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**THE NEED TO ESTABLISH CONSTITUTIONAL COURT: ITS
APPROPRIATENESS FOR THE PROTECTION OF HUMAN
RIGHTS IN ETHIOPIA.**

BY GIRMA GELETA

MAY 2021

ADDIS ABABA, ETHIOPIA

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**A THESIS SUBMITTED TO SCHOOL OF LAW, ADDIS
ABABAUNIVERSITY, IN PARTIAL FULFILLMENT OF THE
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IN HUMAN RIGHTS LAW**

**ADDIS ABABA UNIVERSITY
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SCHOOL OF LAW**

MAY 2021

ADDIS ABABA, ETHIOPIA

Declaration

I, undersigned graduate student, hereby declare that this work is original and has not been presented before any other institution. Besides, every source used or quoted in this work has duly been acknowledged with a proper citation.

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Lists of Abbreviations and Acronyms

ACHPR:	African Charter on Human and Peoples' Rights/ African Commission on African Charter on Human and Peoples' Rights, as the case may be.
CC:	Constitutional Court
CCI:	Council of Constitutional Inquiry
CoM:	Federal Democratic Republic of Ethiopian Government's Council of Ministers
FDRE:	Federal Democratic Republic of Ethiopia
HoF:	House of Federation of Federal Democratic Republic Government of Ethiopia
HPR:	House of Peoples' Representatives of Federal Democratic Republic Government of Ethiopia
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
MoJ:	Ministry of Justice
NNP:	Nation, Nationalities and Peoples' of Ethiopia
OP:	First Optional Protocol to International Covenant on Economic, Social and Cultural Rights
PDRE:	Peoples' Democratic Republic of Ethiopia
SER:	Socio-Economic Rights

Abstract

In 21st Century human rights are at the center-stage of everything. They advocate for constitutional and democratic government. In so as to protect and enforce human rights, the government powers should constitutionally be limited. To this effect, there should be constitutional adjudicating body supervising the government powers in line with constitutionally pre-set limitations with a view to ensure protection and enforcement of human rights. Put differently, protection and enforcement of human rights presuppose on the existence of strong and independent constitutional adjudicator. The latter entertains constitutional adjudications and review legislations and decisions so as to make certain that human rights are getting protection and enforcement. In case when they are not, it takes remedial actions. In Ethiopia, human rights to review legislations and entertaining constitutional adjudications. Conversely, constitutionally are not getting protection and enforcement as a result of institutional inappropriateness and functional unsuitability of CCI/HoF, constitutional adjudicatory body, in carrying out its function guaranteed human rights should able to get protection and enforcement they need to be enjoyed by the right-holders. Constitutional rights' contents and scopes should better be determined and specified to courts, litigants and individuals. Besides, constitutional review should be carried out properly. In this regard, CCI/HoF has not been discharging its function properly which in turn is affecting the protection of human rights in Ethiopia. Therefore, the researcher argues that Ethiopia should promptly establish Constitutional Court with a view to give protection and effective enforcement to fundamental human rights.

Key words: human rights, constitutional court, constitutional review, constitutional interpretation.

CHAPTER ONE: INTRODUCTION

1.1. Background of the Study

A written constitution is generally intended to have legally binding effects on members of a given society and on political processes like elections, legislative procedure and enforcement of laws.¹ If a constitution is intended to be binding there must be some mechanism of enforcing it by way of determining when act or decision is contrary to the constitution and providing remedy for those whose rights are affected by the act or decision. This process is called 'constitutional review'.² Constitutional court (sometimes called a 'constitutional tribunal/council') is a special type of court that exercises the power of constitutional review.³

Constitutional Court (CC) is a separate body that serves as a watchdog of the supremacy of the constitution in a given country, and as a protector of the constitutionality, legality, and the citizens' freedoms and rights within the national constitutional framework.⁴ The prime purpose of the constitutional body is to ensure the supremacy of the constitution.⁵ To this end, its role is to review laws, and usually also executive acts and decisions, to decide whether they are constitutionally valid and provide a remedy in cases where they are not. It exercises this power exclusively: no other court or body can engage in constitutional review.⁶ CC was first created in Europe in Austria in 1919 being the first ever CC that appeared in the world.⁷ European CCs

¹ Andrew Harding, 'The Fundamentals of Constitutional Courts' (April 2017), International IDEA, Constitutional Brief. P. 1

² Ibid

³ Ibid

⁴ Karakamisheva- Jovanovska, 'Different Models for Protection of Constitutionality, Legality and Independence of Constitutional Court of the Republic of Macedonia', (2010), p. 1. Available online at: www.venice.coe.int accessed on 30th August 2020.

