Executive Usurpation of Judicial Power: In Search of Constrained Exercise of Delegated Legislation in Ethiopia

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1. Introduction

As in any modern administrative state, delegated legislation is a common practice in Ethiopia. As a result,, many delegated legislation are issued by the executive. Such practice by the legislature has in fact a constitutional basis. However, there seems to be a problem in controlling the legislature's discretion to delegate its power to the executive since there is no clear constitutional standard governing delegated legislation. Moreover, the absence of substantive and procedural requirements of administrative rule making in the delegating (parent) legislation and separate administrative procedure act resulted in unconstrained exercise of delegated power by the executive in a manner contrary to the fundamental rights of citizens. The delegated legislation are also used to limit the judicial power of reviewing the decision of agencies. It is worth noting that such abuse of delegated legislation by the executive seems to be confirmed by the decisions of the Federal Supreme Court Cassation Division and the Council of Constitutional Inquiry (hereafter the CCI). Other levels of courts are also relinquishing their power to decide whether or not the enactment of a delegated legislation amounts to an *ultra vires* act.

This article therefore makes a modest attempt to analyze the legal and practical aspects of delegated legislation in Ethiopia. The article does not look in to issues of sub-delegation, which in fact gives rise to many issues. It, however, aims at revealing the practice of broad delegation by the legislature and abuse of these delegated powers by the executive. To this end, one regulation issued by the Council of Ministers to administer employees of the Ethiopian Revenues and Customs Authority (hereafter the Authority) is selected to conduct a close scrutiny of the issue. After briefly describing the Regulation, the article critically examines decisions of lower courts, the Federal Supreme Court Cassation Division and the CCI.

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Starting with the introduction, section two of the article provides a general overview about delegated legislation. The third section briefly deals with some controlling mechanisms of delegated legislation. The fourth section will deal with the practice of delegation of legislative power in Ethiopia. The fifth section will canvass executive override of judicial review of agencies action, particularly in Ethiopia. After providing an in-depth analysis and critique of the decisions of courts, the Cassation Division, and the CCI in section six, the article concludes in section seven.

2. Delegated Legislation- An Overview

Delegated legislation are legislation made by a body or person to whom the legislature has delegated its power to legislate on certain areas. Such legislation, also called as subordinate legislation , comprise those legislative instruments made by persons or bodies (other than the legislature) to which the power to legislate has been delegated by the legislature.[1] Delegated legislation may take various forms (e.g. rules, regulations, bylaws, ordinances, regulations, orders, etc) and tend to provide detail to a legislative scheme, setting out matters that are regarded as unnecessary for the legislature itself to address within a primary legislation.[2]

The delegation of legislative power to executive organs or agencies had, however, been challenged for various reasons. These include two important values of constitutional law, which are democracy and separation of powers. From the point of view of democracy, the person upon whom the power is conferred must be the one to exercise the discretion.[3] According to this point of view, which was also expounded by the 'non-delegation doctrine', the power to make law is delegated by the people to the legislature, thus to make laws that

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[1] I. Ellis-Jones; Essential Administrative Law, (2nd ed., 2001), p.11

[2] S. Argument, "Delegated Legislation", in M. Groves and H. P .Lee (eds.) Australian Administrative Law: Fundamentals, Principles and Doctrines, (2007), p.134.

[3] D. Stott and A. Felix, Principles of Administrative Law, (1997), p.60.

may affect the subjects, they should first be submitted to the elected representatives of the people for consideration and approval.[4]

Furthermore, delegated legislation has often been criticized on constitutional grounds that it is as an infringement of the strict application of the theory of the separation of powers. The point is that the allocation of legislative, executive, and judicial functions to three different branches of government has the primary purpose of preventing arbitrary and tyrannical government that arise from the concentration of power.[5] Accordingly, when legislative power is delegated to the executive, it amounts to reinforcing the aggrandizement of the executive and the concentration of power in one government branch contrary to the objective separation of powers intends to achieve.

Despite the objection against delegation of law making powers, delegated legislation is common in modern state practice. This is because, for one thing, the non-delegation doctrine does not have currency these days for delegated legislation are routinely being enacted without passing through a democratic process in which the public is represented.[6] For another strict application of separation of powers is not feasible in a modern state with pressing administrative needs and exigencies. As a result, delegated legislation has become a common phenomenon and few had doubted the continued need for delegated legislation. A number of reasons have contributed towards the practice of delegating lawmaking powers to the executive as a necessary evil that a system resorts to. Agency expertise, the ability to fill legislative gaps, administrative flexibility in changing times, and the need to reduce pressure upon parliamentary time are some of the reasons that are often cited to justify delegated legislation.[7]

It is true that most delegated legislation are detailed and highly technical. It would be impractical to subject all delegated legislation to detail democratic scrutiny, thus delegated legislation is necessarily a compromise.[8] If one wishes the legislature to represent the community in the determination of the most

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[4] Argument, cited above at note 2, p.136.
[5] E. Barendt, "Separation of Powers and Constitutional Government", in R. Bellamy (ed.), the Rule of Law and Separation of Powers, (2005) p.282.
[6] J. Alder, General Principles of Constitutional and Administrative Law (4th ed., 2002), p.140.
[7] D. H. Rosenbloom and R. O'Leary, Public Administration and Law, (2nd ed., 1997), pp.55-56
[8] Alder, cited above at note 6, p.281.

important matters, it would be impossible for the legislature to produce all the laws required to a country efficiently or to manage unforeseen events flexibly. Moreover, proponents of delegated legislation argue that even primary legislation is usually prepared and proposed by the executive, the legislature being essentially a reactive body that provides some scrutiny.[9]
The question is not; therefore, whether delegation of legislative power is proper. The question is rather, in which cases, under which conditions, and to what extent delegation of legislative power is tolerable. An equally relevant question is what mechanisms need to exist to control undue delegation of legislative power and subsequent exercise of this power by the executive.

3. Controlling Delegated Legislation

Owing to the expansion of administrative functions in modern regulatory states, delegation of law making power is a common practice. In general terms however, there are some concerns about delegated legislation that may give administrative agencies unduly wide powers. Such concerns call for effective and expedient controlling mechanisms that can be applicable both to the delegating authority and the delegated organ.

Regarding controlling the legislature's authority to delegate its power, one of the important issues is distinguishing between delegable – non-delegable matters i.e., matters that the legislature can delegate and those it cannot delegate. There is no uniform standard to decide this issue. However, some countries provide for a list of items that cannot be legislated through delegation. In Australia, for instance, rules governing appropriations of money, addressing significant policy questions, rules that have a significant impact on individual rights and liberties, provisions imposing obligations on citizens or organizations to undertake certain activities, provisions conferring enforceable rights on citizens or organizations, etc, can only be put in place by primary acts of the legislature.[10] Similarly, the German Constitutional Court has established the doctrine that the legislature cannot delegate its authority in relation to

[9] Id, p.110
[10] Argument, cited above in note 2, p135.

certain crucial issues to the executive, in particular, where the rights protected by the Basic Law are at issue.[11]

The other issue pertaining to the matter at hand is controlling the executive to ensure that it exercises its delegated power within the scope of delegation. Countries adopt different mechanisms to check that delegated powers are exercised within the ambit of delegation. These include legislative controls, judicial control[12] and control by other organs such as Human Rights Commission and Ombudsman. After providing a brief discussion on legislative control, the will give a detail account of judicial control of delegated legislation in the next sub-section.

