which is tantamount to abandoning the constitutional principle of separation of powers. The powers and responsibilities of the government are far too complex and intertwined to be neatly compartmentalized. Thus, there is an inherent measure of competition and conflict among the branches of government.¹⁷⁰ In relation to this, the tribunals are outraged if the executive fails to comply with their judgments, and on the other hand, the tribunals lack the courage to make decisions that are contrary to the interests of the administration because the tribunals' judges are apparently considered to employees of that administrative agency. Thus, it is quite obvious that administrative tribunals are vulnerable and at risk of crisis when there is a conflict of interest, as is executive capacity and judicial status.¹⁷¹ In view of Montesquieu's assertion of separation of powers, the writer argues that ousting legislation violates the very notion that the three branches of power must be divided in person and function, and they must act independently, and limiting any one branch from exercising the core functions of another. Otherwise, it is ineffective in protecting liberties and preventing tyranny.¹⁷²

Last but not least, as I mentioned earlier, administrative tribunals are responsible for striking a balance between the public interest and individual complaint adjudication. It affects judges' decisional freedom because adjudication is not solely based on the presented laws and facts; rather, there is a demand in securing the public interest. Thus, administrative tribunal decisions

¹⁷⁰ Jasna Omejec, Principle of the Separation of Powers and the Constitutional Justice System, available at [https://bib.irb.hr/datoteka/785200.Omejec - Separation of Powers and Constitutional Judiciary - Strasbourg 28.10.pdf](https://bib.irb.hr/datoteka/785200.Omejec_-_Separation_of_Powers_and_Constitutional_Judiciary_-_Strasbourg_28.10.pdf) (accessed on 21 April 2022).

¹⁷¹ Klaus Rennert, Administration, Administrative Jurisdiction and Separation of Powers, *ELTE LAW JOURNALS*, <https://eltelawjournal.hu/administration-administrative-jurisdiction-and-separation-of-powers/> (accessed on 21 April 2022).

¹⁷² Separation of Powers – An Overview, National Conference of State Legislatures – NCSL, available at <http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx> (accessed on 21 April 2022).

may undermine the legitimacy of the decision and go against the very principle of fairness and rule against bias.

3.6.4 The Practical Gaps on Lack of Uniformity

Tribunals, which are driven by statutory judicial ousting, engage in dispute adjudication through acquired jurisdiction, and widely accept the proposition that it should be uniform throughout the nation. While the writer observes that there is no consensus on whether the statutory-guaranteed powers and functions of various tribunals should be applied uniformly. Ato Beyene told to the writer that in Urban Land Cleaning Appellate Board found in Addis Ababa, although the judges are full-time employees of the Tribunal; most cases are not heard on a daily basis. According to Ato Tsegaw, in the counterpart found in Dire Dawa, however, the judges entertain cases based on their part-time working capacity, and they specifically sit to hear cases on Tuesdays and Thursdays. On the rest of the working days, the judges are engaged in other works. As a result, parties to the case feel betrayed and aggrieved by the case's repeated adjournments. Indeed, no doubt, this affects speedy trial before the Tribunal as the dates are limited as an interviewee opined. Besides, the delay of the trial and the cost incurred are inextricably linked, and both frequently obstruct the administration of fair justice. Fortunately, the writer was present to hear the grievances of the parties involved in a case before the Dire Dawa Urban Land Cleaning Tribunal while conducting this research. Another inconsistency here is the Tribunals' practical independence, especially from the executive branch. This is because, as it is interviewed,¹⁷³ many of them thought that they perform their tasks independently and they believe that so far there are no any kinds of interference which come from the executive too, while interviews conducted with unnamed judges in the counterpart tribunals found at Dire Dawa strongly contest that the independence of the tribunals stated herein above. By contrast, the independence concerned with the ability of tribunal members to make decisions is not quietly impartial and independent. In conclusion, administrative tribunals' practical independence is as yet inconsistent and non-uniform. This also leads to the creation of administrative tribunals that fail to achieve their ultimate objective of being more effective adjudicatory organs than ordinary courts.

¹⁷³ Supra note 120.

CHAPTER FOUR

CONCLUSION

On the basis of some constitutional provisions, some administrative tribunals establishing proclamations have established first instance grievance hearings as well as appellate tribunals, to decide on cases arising in relation to the power and responsibilities of the tribunal stated under the establishment proclamation. Regarding the concerns of this paper, such legislation in some cases states that determination by tribunals is final and non-reviewable by ordinary courts. The question at this point is what are the driving forces behind the referral of adjudicatory powers to tribunals by those ouster legislations that appear to deprive ordinary courts of their power? And what are the effects of judicial ouster too? The answer to the first question is the referral of cases to tribunals is preferred because of the need to hear cases by experts in the field, time and cost efficiency, securing the public interest, and attempting to balance it under individual claims, decisional predictability and consistency, and avoiding procedural rigidity to hear the case. Coming to the second question, the violation of some constitutional principles and the conflict with the inherent powers of ordinary courts has remained a source of contention for a variety of reasons from various perspectives. Moreover, the writer has witnessed judicial deferral to entertain some cases has different practical gaps. Some of these are the question of those tribunals' decisional independence and accessibility. This paper has revealed some issues regarding the Tribunal's independence. On the one hand, the law makes it clear that the Tribunal is not a separate government institution because it is organized as a quasi-judicial organ under the executive's auspice. Furthermore, the judges of the Tribunal are appointed by the executive branches of government and are directly and/or indirectly accountable to them. There is also no comprehensive law that governs the qualifications, appointment, and removal of Tribunal judges. It also couldn't afford to hire its own administrative staff and manage its own budget. As a result, judges' personal independence as well as the Tribunal's institutional independence is in jeopardy. Likewise, based on the finding of this paper the writer concludes that some tribunals are inaccessible. This is evidence that some appellate tribunals can only be found in Addis Ababa. It does not establish benches in regional states. Thus, aggrieved parties were required to present their claims in Addis Ababa, despite the fact that they lived in a different region. Therefore, the

writer concludes that statutory relinquishment of jurisdiction by courts appears to amplify the erosion of judicial power in Ethiopia.

Nevertheless, the FSCCD's cassation power over any final decision, including tribunal final decisions, is one of the mechanisms for safeguarding the court's inherent powers from being unnecessarily eroded by tribunals and keeping significant judicial powers in the courts. The FSCCD's binding decision on the Cassation bench, in particular, implies that it has the power and responsibility to oversee cases brought before any competent organ with judicial power, such as tribunals, and to adjudicate and render a final decision solely in accordance with the law.

To sum up, the legislature seems to disregard the very principle of the separation of power. The result is also clear; the laws make a tribunal the sole and final arbiter of its own standards, which is not only irrational but also reinforces the concentration of executive and judicial powers in the same government organ. Even though the judicial ouster clauses seem to be clear indicators that the other two branches are conspiring to expand their power over the judiciary, which is a direct threat to the separation of powers. Any threat to the separation of powers can thus be viewed as a threat to the independence of the judiciary, with the resultant effect of the judicial function being undermined by other branches of government. However, these facts do not support the assertion that tribunals always have downsides only. By contrast, they have the above-mentioned justifications for their establishment. Hence, as already noted, judicial ouster legislation is required for the establishment of effective and significant dispute resolution institutions. Consequently, tribunals should be quite independent of the executive branch in the process of resolving cases, they should also be accessible, implement uniformly, and the legality of their establishment procedure whether they followed legally prescribed procedure, and their institutional structure and composition should be clear enough both in the constitution and in legislation in order to solve the problem revealed by this paper.

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