⁵ Anca-Florina Morostes and Narcisa-Miahela Stoicu, 'Constitutional Justice' (2017), Journal of Legal Studies Volume 19 p 135 Available online at: www.publicatii.uvvg.ro/index.php/jls

⁶ Harding Supra notes 1 ibid

⁷ Constitutional Court-Wikipedia; available online at: <http://en.m.wikipedia.org/wiki/Constitutional-court> assessed on 30th August 2020

were created to ensure governance under the rule of law.⁸ Constitution is the supreme law of the land, such incorporation of human rights provisions help to entrench human rights. As a result, human rights are granted not only a higher but also a foundational position in the legal system.⁹

The supremacy clause of the constitution is a shorthand expression of the fact that constitutional principles are sources of ‘an objective normative value system, a set of values that must be respected’¹⁰ whenever laws are passed, interpreted or applied, and decisions are made or actions are taken.¹¹ It is apparent that, the practice of constitutionalism ensures a limit on the power of the government so that the fundamental rights of citizens are protected or enforced effectively. This is because constitutionalism requires, apart from legalization, the process, and institutional structure.¹² The process reflects the act of the government safeguarding fundamental rights and freedoms.¹³ There should be well-designed and better fitted institutional framework to this end. Constitutionalism denotes not only the division of power among branches of government but also envisages checks and balances and putting the power of the legislature and the executive under some restraints and not making them uncontrolled and arbitrary.¹⁴ To this effect, there are two major models of constitutional review, namely, decentralized and centralized models. Ethiopia follows the centralized model.

⁸ Herman Schwartz, ‘The New East European Constitutional Courts’ (1992), Michigan Journal of International Law Volume 13. P. 742 Available online at: <https://repository.law.umich.edu/mjil/vol13/iss4/1>

⁹ Tsegaye Regassa, ‘Making Legal Sense of Human Rights: the Judicial Role in Protecting Human Rights in Ethiopia’, (2009), Mizan Law Review, at p. 307.

¹⁰ I. Currie and J. de Waal, ‘Application of the Bill of Rights’, in I. Currie and J. de Waal (eds.), The Bill of Rights Handbook, 5th edn, (2005), Juta and Company, at p. 32.

¹¹ Takele Seboka, ‘Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory’ in Assefa Fiseha and Getachew Assefa (eds.) Institutionalizing Constitutionalism and Rule of Law: Towards Constitutional Practice in Ethiopia, (2010), Ethiopian Constitutional Law Series, Vol. III at p. 102

¹² Rizine R. Mzikamanda, ‘Constitutionalism and Judiciary: A Perspective from South Africa’, available at www.justice.org.za/.../constitutionalism-and-judiciary-mzikamanda accessed on 31st August 2020

¹³ Livinus I. UZOUKWU, ‘Constitutionalism, Human Rights and the Judiciary in Nigeria’, (2010), Submitted for the Requirement of Degree of Doctor of Laws, University of South Africa as cited by Zerihun Supra notes 22

¹⁴ M.P. Jain, ‘Indian Constitutional Law’, (4th ed. 2002), Nagpur: Wadhwa and Company Law Publishers, at 836.

Therefore, this study focuses on the current institutional arrangement for constitutional review and interpretation and its effect on the protection of human rights. To this effect, the study is divided into two major parts: first it discussed legal and institutional practices of HoF/CCI in conducting constitutional review and constitutional adjudications on one hand and its effect on the protection of human rights on the other hand. The second part dealt with the need to rearrange the existing institutional arrangement in a bid to provide human rights a strong protection and enforcement. Thus, it links CC and effective protection and enforcement of human rights to that end.

1.2. Research Problem

FDRE Constitution guarantees extensive lists of human rights in conformity with international human rights laws. Those guaranteed human rights should be protected and enforced at any cost by independent constitutional adjudicator body, having no interest from the outcome of the matter. Nonetheless, in Ethiopia, HoF, a parliamentary political organ that represents the political interests of ethnic groups, is mandated to interpret the constitution.¹⁵ The question, however, is whether the existing institution is strong and competent institutions to protect and enforce human rights.¹⁶

Despite the fact that the list of enumerated fundamental rights and freedoms in the FDRE Constitution is progressive and impressive,¹⁷ only little attention has been paid to protect and enforce these rights. In its capacity as a constitutional adjudicatory body, CCI/HoF has not able to determine the contents and scopes of the constitutional rights. Most constitutionally guaranteed human rights left indeterminate for the fact that they have never been interpreted to the extent they ought to be. Due to its limitative approach in both constitutional interpretation

¹⁵ C. Mgbako et al., 'Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and Its Impact on Human Rights', (2008), *Fordham International Law Journal Volume 32 Issue 1* at p. 259.

¹⁶ Minasse Haile, 'Comparing Human Rights in Two Ethiopian Constitutions: The Emperor's and the "Republic's"-Cucullus Non Facit Monachum', (2005) *Cardozo Journal of International Law & Comparative Law*. Volume 13 Issue 1, at pp. 30-32 (Emphasis added)

¹⁷ See Rakeb Messele, 'Enforcement of Human Rights In Ethiopia' (2002), Online *available at* <http://www.apapeth.org/Docs/ENFORCEMENT%20F%20HR.pdf>

and constitutional review Ethiopia does not have enormous constitutional jurisprudence. From 1995 to (April) 2018 only 37 constitutional human rights cases needing constitutional interpretation have been decided by CCI.¹⁸

In many of its decisions, it practically failed to uphold the sanctity of human rights.¹⁹ Federal courts proclamation No. 25/96, urban lease holding proclamation No. 721/2011, expropriation of land holding for public purpose and payment of compensation proclamation No. 455/2005, property mortgaged or pledged with banks proclamation No. 97/1998 and consolidation of the house of the federation and definition of its powers and responsibilities proclamation No. 251/2001 are some of laws enacted either by HPR or CoM, by way of delegation, that are incompatible with human rights and should have been declared null and void to the extent they are incongruent with the constitution.