3.1 Legislative Control

While there are differences in the nature and extent of control, the legislature in every democratic system provides different mechanisms to see whether the executive is exercising delegated power in a manner that is consistent with the spirit and scope of the relevant primary legislation. In the UK, for instance, delegated legislation normally requires the direct approval of Parliament through a process called 'laying procedure' except in some cases.[13]

Similarly, delegated legislation in the United States can only be implemented after strict compliance to the conditions set in the Administrative Procedure Act (APA) that are set in place to ensure that the delegated power is exercised in conformity with legislative intent and is not abused.[14] This Act sets procedures for formal and informal legislative rule making by agencies, which include requiring agencies to publish notice of the proposed rule in the federal register, accepting and considering comments from the public and interested

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[11] Brandet, cited above in note 5, p. 282.

[12] P. P. Craig, Administrative Law, (5th ed., 2007), pp.174-179

[13] N. Hawke and N. Parpworth, An Introduction to Administrative Law, (1st ed., 1998), p.121. On those occasions when such approval is required, it is usually the case that delegated legislation is subject either to an affirmative resolution or a negative procedure. In either case, an item of delegated legislation will be laid before Parliament for 40 days. In the case of the affirmative procedure, a resolution is required within 40 days to bring the item of delegated legislation into force, whereas the negative procedure sees the delegated legislation in force after 40 days when no challenge has been made in that time.

[14] Rosenbloom and O'Leary, cited above at note 7, p.58.

parties, and conducting elaborate hearing on the proposed rule.[15] Other legislative controlling mechanisms are also applicable, especially in parliamentary systems such as requiring that delegated law making powers be subjected to additional controls such as scrutiny by parliamentary committees and requiring agencies to make consultations with relevant parties.[16]

3.2 Controlling Through Judicial Review

It is true that judicial review is one of the mechanisms which could be used to ensure that the executive remains within the scope of delegated power. However, one of the pivotal issues in administrative law is the scope of judicial review of with regard to the actions of administrative agencies. Particularly, the scope of judicial review of administrative acts in parliamentary systems may be diminished by statutory exclusions. Since (in countries where there is no constitutional supremacy) the Parliament is supreme, the role of courts to review agency decisions may be limited when the Parliament provide for 'ouster clauses' in legislation. 'Ouster clauses' are clauses provided by primary legislation that purport to exclude the courts from reviewing the decisions of a public body.[17] 'Ouster clauses' can be of different types, mainly, 'total ouster clauses' and 'finality clauses'. Total ouster clauses are those, which state that a decision of public body is *not to be challenged in any court of law*.[18]

'Finality clauses' on the other hand are clauses in the primary legislation, which provide that the decision of a public body *shall be final*.[19] Unlike total ouster clauses, finality clauses do not prevent judicial review, but only appeal.[20] At this juncture, appreciating the distinction between appeal and judicial review is important. Regarding this issue, the relevant literature reveals that appeal is a statutory right that the Parliament can deny or grant to litigants

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[15] Id, pp.60-61; the APA's scope is not limited to administrative rule making. It rather additionally governs agency provision of public information and agencies formal adjudication procedure.
[16] Craig, cited above at note 12, pp.377-381.
[17] D. Longley and R. James; Administrative Justice: Central Issues in UK and European Administrative Law, (1999), p.160.
[18] Ibid
[19] Id, 161
[20] Ibid

whereas judicial review is an inherent power of the judiciary.[21] The effect of such distinction is that courts have an inherent power to review decisions of administrative agencies and the fact that a statute expressly provides that an administrative decision shall be "final" does not mean that courts cannot inquire into whether the agency has observed procedural requirements.[22] In both cases, however, ouster clauses imply the sovereignty of the Parliament to restrict courts' power of reviewing agency decisions.

Despite the variation in the scope of judicial power to review administrative decisions across systems, subordinate legislation are often susceptible to judicial control on various grounds. Even in countries where the Parliament is supreme, such as the UK, and various types of ouster clauses are inserted into legislation with the intent of precluding judicial review of agencies' decisions, these efforts have been found to be unsuccessful. This is because courts have time and again restrictively construed such exclusionary provisions of legislation in a way that defends their review power[23]

Thus, judicial review of administrative decisions cannot be totally excluded even where a statute contains a total ouster clause that says a decision of public body '*shall not be questioned before any court of law'*. This is because such clauses can only exclude courts from reviewing agency decisions on grounds of *intra vires*, but not for *ultra vires* (jurisdictional error) of administrative act.[24] This was the case in *Anisminic Ltd. v foreign Compensation Commission* (UK) where the Foreign Compensation Act of 1950 stated that a determination of the Commission should not be called in question in any court of law. The court before which the case appeared unanimously held that this only prevented *intra vires* determinations, and not of *ultra vires* determinations by the court.[25]

In Ethiopia too, there is a real practice of excluding judicial power to review administrative decisions through 'finality clauses'.[26] However, the way ouster

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[21]Louis L. Jaffe, Judicial Control of Administrative Action, (1965), pp.153-154

[22] Ibid

[23] Craig, cited above at note 12, p.847.

[24] Id, p.849

[25] Id, p.849

[26] See for instance Urban Lands Lease Holding Proclamation, 2011, Art.29 (3), Proc. No.721, Fed. Neg. Gaz, 18th Year no. 4; the Social Security Agency Re-establishment Proclamation,

clauses are interpreted in Ethiopia is quite different from what is discussed above. A survey of decisions of the Federal Supreme Court Cassation Division (hereafter the Cassation Division) and the CCI reveals that judicial review is excluded when the legislation contain finality clauses. For instance, decisions of the Cassation Division on *Southern Region Hawassa City Manucipality v Hawassa Debre Genet St. Gabriel Church*[27] and *Social Security Agency v Berhanu Hiruy and Kebede G/Mariam*[28] stated that judicial review of agency decisions is totally precluded when such decisions are supposed to be final on the basis of the pertinent legislation.[29]

Thus, the jurisprudence in Ethiopia reveals that there is no need to make a distinction between appeal and judicial review. Thus, if a decision of an agency is said to be final in a statute, such decision cannot be reviewed by court of law. One of the reasons that are mentioned by the Cassation Division and the CCI is that judicial review of courts in Ethiopia emanates from laws, including legislation, and courts cannot claim to have an inherent power of judicial review.[30] In this way, one may safely say that there is no distinction between 'finality' clause and total ouster clauses in Ethiopia.

2006, Art.11 (5), Proc. No.495, Fed. Neg. Gaz, 12th Year, no. 31; and Charities and Societies Proclamation, 2009, Art.104 (2), Proc. No.621, Fed. Neg. Gaz. 15th Year no.25

[27] Southern Region Hawassa City Manucipality v Hawassa Debre Genet St. Gabriel Church, (Federal Supreme Court Cassation Division, January 27, 2010,), Federal Supreme Court Cassation Division, vol. 10, p. 260

[28] Social Security Agency v Berhanu Hiruy and Kebede G/Mariam, (Federal Supreme Court Cassation Division, File No.18342 , December, 2005. Similar decision is given by the court in the case Social Security Agency v Wubayehu Abebe where decision of the East Gojam High Court is reversed by the Cassation Division on the ground that the High Court does not have jurisdiction to see cases come from the decision of the Social Security Appellate Tribunal since its decision is made by law 'final'. See Social Security Agency v Wubayehu Abebe, (Federal Supreme Court Cassation Division, March 2, 2008), Federal Supreme Court Cassation Division, vol. 5, p.131

[29] For more on ouster laws and decisions of the Cassation Division and the CCI on the issues, see Yemane Kassa, the Judiciary and Its Interpretative power in Ethiopia: A Case study of the Ethiopian Customs Authority, (2011, unpublished, AAU Law library)

[30] Welday Zeru *et al* v the Ethiopian Revenues and Customs Authority, (Federal Supreme Court Cassation Division, May 23, 2011), Federal Supreme Court Cassation Division, vol. 12, p.482, and Ashenafi Amare *et al* v the Ethiopian Revenues and Customs Authority, File No 101, (CCI), February 9, 2010

4. Delegated Legislation in Ethiopia

It is an established fact that delegated legislation is a necessary evil that a modern state with many exigencies is forced to practice. However, apart from theoretical and practical justifications for the need of delegated legislation, there is no uniform authority that allows the legislature to delegate its power to the executive or specific agencies. For the better appreciation of the issue of delegation in Ethiopia, it would be useful to get some comparative perspective by looking at the legislatures' authority to delegate its power to the executive in the United States and Germany.