The recent decision of the CCI/house to interpret the constitution to extend the 6th general election as a result of Covid19, which in effect extended the constitutional term-limits of the political wings of federal and regional governments, was arguably unconstitutional because of: first, according to textual interpretation, constitutional interpretation is warranted when there is ambiguity, vagueness, unclear meaning/provision in the constitution. Thus, there is no need for constitutional interpretation when the constitutional provision is clear, unambiguous and not vague. In this regard, the constitution is clear enough that parliamentary election should be conducted each five years no matter what. It does not envisage the possibility of postponing election like due to civil/international war and pandemic disease. Under such circumstance what should have done was amending the constitution, not interpreting the clear provision of the constitution. Second, the decision, under the pretext of interpretation, was in effect tantamount to the amendment of Articles 54, 67(2) and 72(3) of the FDRE Constitution. Third, it eroded the

¹⁸ See Secretariat of CCI, Recommendations of CCI, Journal of Constitutional Issues, (2018), Volume 1(1). They are: 17 property rights cases, 2 family cases, 7 access to justice cases, 4 women right cases, 2 equality right cases, 2 children right cases, 2 SERs cases and 1 supremacy of the constitution case.

¹⁹ See Ashenafi Amare et al vs. ERCA, CCI, decision on Yekatit1, 2002. See also *Coalition for Unity and Democracy v Prime Minister Meles Zenawi*, CCI, 14th June 2005; See also Sisay Alemahu, 'the Justiciability of Human Rights in Ethiopia', (2008), African Human Rights Journal Volume 8 at pp. 279-283.

notion of federalism. Finally, it suppressed constitutional right to (periodic) election which is five years per Article 38 cumulative with 54 of the same.

Thus, the researcher has done its assessment as to whether or not the house/CCI is competent and strong enough to enforce and protect human rights; whether or not there is a legal and institutional limitation in carrying out constitutional review and constitutional interpretation and whether or not there should institutional and functional rearrangement to that end.

1.3. Objectives of the Study

The thesis has two objectives: the general and specific objectives.

1.3.1. General Objectives

The general objective of the study is ascertaining whether or not the HoF/CCI is effectively and efficiently discharging its constitutionally entrusted power to interpret the constitution and constitutional review of legislations by way of giving protection to rights. This is done with a view to show the in/appropriateness of the house for the protection and enforcement of human rights.

1.3.2. Specific Objectives

The specific objectives of this study are:

- Ascertaining out the reason for/evaluating (under)performance of the HoF in protecting human rights in Ethiopia.
- Showing why CC is appropriate for the protection and enforcement of human rights in Ethiopia.
- Appraising the possible challenges to be encountered in establishing CC in Ethiopia.
- Finding out justifications why CC should interpret the constitution in a view to protect and enforce human rights in Ethiopia.

1.4. Research Questions

The research questions considered in this thesis are:

1. What are the performances of the HoF as a constitutional interpreting body in terms of protection of human rights?
2. What makes Constitutional Court appropriate for human rights protection in Ethiopia and why does its establishment matter?
3. What are the possible challenges to the establishment of Constitutional Court in Ethiopia?
4. What makes Constitutional Court appropriate for interpreting constitution from human rights viewpoint?

1.5. Review of Related Literatures

The following scholars have done their researches on the importance and the role of constitutional review in upholding the protection of human rights and the role of judiciary thereto: Adem,²⁰ Zerihun,²¹ Yonatan²² and Takele.²³ To begin with Adem, he argues that the constitutional review system in Ethiopia has already failed and the main reason for such is the fact that the power of constitutional review is granted the HoF, Upper chamber of the parliament.²⁴ In his view, independent constitutional adjudicators serve the foremost safeguard for human rights.²⁵ Accordingly, he puts that the constitution should be overhauled to grant the

²⁰ Adem Kassie Abebe, 'The Potential Role Constitutional Review in the Realization of Human Rights In Ethiopia', (2012), A Dissertation Submitted in the Partial Fulfillment of the Requirements for the Degree Doctor Legum (LLD), University of Pretoria, South Africa

²¹ Zerihun Geleta Yimer, 'Jurisdictional Quandary between the House of Federation and Courts in Ethiopia', (2018), World Conference on Social Science, University of Graz, Budapest, Hungary

²² Yonatan Tesfaye Fisseha, 'Who Interprets the Constitution: A Descriptive and Normative Discourse on Ethiopian Approach To Constitutional Review', (2004), A Dissertation Submitted to the Faculty of Law of the University of Pretoria, In Partial Fulfillment of the Requirements for the Degree of Masters of Law (LLM Human Rights And Democratization In Africa)

²³ Takele Supra notes 11

²⁴ Adem Supra notes 20 at p. vi

²⁵ Ibid at p. vi

power of constitutional review to an independent adjudicator.²⁶ To this end, he proposed that Ethiopia should either establish a new constitutional court or empower the Supreme Court as the only and a final constitutional arbitrator.²⁷

Apart from suggesting that either CC be established or Supreme Court be empowered, Adem has not specified which institution is appropriate and the reasons thereof. In his dissertation, he has not paid attention to why CC should exclusively be given the power to interpret the constitution and conduct constitutional review. Nor has he showed how CC should operate. He simply listed them as alternatives. His concern was not on the institutional appropriateness. Rather, it was on the function of constitutional review in protecting human rights in Ethiopia.

On the other hand, Yonatan argues that ordinary courts should be given the power to interpret the constitution, with final and binding decision on the matter exclusively be retained by the council.²⁸ According to him, Ethiopia should follow the decentralized model of constitutional review with some exceptions.

The argument that ordinary courts should be empowered to interpret the constitution stems from misunderstanding of Ethiopian legal history. They were dependent on and obliged to act in accordance with executive's order. Currently, despite the fact that their independence is constitutionally guaranteed under the FDRE Constitution, functionally they are far from being independent. Yet, they have not got the independency the need to function properly. Their functions are depending on the executive willingness. Thus, practically our courts do not have individual and institutional independency to act as a custodian of human rights. The cases of high political figures such as Abdi Regassa, Eskindir Nega, Jawar Mohammed, Bekele Gerba and Lidetu Ayalew et al, are some exemplary recent cases. Besides, our courts historically have always had connection with the regime in power. Thus, they have a bad public image.

In many countries including Germany and South Africa one their main reasons behind establishing CC was to create new constitutional order/ideals protected by it because they did not

²⁶ Ibid at p. vii

²⁷ Ibid at p. 233

²⁸ Yonatan Supra notes 22 at p. 49

trust their domestic courts due to their association with past regimes. Their domestic courts were part of the regime that committed heinous crimes. In many European countries, centralized judicial review model was adopted as one of the democratizing measures following a period of authoritarian rule for the reason the existing courts were unable to offer adequate guarantees of structural independency and intellectual assertiveness.²⁹ Thus, empowering those courts for constitutional review and interpretation would amount extension of that past regime to now.

Our courts have not been able to stop the political branches when they grossly violated human rights. Thus, there is no reason why we should trust them to conduct constitutional reviewing and interpretation. They do not want to engage in the constitutional adjudication. They generally tend to avoid adjudicating cases based on constitutional provisions (including the ones on human rights) even where such provisions are invoked and are relevant.³⁰ Constitution, being both political and legal document, needs an institution that capable to exercise both. Additionally, most of our judges are not constitutional experts. They do not possess necessary skills and knowledge in the area of constitutional law. Without equipping the latter how could they be empowered to interpret and review the constitutionality of laws and actions of government? Moreover, there are also infrastructures inadequacies. Therefore, judiciary should not be empowered to interpret and review the constitutionality of laws and executive actions.

On the other hand, Zerihun argues that in any country enforcement of human rights requires an institution, which should not have an interest in the outcome of the case.³¹ Corollary, given HoF is a political body, it should not have been given the power to interpret the constitution; thus, CC should be established, he concludes. He has not discussed about controlling constitutionality of laws. He left out the relevancy of constitutional review in protection of human rights and who should do it. As Adem, he has not discussed things that make CC appropriate, how should it function, what must first be done so as to establish it, whether there are opportunities to that end and the challenges that could be faced in establishing CC. Finally, he has not showed the casual

²⁹ Lech Garlicki, 'Constitutional Courts versus Supreme Courts', (2007), International Journal of Constitutional Law Volume 5 at p. 45

³⁰ Sisay Supra notes 19 at pp. 278-79. See also Tsegaye Supra notes 9 at p. 327

³¹ Zerihun Supra notes 21 at p. 84

relationship between CC and protection and enforcement of human rights, apart from such suggestion.

Takele on the other hand argues that courts have constitutionally been given the power to interpret the constitution in so as to adjudicate ‘constitutional disputes’³² and disapply laws incongruent with the constitution.³³ To this effect, he puts that CCI and HoF are not adjudicatory bodies, only exercising quasi-judicial powers constitutionally ceded to them and exercisable exceptionally when the constitutionality of law is at issue.³⁴ According to him, although the power to rule on the constitutionality of law is the power of CCI/HoF, the power to interpret the constitution is given to courts because it is a daily duty of courts³⁵ to do so in so as to adjudicate constitutional dispute and in so doing, they have constitutional mandate to disapply law that violates/incongruent with the constitution. It is via this means that courts exercise their constitutional duty, as enshrined in Article 13(1) of the constitution.³⁶

Although it is true that courts have given the constitutional mandate to ‘respect and enforce’ the constitution this by any means does not mean that they have shared power to interpret the constitution, which is exclusively given to the CCI/HoF. In contrast to the view of Takele, Article 83 of the constitution talks about issue constitutional review. In this regard, the writer agrees with Yonatan.³⁷ The role of courts in the enforcement of the constitution in general and bill of human rights in particular, per FDRE Constitution, are, firstly, they should directly apply the constitutional provisions that need no interpretation. Secondly, they should refer the case to the

³² Takele contends that the phrase ‘constitutional dispute’ must be taken as constitutional interpretation. Otherwise, it would go against Article 78 of the constitution. See, Takele Supra notes 11 at 111-112.

³³ Ibid at 123

³⁴ Ibid at 117

³⁵ This position is also maintained by Tsegaye Regassa in his ‘Courts and Human Rights in Ethiopia’ in *Assefa Fisseha (ed.) Proceedings of the Symposium on the role of Courts in the enforcement of the constitution*, (2000), p. 116.