In the United States, the Congress' power to delegate the president to make a law has no direct constitutional authorization since Art. I of the Constitution clearly provides that all federal legislative power resides in the Congress. Thus, the practice of delegated legislation in the United States is something that developed through jurisprudence to meet the practical necessities of state administration. On the other hand, there are constitutions that provide for possible delegation of legislative power to the executive. The Basic Law of Germany is an example that provides that the legislature (constituting *Bundestag and Bundesrat*) may delegate its power to a very limited extent.[31]

In Ethiopia as well, the Constitution, though not directly, authorizes the legislature to delegate its power to the Council of Ministers (hereafter the CoM). It states "It [the CoM] shall enact regulations pursuant to powers vested in it by the House of Peoples' Representatives (here after HPR).[32]
The issue is therefore, what extent of delegation by the legislature is tolerated under the Constitution. Can the HPR delegate any power that it wishes to delegate to the CoM? Is there any standard based on which the discretion to delegate legislative power by the HPR is constrained? Our Constitution does not seem to have an explicit provision to address these issues. One may soundly argue that implied standards enshrined under the Constitution, such as separation of powers, the rule of law, and protection and enforcement of constitutional rights, can be invoked to control undue delegation of legislative powers. However, the absence of clear constitutional provisions on these issues

[31] The Basic law of the Federal Republic of Germany, 1948, Art.80 (1)
[32] Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art.77 (13), Proc. No.1, Fed. Neg. Gaz, 1st Year, no.1

has resulted in the proliferation of unconstrained delegation of legislative power to the executive. Unconstrained delegation of law making power to the executive seems to be a common practice in Ethiopia and many laws can be mentioned as a proof for this.

In the Value Added Tax Proclamation, the HPR delegated the Ministry of Finance and Economic Development, not even the CoM, through directives, to increase or decrease the threshold, which was originally determined to be annual turnover exceeding 500,000 Birr, for Value Added Tax registration.[33] Furthermore, the HPR in the Income Tax Proclamation has delegated to the CoM, by regulations, to exempt any income recognized as such by the Proclamation for *economic, administrative or social reasons*.[34] This is unusual in that determination of tax issues involving a significant policy question is delegated without specific statutory conditions attached to it. In Australia, for instance, matters implying significant policy questions such as those involving significantly new policy or fundamental changes to existing policy can only be regulated through primary legislation.[35]

More ironically, the Proclamation that empowers the executive branch through delegation to demolish and restructure the federal government any time it wishes is concrete evidence that proves the assertion that the HPR considers itself to be free to grant the executive unconstrained powers to do whatever it deems necessary. Owing to the seriousness of the implications of this Proclamation, the most pertinent provision is reproduced as follows;

> *"The Council of Ministers is hereby empowered, where it finds it necessary, to reorganize the federal government executive organs by issuing regulations for the closure, merger or division of an existing executive organ or* ***for change of its accountability*** *or mandates or for the establishment of a new one."*[36]

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[33] The Value Added Tax Proclamation, 2002, Art.16 (2), Proc. No.285, Fed. Neg. Gaz, 8th Year no.33

[34] The Income Tax Proclamation, 2002, Art.13 (e), Proc. No.286, Fed. Neg. Gaz, 8th Year no. 34

[35] Argument, cited above at note 2, p.135

[36] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation, 2010, Art.34, Proc. No.691, Fed. Neg. Gaz., 17th Year no. 1

The quoted provision reveals that the executive is given a blank cheque to decide on every matter regarding the very establishment or abolishing of ministerial offices and other executive departments without any say from the legislature. It is also given a power to change the accountability of executive bodies, which have already been determined by the parent legislation. This ultimately reinforces the fact that the executive may change the whole spirit and essence of the legislation that establishes the executive organs and their powers.[37]

It is true that such broad delegation may be attributed to the fact that we have parliamentary system of government where the government (including the chief executive) is elected by the Parliament (whose members are directly elected by citizens) whereas in presidential systems, the executive (president) and the legislature are elected in separate and independent elections by the citizenry. The effect is therefore, the executive in parliamentary systems needs to secure parliamentary (legislative) confidence in order to survive while this is not necessary for the President in the presidential systems.[38] As a result, one may argue that such flexible and broad delegation is justified on the ground that the executive is dependent on and subject to close parliamentary oversight.

5. Excluding Judicial Review by the Executive

As discussed above, the legislature especially in parliamentary systems may attempt to prevent any challenge to an administrative decision, usually by attempting to oust the jurisdiction of the court. With all the debate on the extent and practical enforceability of such ouster provisions, we can see that there is nothing novel about attempts by the legislature to preclude judicial review of the decisions of administrative agencies. However, excluding judicial review by the executive through secondary (delegated) legislation is not only unbearable and unusual but also a direct threat to judicial power. This is so

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[37] This is true because the powers, functions, and accountability of existing executive organs have already been stipulated in the parent legislation. However, such legislative stipulation is made to be open for potential repeal by executive act, regulation, thus shows legislation may be repealed by executive acts. See Ibid for detail Definition of Powers and Duties of the Executive Organs

[38] Richard Albert, "Presidential Values in Parliamentary Democracies" Oxford University Press and New York University School of Law , vol.8, No.2 (2010), p.228

because the rule of law requires the existence of impartial tribunals that gives a remedy when individual rights are violated by the government.

In Ethiopia, legislative practices and the relevant case law seem to reveal that a restriction on judicial power may be put by an executive act. They also established, not only the power to impose limitation on judicial power, but also provide that claims can be made non-justiciable by subordinate laws of the executive organ. Owing to space limitation, the focus of this article is to see the delegated legislation issued by the CoM for the administration of employees of the Ethiopian Revenues and Customs Authority. Such discussion is also supplemented by an analysis of cases decided by various courts, the Cassation Division and the CCI on the issue.

The Ethiopian Revenues and Customs Authority (hereafter the Authority) is established by Proclamation in 2008 after the merger of three previously independent government institutions; the Ethiopian Inland Revenue Authority, the Ethiopian Customs Authority, and the Ministry of Revenue.[39] Following the new structure, the legislature delegated the CoM to issue a regulation regarding the administration of employees of the Authority. The primary legislation in its delegating provision stated that "The *administration of the employees* of the Authority shall be governed by regulation to be issued by the Council of Ministers."[40] Accordingly, the CoM issued a regulation (hereafter the Regulation) and Art.37 of same states;

1. Notwithstanding any provision to the contrary, the Director General may, *without adhering to the formal disciplinary procedures dismiss* an employee from duty whenever he has *suspected him of involving in corruption* and *lost confidence in him*.
2. An employee who has been dismissed from duty in accordance with sub article 1 of this Article may not have the right to reinstatement by the *decision of any judicial body*.[41]

The reading of the preceding two paragraphs of the Regulation has many consequences; first, it denies procedural justice to employees since it provides no chance for them to be informed about and defend themselves from

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[39] Ethiopian Revenues and Customs Authority Establishment Proclamation, 2008, Proc. No. 587, Fed. Neg. Gaz., 14th Year no.44

[40] Id, Art.19 (1) b

[41] Administration of Employees of the Ethiopian Revenues and Customs Authority Council of Ministers Regulation, 2008, Reg. No.155, Fed. Neg. Gaz., 14th Year no.49

allegations made against them by the Authority. Obviously, the right to be informed of charges or accusations brought against oneself and to defend oneself from such allegations is an important aspect of due process of law. Second, a mere suspicion of corruption and loss of confidence by the Director General suffice for the Authority to exercise this power which has huge consequences on the rights of individuals. Third, it removes the remedy of reinstatement for illegal dismissal that aggrieved employees could have against the Authority. Finally, it undermines the jurisdiction of courts by rejecting their decision of reinstatement of employees. What is worthy to note here is that all this power is vested on a single man, the Director General, not even to a board or a committee.

These facts give rise to many issues some of which include; a) on the issue of delegation- is there any authority (legislative basis) for the executive to make a law with such content?; if yes, is it constitutionally appropriate for the legislature to delegate such power to the executive b) on the issue of judicial power- what is the impact of the Regulation on the power of judiciary? If there is adverse impact on the powers of the judiciary, how and to what extent is it? Such issues are addressed in subsequent sub-sections dealing with decisions of courts, the Cassation Division and the CCI.

6. A Discussion of Some Relevant Decisions

6.1 Decisions of Ordinary Courts

In the preceding sub-section, some issues are framed with a view to test the legality of the Regulation and its impact on judicial power in light of constitutional and legislative standards. At this level, the author found it important to appraise how courts (including administrative tribunals[42]) are interpreting and applying the provision of the Regulation so that it will provide an account on the issues raised above.

To begin with the Federal Civil Servants Administrative Tribunal (hereafter the Tribunal),[43] in the case *Tewodros Yilma v the Ethiopian Revenues and Customs*

[42] Decisions of the Cassation Division are excluded here since they are separately addressed in the subsequent subsections

[43] The Federal Civil Servant Administrative Tribunal is made to be part of the discussion for the reason that it is established to exercise judicial function in similar procedure as ordinary

Authority and other cases, declined to assume jurisdiction to hear cases brought before it from employees of the Authority claiming that its power to entertain such cases is ousted by the Regulation.[44] In its decisions, the Tribunal rejected to entertain the claims brought by dismissed employees of the Authority on suspicion of corruption saying that the claimant does not have legal basis to be heard as the Authority acted in accordance to the Regulation.

The Tribunal did not make any sort of scrutiny as to whether the grounds, which would entitle the Director General of the Authority to dismiss employees, exist or not. The grounds for the Director General are two; suspicion of corruption and loss of confidence on employees.[45] Thus, the Tribunal could be expected to see whether these grounds exist. In this regard, in the case of *Jemal Ahmed v the Ethiopian Revenues and Customs Authority*, the dissenting judge provides that the mere fact that the Director General has suspected an employee for corruption alone cannot suffice, rather some grounds of suspicion, real or circumstantial, should be submitted to the court.[46]

Furthermore, there is the practice of voluntary relinquishment of jurisdiction by the Tribunal to see some claims brought before it. In the Case *Ashenafi Amare et al v the Ethiopian Revenues and Customs Authority,* the Tribunal simply relinquished its jurisdiction over the case by itself and referred it to the CCI for the mere fact that the provision is said to be contrary to Art.37 of the Constitution while the issue raised in the case could have been disposed of by reviewing the regulation in light of the parent legislation. Cases decided by the Federal Supreme Court show a similar trend. In *Jemal Mehamed v The Ethiopian Revenues and Customs Authority* [47] and other cases[48], the court

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courts. See the Federal Civil Servants Proclamation, 2007, Art.74, Proc. No.515, Fed. Neg. Gaz., 13th Year no.15

[44] Many cases show the act of surrendering jurisdiction of dismissal cases by the Authority. To mention some, the Tewodros Yilma v the Ethiopian Revenues and Customs Authority (File No.00828, Federal Civil Servants Administrative Tribunal, August 19, 2009), (unpublished); Amare Terfe v the Ethiopian Revenues and Customs Authority, (File No.00826, Federal Civil Servants Administrative Tribunal, August 27, 2009), (unpublished); and Jemal Mehamed *et al* v the Ethiopian Revenues and Customs Authority, (File No. 00833, Federal Civil Servants Administrative Tribunal, September 01, 2008), (unpublished).

[45] The Regulation, cited above at note 41, Art.37 (1)

[46] Jemal Mehamed *et al* v the Ethiopian Revenues and Customs Authority, cited above at note 44

[47] Jemal Mehamed v The Ethiopian Revenues and Customs Authority, (Civil File No.48872, October 20, 2009, Federal Supreme Court) (unpublished)

upheld the decision of the Tribunal on the ground that the court does not have the power to review decisions of the Authority made based on Art.37 of the Regulation.[49]

One can soundly deduct two major conclusions from the cases discussed above. First, the courts accepted the unconstrained discretion given to the Authority without scrutinizing the fairness and legality of the power given to the Director General under the Regulation. Second, there is the practice of voluntary relinquishment of jurisdiction by courts and the Tribunal with regard to some claims brought before them. The above mentioned cases revealed two main reasons for surrendering jurisdiction. First, for the mere fact that the applicants contend that the Regulation violates Art.37 of the Constitution (access to justice), the claims are referred to the CCI for constitutional interpretation. This tells us that there is a misconception that courts in Ethiopia cannot interpret the Constitution in order to determine the meaning, content and scope of any constitutional provision. Second, they declined to entertain complaints on the ground that the Regulation excludes courts from reviewing decisions of the Authority.

The decisions of the Tribunal and the Supreme Court in the above cases may be challenged on many grounds. However, for the sake of convenience, the issues are addressed in the section below which provides a critical reflection of the decisions of the Cassation Division and the CCI together since the reasoning of the decisions are substantially similar.

6.2 Decisions of the Cassation Division and the CCI

i. Summary of the Decisions

Decisions of the Cassation Division and the CCI play an important role in shaping our constitutional jurisprudence in general and the role of courts to review administrative decisions in Ethiopia in particular. This is because

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[48]See also decisions of the Amare Terefe *et al* v the Ethiopian Revenues and Customs Authority, (Civil File No.48870, October 20, 2009, Federal Supreme Court) (unpublished) and Tewodros Yilma *et al* V. the Ethiopian Revenues and Customs Authority, File no.48873, October 20, 2009, Federal Supreme Court) (unpublished).

[49]Jemal Mehamed v The Ethiopian Revenues and Customs Authority, (Civil File No.48872, October 20, 2009, Federal Supreme Court) (unpublished)

decisions of the Cassation Division are binding over all courts below it[50] and as such, its decision that has the effect of excluding a specific matter from the scope of judicial power has a far-reaching effect. Similarly, the CCI is an organ established to give legal assistance to the House of Federation (HoF) in its role of upholding the supremacy of the Constitution through constitutional interpretation.[51] To this end, two relevant cases emanating from the Regulation in consideration and decided by the Cassation Division and the CCI are discussed in this section.