³⁶ Assefa Fisseha also argues that courts have the constitutional power to interpret the constitution. For further, See *Assefa Fisseha, ‘Constitutional Interpretation: the Respective role of courts and House of Federation’, in Assefa Fisseha (ed.) Proceedings of the Symposium on the role of Courts in the enforcement of the constitution*, (2000), p.14

³⁷ See Yonatan Supra notes 22 at p. 12

CCI for interpretation or rule on constitutionality, should they believe it warrant. This at first glance involves interpretation but it is not authoritative. Such interpretation is not to determine the content, scope and meaning of the constitutional rights rather it is to determine whether there is a need/cause to interpret by the CCI/HoF. And finally, they should follow and implement the decisions of CCI/HoF regarding constitutional interpretation and rule on constitutionality of acts of the government. Thus, the argument that courts have constitutional power to interpret the constitution is based on wrong premises and it also goes against the constitution itself as it violates principle of separation of power.

Generally, abovementioned researches and articles have been written on the importance of constitutional review in protecting human rights and who should do it. They all are inadequately studied and not full-fledged works. They failed to show the link between CC and human rights protection, things that necessitate the establishment of CC and make it appropriate, opportunities and challenges to that end and finally, justification for institutional appropriateness of CC in carrying out constitutional interpretation and constitutional review so as to protect and enforce human rights. Thus, this research fills the gaps and explores possible solutions thereto.

1.6. Research Method

The thesis is of doctrinal legal research in type and qualitative in approach. Hence, legal rules and practical analysis are made in regard to Ethiopian model to constitutional review and construction. The thesis investigates why CCI/house's power to constitutional interpretation and review is not suit for the protection and enforcement of human rights.

1.6.1. Type of Sources

The research has used both primary and secondary data sources. Hence, national legislations related with human rights including the constitution, CCI proclamation No. 798/2013, Consolidation of the HoF and definition of its powers and responsibilities proclamation No. 251/2001 and international human rights instruments, their jurisprudences, human rights' cases decided by the house/CCI have been used as primary sources of data. With respect to the secondary source, books, articles, internet sources, journals, research materials/findings and conference papers have been used.

1.7. Scope of the Study

The thesis has limited itself to discuss why CC should be established from human rights protection viewpoint. Hence, the thesis delimits itself to the role of CC in the protection of human rights and reasons that necessitate its establishment in Ethiopia.

1.8. Significance of the Study

The study has significance in explaining why Ethiopia should establish CC. It also provides the overall functions of CC in protecting and enforcing human rights, its structure, composition and tenure of judges. By so doing it contributes to the protection human rights. Further, it explains the appropriateness of CC in human rights protection and constitutional democracy in Ethiopia. Furthermore, it provides stakeholders all necessary information about CC and its functions to help them in decision making process. Finally, it contributes to academic debates and serves as an initial base for prospect human rights researchers and NGO's/CSOs.

1.9. Limitation of the Study

Due to the Covid19 pandemic, it was difficult to move freely and gather data comfortably. It has been easy to feel free and concentrate on the study. Time and resources have also been encountered.

1.10. Organizational Structure of the Study

The thesis is organized into four chapters. The first chapter is the introductory part of the thesis dealing with background of the study, statement of the problem, review of literatures; scope of the study, research questions, objectives, significance and limitations.

The second chapter presents the theoretical and conceptual frameworks of constitutional review, counter-majoritarian problem; models of constitutional review, separation of power versus constitutional review, the interface and interplay between constitutional review and human rights, the co-relationship between democracy, rule of law and CC, constitutional review in Ethiopian legal system and organizational structure of the CC: comparative perspective.

The third chapter is devoted to revealing the shortcomings of the current arrangement and the need for the establishment of CC in Ethiopia, the role of CC in the protection of human rights in Ethiopia, the mechanisms in which CC protects and enforces human rights, setting jurisdiction between the CC and the ordinary courts of Ethiopia, the legitimacy question, the prospects and challenges in establishing CC in Ethiopia and lessons to be taken from the South Africa.

The final chapter is wrapped up by forwarding the conclusion and implication.

CHAPTER TWO: CONSTITUTIONAL REVIEW: THEORETICAL AND CONCEPTUAL FRAMEWORKS

Introduction

Ginsburg and Versteeg define constitutional review as a formal power of local court or court-like body to set aside or strike legislation for incompatibility with national legislation.³⁸ Likewise, Yonatan defines constitutional review as the power to determine the constitutionality and the validity of the acts of the legislature.³⁹

Constitutional review evolved in 1920 when Austrian legal scholar and theorist Hans Kelsen invented constitutional court.⁴⁰ He stated that CCs are specialized courts with ‘authority to adjudicate question of constitutional interpretation or to review legislation’ and that are separate from the judiciary system.⁴¹ In his view, ordinary judges are servants of the law, and their task is limited to interpreting and applying it. Judges are not empowered to make law, nor could they properly determine the constitutionality of legislation.⁴² He therefore postulated that, the CCs must conduct constitutional review so as to protect the supremacy of the constitution. To this end, he noted, they ought to act as a ‘negative-legislator’-that is authorized to annul or terminate the laws or some of their parts that are not in accordance with the supreme legal act.⁴³

Judicial review was emerged in America in 1803 in a famous case between Marbury and Madison.⁴⁴ Judicial review is carried out by ordinary courts while entertaining cases and their decisions have no erga omnes effect, but interparty effect. Judicial review is essentially natural function of the judicial department.⁴⁵ Thus, there is no specific court or tribunal with

³⁸ Tom Ginsburg and Mila Versteeg, ‘Why Do Countries Adopt Constitutional Review?’, (2012), at p. 4

³⁹ Yonatan Supra notes 22 at 6

⁴⁰ Ginsburg and Versteeg Supra notes 38 at 12

⁴¹ Andrew Harding et al, ‘Constitutional Courts: Forms, Functions and Practices in Comparative Perspective’ in Andrew Harding and Peter Leyland (eds.) *Constitutional Courts: A Comparative Study* (2009).