To begin with the Decision of the Cassation Division, the case *Welday Zeru et al v the Ethiopian Revenues and Customs Authority*[52] is very crucial. In this case, 61 complainants having the same cause of action, appealed to the Cassation Division against the defendant after lower courts declined to hear their complaint on the ground that the Regulation did prohibit them from reviewing decisions of the Authority. The applicants argued that they were dismissed by the Authority from their work based on Art.37 of the Regulation which is against their constitutional rights particularly the right of access to justice. The ruling of the Cassation Division in the case is summarized as follows;

> "*The Regulation is legitimately issued by the CoM as authorized by the legislature. Persons can bring their cases to courts only if the matters are justiciable. According to Art.37 (1) of the Constitution, an issue is justiciable only when the power to decide that case is not given by law to another institution. In the cases at hand, the power to give final decision is given by the Regulation to the Authority. Thus, issues of reinstatement*

[50] Federal Courts Proclamation Re-amendment Proclamation, 2005, Art.2 (4), Proc. no.454, Fed. Neg. Gaz., 11th Year no. 42

[51] The CCI is established by the Federal Constitution to give professional support to the HoF in its task of interpreting the Constitution. At least, eight out of the total eleven members of the CCI are lawyers. See the FDRE Constitution, cited above at note 32, Art.82 (1and 2). From this, one may easily guess that the professional support expected from it is giving legal expertise opinion on a constitutional issue presented to the HoF. Thus, the opinions and decisions of the CCI on issues involving judicial power to review administrative decisions have an impact on the final stand of the HoF regarding the same cases. See for detail on this the preamble and Art.6 of the Council of Constitutional Inquiry Proclamation, 2001, Proc. no.251, Fed. Neg. Gaz., 7th Year no. 40

[52] Welday Zeru *et al* v the Ethiopian Revenues and Customs Authority, cited above at note 30

are made to be non-justiciable and courts' power to entertain such claims is thereby excluded."[53]

The other relevant case decided by the CCI is *Ashenafi Amare et al v the Ethiopian Revenues and Customs Authority.*[54] The claim by the complainants says "Art.37 (2) of the Regulation is contrary to the constitutional right of access to justice which provides that everyone has the right to bring any justiciable matter to courts…"

In this case the CCI did not address the main issue of delegation. It rather proceeded with the case with a presumption that the Regulation is issued by the CoM based on the power it acquired under the parent legislation. The reading of this decision implies that the scope of delegation includes the power to issue a regulation that may have the effect of totally excluding judicial review of decisions of the Authority. Accordingly, the CCI seems to believe that the controversial provision that is included in the Regulation is consistent with the intention of the legislature. Adopting a view similar to the position of the Cassation Division, the CCI stated that by on the basis of the delegated power it exercised, the CoM has excluded from the purview of the judiciary claims of employees that challenge the decision of the Director General to dismiss them and seek reinstatement thereby making such matters non-justiciable.

The gist of the decision of the CCI reveals that the Regulation is, for all legal purposes, considered as the act of the legislature that delegated its power. Accordingly, the CCI concluded that the Regulation has two legal effects; making claims of reinstatement non-justiciable and excluding judicial review of the Authority's decision. The CCI, in its opinion, provides;

> *"…the HoPR is the highest legislative organ in our Constitution; and* ***within the constitutional boundary****, it has an absolute power to do whatever it deems necessary. Yet, the power to decide as to what type of laws it should adopt is within its discretion; and so far as it* ***does not exceed the constitutional limit****, it can adopt any type of policy choice from among available alternatives when issuing*

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[53]Ibid; the Cassation Division gave much emphasis to Art. 19(1) b of Proclamation No.587 (cited above at note 39) to justify Art.37 (2) of Regulation No.155 (cited above at note 41) and it concludes that the Regulation is issued within the appropriate scope of delegation under the parent Proclamation. The ruling of the Division quoted in this paragraph is not verbatim translation, rather summary of the main facts of the ruling.

[54] Ashenafi Amare *et al* v the Ethiopian Revenues and Customs Authority, cited above at note 30

legislation. To decide whether or not the adopted law is appropriate is ***not the mandate of the Council****".*[55]

The quoted paragraph envisages the message that the Regulation is issued according to the policy choice of the legislature as delegated to the CoM. On this presumption the CCI firmly ruled that since the judiciary is established within a parliamentary system, it is up to the Parliament to decide 'these issues are justiciable and others are not', provided that it is in line with the constitutional limit. It further stated that "regarding the issue of whether or not [a] matter is justiciable, the decision the legislature made *according to the Constitution* saying this matter is justiciable or not, is correct even though it could be said that *it narrows judicial power*".[56]

ii. Critique on the Decisions of the Cassation Division and the CCI

To start with the issue of delegation, both the Cassation Division and the CCI concluded that the Regulation is issued within the scope of delegation. The author nevertheless finds it difficult to accept the decisions for at least two reasons. First, both the Cassation Division and the CCI did not make any attempt to scrutinize the contents of the Regulation's contested provisions in light of the parent legislation. The issue that should have been first addressed is whether the delegated power regarding '*administration of employees'* includes the power to exclude rules of procedural fairness in taking disciplinary measures and limiting the power of courts.[57] Particularly, a close look at the decisions reveals that the CCI has failed to see the real issue that needs to be solved at the constitutional level, i.e. the issue of delegation. It did not make any attempt to discuss the specific provision of the parent legislation based on which the Regulation is issued. The CCI, being an organ established to give legal assistance to the House of Federation (HoF) in its role of upholding the supremacy of the Constitution through constitutional interpretation, should have looked into the legality of the delegation in light of, if not express provisions, implied constitutional standards such as the rule of law, separation

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[55] Ibid

[56] Ibid

[57] Scrutiny would have been proper if a critical look was made to the delegating clause under Art.19 (1) b of the parent Proclamation (cited above at note 39) and the Contested Art.37 of the Regulation (cited above at note 41)

of powers, and entrenchment of human rights and freedoms as will be discussed below.

Second, there is no clear or implied statement in the parent legislation that authorizes the CoM to issue a law with content that strips the judiciary from its review power and exclude minimum rules of fairness while taking dismissal measures. What is expressly delegated is the power to "issue a regulation regarding administration of employees of the Authority" and to argue that administration of employees includes determination of jurisdiction of courts is at any rate untenable. The main issue that needs to be settled here is that what constitutes 'matters of administration' since what is delegated (administration of employees) is a matter of administration. The question of what constitutes a 'matter of administration' is quite complicated. Literature provides that matters of administration "will include a wide range of governmental activity carried on by bodies other than the legislature and the judiciary, and arguably do not include 'policy' considerations; that is, the performance of executive or administrative functions.[58] The South Africa Administrative Justice Act similarly defines administrative action as "any decision or failure to take decision by an organ of state [...] which adversely affects the rights of any person and which has a direct, external legal effect; but does not include...the legislative functions of the Parliament, a provincial legislature, or a Municipal Council, the judicial function of judicial officers of court..."[59]

From the above definitions, one can easily infer that administration of employees cannot be extended to include determination of powers of other government branches particularly the judiciary. Apart from the definitions in the preceding paragraph, a look at the Federal Civil Servants Proclamation, though it did not have a direct definition, tells us something on the issue. The reading of the Proclamation which governs the administration of employees of federal agencies addresses matters related to the recruitment, promotion, salary, allowance, transfer, secondment, conditions of work, leave, working hours, overtime work, termination, etc of employees; not imposing limitation on courts power or rejecting decisions given by same.[60]

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[58] Ellis-Jones, cited above at note 1, p.132
[59] The Promotion of Administrative Justice Act 3 of 2000, section 1 (as amended)
[60] Federal Civil Servants Proclamation, cited above at note 43

In fact, one may argue that 'administration of employees' includes deciding on the modalities of termination of employment contract which Art.37 (1) of the Regulation did; thus exclusion of courts' jurisdiction is only incidental. However, such argument is hardly sound since any power exercised by a delegated organ cannot, incidentally or otherwise, exceed the scope of delegation. 'Administration of employees' cannot be, even in a very broad interpretation of the phrase, construed to include excluding and limiting judicial power that is already constitutionally recognized. Looking at its effect as well, the exclusion of courts' jurisdiction ultimately solidifies the untouchable nature of the Authority and closes any room for remedy even when the Authority illegally dismisses individuals, which is not something that should be considered as a subsidiary but a primary issue in the Regulation.

The decisions are also erroneous in the way they interpret the content of Art.37 (2) of the Regulation. This sub-article states that "an employee who has been dismissed from duty in accordance with sub article 1 of this Article may not have the right to reinstatement by the *decision of any judicial body"*. It is clear from the provision that the Regulation does not exclude judicial review of the Authority's decision, but only rejects decision of the court that orders reinstatement of a dismissed employee.[61]

At this juncture, it is important to note that excluding courts from reviewing the decision of the Authority has different legal implication from rejecting the enforcement of courts' decision. In this regard, it is important to mention that, not only the case law developed in relation to the Regulation, but also academic works too took for granted that the Regulation ousted courts' power. Aron and Abdulatif, for instance, conclude that the Regulation has excluded judicial power to review the Authority's decision thereby abrogating the constitutional right of access to justice.[62] The author, however, argues that the

[61]This is also what Ato. Mekonen Ayele (Deputy Prosecutor General of the Authority) asserted. He stated that "we are not prohibiting courts from assuming jurisdiction on the issue; rather we are saying that the decision of a court that orders reinstatement of an employee is not acceptable by the Authority. See more on this in Yemane, cited above at note 29, p.117, in his interview conducted with Ato Mekonen Ayele, Deputy Prosecutor General of the Ethiopia Revenues and Custom Authority

[62]Aron Degol and Abdulatif Kedir, "Administrative Rulemaking in Ethiopia: Normative and Institutional framework", Mizan Law Review, vol. 7 No.1, (September 2013), pp.25-26. The authors seem to consider that the Regulation is issued based on the delegation given to the Council of Ministers without looking whether the contents of the power is really delegated by

Regulation does not, in its strict legal sense, exclude judicial review. In fact, it could be said that when the Regulation says decision of a court ordering reinstatement of an employee is not acceptable, it may have the same effect of excluding remedy options from courts; for courts' power to review agency decision is meaningless if the decision is not enforceable. This is nonetheless different from saying that the right to get remedy from the judiciary is eliminated. This is because the Regulation only prohibits the enforceability of reinstatement orders given by courts without negating the courts' power to entertain dismissal cases from the Authority. For instance, one may argue that the Regulation does not reject decision of courts ordering payment of compensation, instead of reinstatement. However, the CCI and the Cassation Division have failed to make distinction between making judicial decision unenforceable (which the content of Art.37 (2) of the Regulation clearly indicates) and excluding judicial review in its entirety.

The proper issue would, therefore be, is it constitutional to let the Authority reject decision of courts duly given based on law. One may not get a clear constitutional provision that requires the executive or agency to enforce decisions and orders given by courts. However, it is within the spirit of our Constitution that the principle of separation of powers requires each organ of government to exercise powers given to it by the Constitution. This principle has also the implication that each organ shall respect the power of another organ. If this way of construction of the principle is tenable, rejecting the enforceability of judicial decisions is violating the basic constitutional principle of separation of powers and ultimately reinforces arbitrary government.

Owing to the fact that our Parliament is the highest organ of government,[63] it may be said that courts cannot invalidate parliamentary legislation for their incompatibility with the Constitution. This is because testing the constitutionality of legislation requires constitutional interpretation, which is something that courts, arguably, do not have the mandate to engage in.[64]

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the legislature. They rather gave emphasis on the effect of the Regulation on the right of individuals and the power of the judiciary.

[63] When the HoPR is declared to be the highest organ, it is meant that it is the highest organ of the three government branches. It does not mean that however that the Parliament is absolutely supreme; its supremacy is rather subject to the supremacy of the Constitution. see the FDRE Constitution, cited above at note 32, Art.9 (1)

[64] There is a debate, for instance, as to the determination of what amounts to constitutional interpretation is far from clarity yet its similarity or difference with constitutional dispute is

However, nothing prevents them from reviewing the Regulation for its compatibility with the parent legislation. What is expected from courts here is that, not to test the constitutionality of the Regulation[65], but to see whether it is issued within the scope of the powers delegated by the legislature. This would have been one opportunity for courts (including the Cassation Division) to act in defense of judicial power in our country by declaring the Regulation to be *ultra vires*. This is particularly true where our courts are, though arguably, excluded from reviewing the constitutionality of laws. Challenging regulations for exceeding their scope of delegation is one of the best rooms that courts can have to defend their powers and fundamental rights.

Even in the contestable rulings of the Cassation Division and the CCI that judicial review of the Authority's decision is precluded by the delegated legislation, they seemed to be confused of the conceptual difference between precluding judicial review and the issue of non-justiciablity. Justiciability is a doctrine which prohibits courts from assuming jurisdiction over certain matters because their nature and subject matter are such that they are not to be amenable to the judicial process,[66] not because judicial power of such matters

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part of the issue. Additionally, the scope of the power of the HoF/CCI vis-à-vis the role of courts in constitutional interpretation seems to be unsettled issue. For detail account on the debates, see Getachew Assefa, "All About Words: Discovering the intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation", Journal of Ethiopian Laws, Vol.24 No.2, (2010), pp.139-175, Assefa Fiseha, "Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation", Mizan Law Review, vol.1 No.1, (2007), p.10, Yonatan Tesfaye, "Whose Power is it Any Ways: the Courts and Constitutional Interpretation in Ethiopia", Journal of Ethiopian Laws, vol.22 No.1, (2008), pp.133-134, Takele Soboka, "Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory", in Assefa Fiseha and Getachew Assefa (eds.), Institutionalizing Constitutionalism and the Rule of Law: Towards a Constitutional practice in Ethiopia' Ethiopian Constitutional Law Series, vol.3, (2010), p.67

[65] Whether courts can test the constitutionality of laws (including regulations) other than proclamations is also debatable though providing detail account of it is beyond the scope of this paper. This debate becomes apparent when one looks at Proclamations No.250/2001 and 251/2001. These Proclamations similarly define the term 'law' that will be referred to the HoF for constitutional interpretation as "proclamations issued by the federal or state legislative organs and directives and regulations enacted by federal and state government institutions; and includes international agreements that have been ratified by Ethiopia". See Art.2 (5) and Art.2 (2) of Proclamation No.250/2001(cited above at note….) and Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities Proclamation, 2001, Proc. No.251, Fed. Neg. Gaz., 7th Year No. 41 respectively

[66] Paul Daly, "Justiciability and the 'Political Question' Doctrine", Public Law Series, 2010, p1; Prerogative powers such as those relating to the making of treaties, defense, the prerogative

is ousted by statute. Thus, when a legislature excludes certain matter from the purview of judicial review, it is not because the matter is non-justiciable.

Similar misconception in relation to justiciability could be observed particularly in the decisions of the Cassation Division. Not only in the case *Welday Zeru et al V. the Ethiopian Revenues and Customs Authority*, the Cassation Division in other cases stated that "an issue is justiciable only when the power to decide that case is not given by law to another institution."[67] It further goes to say that if the power is given to other bodies with judicial function according to Art.37 (1) of the Constitution, thus the claim for reinstatement is made non-justiciable. Two important issues may be raised here. First, does establishing other organs to exercise judicial power mean that the matter is non-justiciable and courts can be totally excluded from entertaining the matter? Second, can the Director General of the Authority (a person who exercises the contested power under the Regulation) be considered as an organ established to exercise judicial power?