⁴² Ginsburg and Versteeg Supra notes 38 ibid

⁴³ Jovanovska Supra notes 4 at 3

⁴⁴ *Marbury v Madison*, 5 US 137(1803)

⁴⁵ Gustavo Fernandez de Andrade, ‘Essay: Comparative Law: Judicial Review’, (2001), *Journal of Constitutional Law* Volume 3at p. 979

monopolistic jurisdiction to examine only the constitutionality of statutes—either state or federal courts may hear constitutional claims.⁴⁶ Further, since judicial review is an ordinary activity of the ordinary courts, a constitutional challenge can be made only when there is litigation.⁴⁷ To this end, there is no abstract review.⁴⁸ Under judicial review purview, constitutional litigation is not distinguished from other litigations.⁴⁹

Europe's experience with democratically elected fascist regimes leading to WWII is perhaps one of the most important developments for the establishment of new constitutional democracies.⁵⁰ Post-war constitutional drafters sought to establish fundamental constitutional rights and to protect those rights via specialized CCs.⁵¹ Additionally, the constant expansion of legislation into almost all fields of life and the widespread distrust of legislature necessitate constitutional review by CC.⁵² Therefore, as parliamentary sovereignty posed a threat to human existence during the WWII, there had to be a mechanism designed to control the law and decisions making powers of the government via the instrumentality of constitutional review. The proliferation of international human rights law after the math of the WWII paved the way for the establishment of CCs. Hence, laws, actions and decisions of the legislature, executive and judiciary, respectively, should compatible with the constitution and human rights. This calls for constitutional democracy.

Constitutional government is a government with limited constitutional power. Governmental power is limited, inter alia, via the method of constitutional review. Hence, constitutional review limits government's law making, executive decisions and judicial decisions power. It examines

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Ibid at 981

⁵⁰ Lalisana Samantha, 'Classifying Systems of Constitutional Review: A Content-Specific Analysis', (2020), Indiana Journal of Constitutional Design Volume 5 Article 1 at p. 1

⁵¹ Enrique Lopez, 'Judicial Review in Spain: The Constitutional Court', (2008), Loy Law Review Volume 41, at pp. 529-530

⁵² Wilhelm Geck, 'Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices', (1966), Cornell Law Review Volume 51 at p. 252. Available at: <http://www.scholarship.law.cornell.edu/crl/vol51/iss2/5>

whether those rulings/actions are in line with the constitution. They shall be quashed or amended, as deem necessary, should they incompatible with the constitution. This chapter is going to deal with the theoretical, philosophical and conceptual underpinning of CCs in carrying out constitutional review and interpretation.

2.1. Philosophical foundation of Constitutional Review

According to constitutional positivism theory, constitution is a positive and binding statement of the people to its government.⁵³ Constitutional review, as per this theory, is a main attempt to discern and faithfully to enforce the will of those who made and adopted the constitution.⁵⁴ This theory provides the basis of theory of legitimate constitutional interpretation. The latter requires the [CC] court to interpret the constitution strictly in accordance with that popular will as expressed in the document.⁵⁵

On the other hand, law and politics have mutual interrelationship. With this respect, Miro observed:

Politics cannot exist without law, since the law forms and keeps it within certain limits that are above all. Also, law could not exist without politics, since politics gives law its driving force and its “rough-contents” or substances, which law then adapts to its autonomous framework and develops its final form, expressing it in a specific normative manner.⁵⁶

With respect to constitution, there are two main constitutional models: political and legal constitutional models. According to Gee and Webber⁵⁷, the idea of political constitution is

⁵³ James Gardner, ‘Whose Constitution Is It? Why Federalism and Constitutional Positivism Don’t Mix’, (2005), William and Merry Law Review Volume 47 at 1250

⁵⁴ Alexander Hamilton, ‘The Federalist No. 78’, in Clinton Rossiter (ed.), The Federalist Papers, (1961), New American Library at 466-69

⁵⁵ Gardner Supra notes 53, ibid

⁵⁶ Miro Cerar (PhD), ‘The Relationship Between Law and Politics’, (2009), Annual Survey of International and Comparative Law Volume 15 at pp. 22-23

⁵⁷ Graham Gee and Gregoire CN Webber, ‘What is a Political Constitution’, (2010), Oxford Journal of Legal Study, at p 1

associated with holding those who exercise political power to account, for the most part, through political processes and in political institutions. Conversely, legal constitution is associated with holding those exercising political power, to a substantial and increasing extent, through constitutional review.⁵⁸ In this view, legal constitutionalists present that political activities must be constrained by judicially enforceable constitutional prescriptions.⁵⁹

Kelsen model of constitutional review is based on the theoretical foundation that keeps the judges on a lower pedestal from the parliament and he believed that constitution shall be interpreted by an authority different from the traditional courts.⁶⁰ He manifested this idea by the imagination of separate CCs that will best protect the constitutional order.⁶¹

For Kelsen, CC is subordinate to the parliament, thus not becoming legislators themselves, and at the same time doing the function of constitutional review.⁶² Accordingly, CC was created in order to preserve legislative sovereignty (and the traditional conception of separation of powers) as much as possible while reviewing the legislations.⁶³ It was believed that parliament is a body that cannot do any wrong. But, the destruction of WWII forced these countries to rethink the idea that legislature cannot do any wrong.⁶⁴ Kelsen noted that:

[I]t is not possible to rely on the parliament itself to realize subordination to the constitution. The task of nullifying its unconstitutional acts must be entrusted to a

⁵⁸ Ibid

⁵⁹ Ibid at pp. 7-8

⁶⁰ Tom Ginsburg, "The Global Spread of Constitutional Review", Keith Whittington and Daniel Keleman (eds.), *University of Chicago Law School Draft for Oxford Handbook of Law and Politics* (2008)

⁶¹ Ibid

⁶² See Alec Stone Sweet, 'Why Europe Rejected American Judicial Review: And Why It May Not Matter', (2003), *Michigan Law Review* Volume 101

⁶³ Devashri Sinha, 'Constitutional Review: Study of American Model and European Model', (2016), *ILI Law Review*, at p 161; Ginsburg and Versteeg *Supra* notes 38 at 12

⁶⁴ Sinha *Supra* notes 63 *ibid*

separate organ, independent of it and of any State authority, i.e., a constitutional jurisdiction or tribunal.⁶⁵

As to Kelsen, ordinary judges' power is just limited to interpret and apply law. For this reason, they are not capable to conduct constitutional review.⁶⁶ Conversely, CC is neither political wings nor judiciary. Its main function is controlling the constitutionality of laws. Moreover, it protects and upholds separation of power. These make it structurally appropriate to conduct constitutional review. In terms of its function, it conducts constitutional review of legislations, actions and decisions of organs of government so as to protect the supremacy of the constitution on one hand and interprets the constitution to that end on the other. By doing so, it protects constitutional order of the system. To that end, it does not taken away constitutionally divided power of any government organ.

In a nutshell, Kelsen rejected the idea that the ordinary judiciary should conduct judicial review in the continental legal system. From separation of power viewpoint, when judicial branch invalidates a decision of the legislature or of executive, the decision affects the allocation of institutional responsibility.⁶⁷ Thus, separation of power hinders the judiciary from reviewing legislations. Contrary to this, CC is separate and independent of any governmental organ so it can review legislations without violating separation of power. Its institutional structure, functional suitability and composition make it appropriate for such function.

2.2. Counter Majoritarian Difficulty

Counter-majoritarian difficulty can be defined as a scenario in which unelected and unaccountable constitutional judge invalidates the acts and decisions of the elected and accountable representatives of the people.⁶⁸ The proponent of democratic majoritarian contend

⁶⁵ Hans Kelsen, '*La garantie juridictionnelle de la Constitution*', (1928), *Revue de droit publiqueet science politique*, XXXV, Paris] at pp. 171-172 as translated by Sara Lagi, in his article 'Hans Kelsen and Austrian CC (1918-1929)',(2012) at p. 286

⁶⁶ Ginsburg and Versteeg Supra notes 38 at 12

⁶⁷ Wojciech Sadurski, *Judicial Review, Separation of Powers and Democracy: The Problem of Activist Constitutional Tribunals in Post-Communist Central Europe*, (1999), at p. 93

⁶⁸ Yonatan Supra notes 22 at 2 (emphasis added)

that constitutional review allows constitutional judges, who are neither elected by nor accountable to nobody, to nullify the acts democratically elected legislatures who are accountable to the public. Therefore, it is undemocratic.⁶⁹ The ‘*democratic objection*’ continues to be one of the main theoretical challenges against constitutional review.⁷⁰ Alexander Bickel notes:

The root difficulty is that constitutional review is a counter-majoritarian force...when the CC declares unconstitutional a legislative act or the action of elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.⁷¹

Similarly, Kairys states that since CCs are non-majoritarian entities they are not expected to express or implement the popular whims.⁷² As a counter-argument, positivists contend that once the will of the people are reduced to law-(positivised), they should not be subjected to popular whims. The counter-majoritarian problem finds its roots in the broader structural theory about popular sovereignty and majoritarian governance- a theory which is based on the premise that important decisions like the power of constitutional review should not be uncoupled from the electorate or a body that represents the electorate.⁷³ Any majoritarian version of democracy understands democracy in procedural terms. According to this position, the outcome of important matters should be determined according to the will of the majority of citizens or their representatives.⁷⁴ Any law that the government legislates and policies it adopts should be the

⁶⁹ Ibid at 22

⁷⁰ Pilar Domingo, ‘Introduction’ in Robert Gargerella et al (eds.) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (2006), Taylor and Francis at p. 2

⁷¹ Alexander Bickel, ‘The Least Dangerous Branch: The Supreme Court at the Bar of Politics’, (1986), Bobbs-Merrill Publisher at p. 16

⁷² David Kairys, ‘The Politics of Law: A Progressive Critique’ (1998), Basic Books at p. 1

⁷³ Theodore Ruger, ‘A question which convulses a nation’ the early Republic’s greatest debate about the judicial review power’, (2004), *Harvard Law Review* at p. 857

⁷⁴ Ronald Dworkin, ‘Freedom’s Law: The Moral Reading of the American Constitution’, (1996), Oxford Clarendon Press at p. 16

ones that have received the blessing of the majority⁷⁵ and of course should not be placed under the scrutiny of CC.