The author leaves the first issues untouched owing to the limited scope of the article.[68] But the second question will be addressed as it has a direct implication on the power of courts. Though Art.79 of the Constitution provides that judicial power is vested in courts, Art.37 (1) of the Constitution signifies the possible existence of other organs established to exercise judicial powers. However, this provision does not tell us what and how such organs should be established to exercise judicial power. In this regard, reference should have been made, which the Cassation Division failed to do, to a more relevant

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of mercy, the grant of honors, the dissolution of parliament and the appointment of ministers as well as other similar matters are considered as non-justiciable.

[67]Welday Zeru *et al* v the Ethiopian Revenues and Customs Authority, cited above at note 30, see also the Ethiopian Privatization and Public Enterprises Supervising Agency v Heirs of NurBezaTerga, (Federal Supreme Court Cassation Division, November 12, 2007), Federal Supreme Court Cassation Division, vol. 5, p.300, and Ethiopian Customs Authority v Abero Ergano *et al,* (Federal Supreme Court Cassation Division, March 20, 2007), Federal Supreme Court Cassation Division, vol.4, p108. The last cited case also reveals the broad interpretation by the Cassation Division of delegated power to the former Ministry of Revenue.

[68] I preferred not to get in to the issue because the issue of 'justiciability' is controversial by its nature and more so in the Ethiopian constitutional jurisprudence. It demands a thorough discussion of academic and jurisprudential opinions as to which matters are justicable, which matters are not, who determines such issue. Such issues are important in our Constitution since the Constitution only provide that judicial power is limited to justiciable matters without settling the issues of which matters are justiciable, which are not, and who determines it. Addressing such issue is obviously beyond the scope of this article and demands a separate scrutiny.

constitutional provision. The relevant provision provides that "special or ad hoc courts that take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which *do not follow legally prescribed procedures shall not be established*."[69]

In light of this constitutional provision, the Authority is not a kind of organ established to exercise judicial powers. For one thing, it is purely an administrative organ. For another thing, the Director General, let alone to follow legally prescribed procedures, is authorized not to follow such procedures while making decision. Thus the reasoning of the Cassation Division does not seem to be well founded in light of the Constitution.

Apart from the above contentions made based on clear constitutional and legislative provisions, the broad interpretation of the delegated legislation by the CCI and the Cassation Division does not also seem to be compatible with the spirit of the Constitution. There are principles and values that are incorporated under our Constitution that provide an implied limit on the exercise of power by each organs of the government. Of which, the rule of law and separation of powers are very important.[70] Accordingly, let alone in our country where there is constitutional supremacy, there is an established presumption in the UK, where the Parliament is absolutely supreme, that the legislature intends to legislate in line with the rule of law.[71] There is no legal or moral justification that impedes the CCI and the Cassation Division from operating on the basis of a presumption that the HPR, while delegating its power to the executive, intends to be consistent with the rule of law; for the rule of law is a founding principle that our Constitution aspires to uphold.

Thus, in the absence of clear legislative authorization, it is contrary to the intended scope of delegation by the legislature [thus the rule of law] for the

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[69] The FDRE Constitution, cited above at note 32, Art.78 (4). When Art. 37 (1) of the Constitution says "… any other competent body with judicial power", the competence of such bodies is to be decided only if reference is made to Art.78 (4) of the Constitution i.e., such bodies need to follow certain legally prescribed procedures.

[70] The two principles are essential values of our Constitution, a reading of the preamble, the recognition/protection of human rights and their entrenchment (as revealed in their stringent amendment procedure), the supremacy of the Constitution, and the establishment independent judiciary is some indications that the rule of law is our constitutional value. The structure of the Constitution which provides the three organs with different powers also shows that separation of powers is duly recognized by our Constitution.

[71] D. E. Edlin, "A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States", the American Journal Of Comparative Law, vol. 57, (2009), p.68

executive to issue a regulation that limits judicial power and makes the right to reinstatement non-justiciable. This is true because the rule of law requires the recognition of basic rights together with an independent tribunal capable of giving redress to violation of rights by government organs. However, this does not mean that, had the intention to exclude judicial power been made clear in the parent legislation or is made by the legislature itself, the exclusion would have been constitutional. Such statutory exclusion of judicial review by itself would inevitably be contestable.

Furthermore, it is a generally held view that the executive has no power to act in derogation of fundamental principles and rights; and more so when it is done without explicit legislative authorization.[72] This argument is forwarded from the perspective of the doctrine of separation of powers. In this regard, the German Constitutional Court has established an important doctrine which says "it is unconstitutional for the legislature to delegate its legislative authority in crucial principles to Federal Ministers, in particular, where the rights protected by the Basic Law are at issue".[73] If we see the Regulation in this connection, not only does it encroach upon judicial powers, but also puts the fundamental right of access to courts of every person in jeopardy. What is important to remember here is that the fact that the executive is authorized by the legislature to act in derogation of fundamental rights and judicial power (which the CCI believes to be the case) is not always constitutionally valid for the legislative authorization itself may run contrary to the Constitution of the FDRE.[74]

The Constitution in fact allows the legislature to delegate some of its powers to the CoM.[75] Nevertheless, this shall not be construed in such a way that the legislature is would be at liberty to delegate the whole regime of its power whenever it wishes. In a constitutional system which appeals to the rule of law

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[72] E. V. Rostow, "the Democratic Character of Judicial Review", Harvard Law Review, vol. 66 no. 2 (2003), p.199.

[72] B. Neuborne, "Judicial Review and Separation of Powers in France and the United States", New York University Law Review, vol.57 no.3, (1982), p.420.

[73] E. Brandet, cited above at note 5, p.282.

[74] It is in this regard that the CCI could have played a role of upholding the supremacy of the Constitution. It could have, for instance, question whether the legislature can delegate the power with contents having negative implications on human rights and judicial power. Unfortunately however, the CCI firmly ruled that "…, it [HPR] can adopt any type of policy choice from among available alternatives when issuing legislation . To decide whether or not the adopted law is appropriate is *not the mandate of the Council*", see Ashenafi Amare *et al* v Ethiopian Revenue and Customs Authority, cited above at note 30

[75] The FDRE Constitution, cited above at note 32.

and separation of powers, delegating all or core legislative powers to the executive is aggrandizing the power of the later and may amount to unreasonably putting the HPR in an inferior position though it is constitutionally declared to be the highest organ of state. Thus, it would be within the appropriate mandate of the CCI, subject to approval by the HoF,[76] to provide a limit on the possible areas where legislative power can or cannot be delegated.

Rights recognized by the Constitution or other laws are not always absolute and are subject to lawful restrictions, often called limitation of rights.[77] The rights may be subject to limitation for the better utilization of other rights or to achieve a greater social good. However, the problem is the way the limitation is imposed and when the limitation becomes irrational. Such problems are exacerbated when a constitution does not contain basic standards prescribing how fundamental rights might be justifiably limited or in other words when constitutions do not have a "general limitation clause."[78]

There are jurisdictions that provide general limitation clause so that rights will not be unreasonably suspended, restricted, or derogated. The Constitution of the Republic of South Africa is illustrative in this regard as any limitation on the exercise of fundamental rights should be made to the extent it is reasonable and justifiable in an open democratic society based on human dignity, equality, and freedom and based on consideration of other relevant facts.[79]

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[76] The CCI can only give recommendation when it finds constitutional interpretation of a given matter is necessary. See the FDRE Constitution and the CCI establishment Proclamation, cited above at note 49, Art.84 (1) and Art.6 (1) respectively. In the interview the author made with Dr. Fasil Nahom (member of the CCI) in July 11, 2011, regarding the acceptability of recommendations given by the CCI to the HoF on constitutional interpretation, the respondent stated that "it is hardly sound to think that there is high likely that recommendations by the CCI may be rejected by the HoF; it is rather more sound to think the other way round." See Yemane, cited above at note 29, for detail on this.

[77] Limitations are "lawful infringement of rights" also called "justifiable violations" which are imposed on the exercise of certain rights for some policy and practical reasons. The limitations may take many forms such as suspension, restriction, or derogations. See Tsegaye Regassa, "Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia", Mizan Law Review, vol.3 no.2 (2009), pp.313-314.

[78] Id, p.314, general limitation clauses are "limits to limitations" that requires the fulfillment of certain prescribed standards before exercising the power to limit rights.

[79] Constitution of the Republic of South Africa (1996), Section 36, in this section the Constitution provides that limitation on rights can only be exercised by taking in to account the extent of the right to be limited, the importance of the purpose of limitation, the nature and

To say a little bit more on the decision of the CCI, it would be useful to reproduce in Amharic for the sake of clarity a crucial part of the decision which has been quoted above. . The CCI, in explaining its reasoning behind the decision states;

> "ሕግ በማውጣት ከፍተኛ የመንግስት አካል የህዝብ ተወካዮች ም/ቤት ነው፡፡ ይህ ም/ቤት ሕገ-መንግስቱ በሰጠው የስልጣን ክልል ውስጥ አስፈላጊ ነው ብሎ ያመነውን ማንኛውንም ነገር የማድረግ ከፍተኛ ስልጣን አለው፡፡ ምን ዓይነት ሕግ ነው የሚከተለው የሚለውን የመወሰን ስልጣን የህዝብ ተወካዮች ም/ቤት ሀላፊነት ነው፡፡ የሕገ መንግስቱ ድንበር እስካላለፈ ድረስ ብዙ አማራጮች ሊኖሩት ይችላሉ፡፡ ከነሱ መካከል አንዱን ወስዶ ተግባራዊ ቢያደርግ ተግባራዊ የተደረገው ሕግ ትክክል ነው አይደለም የሚለውን ነገር መፈተሽ የጉባኤው [ሕገ መንግስት አጣሪ ጉባኤ] ስልጣን አይደለም፡፡"[80]

If one reads the above paragraph in light of the main constitutional values canvassed elsewhere above, two important issues arise. First, where is the constitutional limit on the power of the legislature? When is it possible to say that the legislature (HPR) has exceeded its constitutional limit while issuing legislation ? This was the central issue that the CCI ought to have addressed in the case. Second, if deciding on the constitutional appropriateness of a law adopted by the legislature is not the mandate of the CCI, who can exercise this function? This is a very strange statement forwarded by a body with a power of constitutional adjudication and[81] established to ensure that all branches of the government uphold the supremacy of the Constitution.

According to the comparative jurisprudence on constitutional adjudication, one of the core issues to be addressed by a constitutional adjudicator in relation to legislation that limit or remove rights is whether or not there are other or better approaches that could have been adopted by a legislature which are less restrictive of rights when compared with the legislation under review. Legislatures are expected to employ less restrictive means to achieve the

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extent of the limitation, the relation between the limitation and the purpose, and less restrictive means to achieve the purpose.

[80] Ashenafi Amare *et al* v the Ethiopian Revenues and Customs Authority, cited above at note 30, as quoted in note 55.

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

objectives that the laws are designed to attain.[82] However, it is contrary to the rule of law to give the legislature a blank cheque to adopt any means of limiting fundamental rights and excluding judicial review. The CCI therefore failed to make a delicate balance between the two competing interests, which are the interest of ensuring the right to access to justice of employees of the authority and providing an expedient way of fighting corruption within the Authority.

Although there is no clear constitutional limitation on the power of the legislature to limit rights, such as the less restrictive means doctrine, the CCI should have relied on those implied limitations that our Constitution enshrined of which the rule of law is one. In this connection, it is said that if the constitution is to be the highest law, a law that controls state actions, its interpretations must be constrained by the rule of law.[83] Apart from the implied constitutional standards, the CCI should have also resorted to International Human Rights Instruments and Conventions that Ethiopia has adopted for they also serve as a guideline in interpreting the human rights provisions of the Constitution.[84] However, the stand of CCI seems to be that the legislature has no duty to see and choose better solutions from the available alternatives while limiting rights. This may go against the rule of law and normative values enshrined in the FDRE Constitution, because the rule of law can better be ensured if all government organs strive to employ better policy options that cause the least damage to the enjoyment of fundamental rights.

7. Conclusion

In general, the author contends, not only the Regulation is beyond scope of delegation intended by the legislature, but also lacks constitutional basis. There is no constitutional or legislative authority for the executive to deny or grant jurisdiction to courts of law. The Regulation cannot also be justified by

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[82] If limitations on fundamental rights are to be legitimate, such limitations must achieve a benefit that is proportional to the costs of the limitation. However, if there are less restrictive, but equally effective, alternative other than the chosen methods exist to achieve the purpose of the limitation, the limitation is not proportionate. This standard is widely used by the South African Constitutional Court. See for additional J. De Waal, I. Currie, and G. Erasmus, the Bill of Rights Handbook, (4th ed., 2001), pp.144-162

[83] R. Post, "Theories of Constitutional Interpretation", Special Issue: Law and the Order of Culture, vol.30, (1990), p.19

[84] The FDRE Constitution, cited above at note 32, Art.13 (2)

delegation of the lawmaker. This is so because the lawmaker cannot delegate its powers contrary to the Constitution. Any such delegation would be illegitimate and void. Arguably, the Parliament may limit judicial power but this power is subject to constitutional restrictions. The legislature, though constitutionally declared to be the highest organ is subject to constitutional supremacy. Thus, to argue that the legislature can issue or/and delegate any law that limits or removes judicial power and rights of individuals as it deems necessary without providing the corollary limitations on such power seems to be far beyond the very spirit and intent of our constitution.

The core source of the problem is the absence of standards and an oversight on part of the House of Peoples Representatives while delegating its legislative powers. There are laws issued by the executive in Ethiopia but many of them are not required by the parliament to comply with certain prescribed legislative standards. Absence of an administrative procedure code may also be another factor. This is because, had an administrative procedure code been issued, it would be less difficult to control administrative decisions and acts both by the Parliament and the judiciary through oversight and judicial scrutiny of the agencies' compliance with the procedure code.

However, the absence of standards cannot be invoked as a defense of the reactance of courts in reviewing the acts of the executive carried out on the basis of delegated authority. The government may have its own policy reasons that justify the promulgation of laws that impose restrictions on judicial power and on the enjoyment of certain rights. However, the judiciary should not endorse such policies without scrutinizing their implication for rule of law and the integrity of the overall constitutional order of the country. This is because in a system where the rule of law is constitutionally established, rights should not be subjected to limitations to achieve the momentary policy ends of a government and citizens should not required to be instruments of government policy that unduly burdens their basic rights and freedoms.[85]

Thus, unrestricted delegation of legislative power and the absence of a strong parliamentary oversight coupled as well as the judicial reluctance to overrule executive acts issued in excess of the power delegated to the executive are the main sources of unconstrained executive discretion which is ultimately a threat to the rule of law. Looking at the Regulation, decisions of the CCI and the

[85] F. A. Hayek, "Freedom and the Rule of Law", in R. Bellamy (ed.), The Rule of Law and Separation of Powers, (2005), pp.148-151

Cassation Division discussed above, employees of the Authority are left with the absolutely unfettered and arbitrary power of the Authority that is contrary to the Constitution, and violates their constitutionally guaranteed rights.[86]

[86] According to the official Newspaper of the Authority, 75 employees are dismissed at a time in the 2010/11 budget year by the Director General and are left with no remedy for possible abuse of power. Egna Legna, an internal Newspaper of the Ethiopian Revenues and Customs Authority, vol.3 No.1, July 2011, p.4