The proponents of constitutional review on the other hand argue that democracy should not only be seen from procedural perspective but also from substantive contents. For this reason, they labeled the formers as ‘a reductionist’. For them, democracy is not content independent.⁷⁶ They see democracy as “a regime characterized by certain ends and values towards whose realization a certain political group aim and works”.⁷⁷ There are fundamental values to the ‘democratic enterprise’ which cannot be amended or destroyed by the majority government. To this end, they contend that human rights provisions are those that cannot be destroyed and amended as the majority wishes. They would not be placed under the mercy and blessing of the majorities. A constitutional democracy respects and upholds the will of majorities to the extent they are compatible with the constitution and bill of human rights. Accordingly, bills of human rights and CCs, by their very nature, are of counter-majoritarian. Hence, human rights should not be subjected to popular whims of the changing political environment within parliament or electoral body. Thus, day-to-day political activities of the government should take into consideration the issue of human rights. Consequently, once they have been made positive/constitutionalised, they should be placed beyond the reach of political heat of the day and popular whims.

Proponents argue that pure majoritarian or procedural conception of democracy does not recognize human rights as its essential elements.⁷⁸ It is inherently contradictory to the idea of constitutionalisation and constitutional democracy.⁷⁹ They note that constitutional review provides a neutral and independent forum to adjudicate constitutional rights which are designed to bind democratic majorities.⁸⁰ Klaaren on the other hand observes that democracy is evolved from the limited idea of representative government for majority to ‘one in which human dignity

⁷⁵ Barry Brian, ‘ Democracy and power: Essays in political theory’, (1991), Oxford Clarendon Press, at p. 25

⁷⁶ Yonatan Supra notes 22 at p. 24

⁷⁷ Norberto Bobbio, ‘ *Democracy and Dictatorship*’, (1989), University of Minnesota Press at p. 157

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ Ibid

and rights which have evolved there from are effectively protected from majority tyranny'.⁸¹ In this regard, CC balances both democratic majority and human rights. In so far as human rights are not at stake, democratic majority rule works. Thus, democratic majority cannot override human rights. In effect, human rights are a limitation to democratic majority. Constitutionalisation of human rights and CC protects human rights against such democratic majority so as to make sure that Jesus would not crucify and let to die without having committed a (serious) crime because the popular whims. This makes CC appropriate to protect and enforce human rights against democratic majorities and popular whims.

The constitutionalisation of rights implies an understanding of democracy as 'something more than majority rule'.⁸² In this relation, Justice Jackson⁸³ noted that:

“...One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”

Nonetheless, the power to determine constitutionality of laws should not be conflated with the powers of the same entities a constitution aims to limit.⁸⁴ Redish also observes that 'if the majoritarian branches could act as final arbiter of the limits of their own power, there would have been little purpose in imposing super-majoritarian constitutional limits in the first place.'⁸⁵ It is a principle of natural justice that '*a man cannot act as a judge in the case he has an interest.*' Thus, legislature should not be given the power to determine the constitutionality of the laws. It goes against this principle and human rights. It also raises conflict of interest. Therefore, the power of constitutional review should be given to CC for the better protection and enforcement of the human rights.

⁸¹ Jonathan Kaaren (ed.), 'A Delicate Balance: The Place of Judiciary in a Constitutional Democracy: Proceedings of a Symposium to Mark the retirement of Arthur Chaskalson', (2006), at p. 8

⁸² David Beatty, 'The Forms and Limits of Constitutional Interpretation', (2001), American Journal of Comparative Law Volume 49 at p. 79

⁸³ Cited in Hoyt Webb in his 'The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law', (1998), Journal of Constitutional Law Volume 1 at p. 234

⁸⁴ Jeff King, 'An Activist Manual on the ICESCR', (2003), Law and Society Trust, chapter XV

⁸⁵ Martin Redish, 'The Constitution as a Political Structure', (1995) Oxford Clarendon Press at pp. 1045-1046

Generally, CC defends constitutional supremacy and maintains democracy by protecting the constitutionally guaranteed human rights and smooth's its transitions in new democracies by protecting the power balances between different political players. It can be submitted that democracy that does not recognize human rights as one of its foundation stones is not democracy by itself. Consequently, the conception that constitutional review is against democracy is therefore awkward and superseded as it fails to recognize the importance of democratic and constitutional government bound by human rights.

2.3. Separation of Power versus Constitutional Review

The notion of separation of power is that power should not be concentrated at one wing of government because 'power corrupts absolute power corrupts absolutely'. Thus, power should be distributed among governmental wings-horizontally, but also vertically, should state structure is a federal. Separation of power deals with the horizontal distribution of power.

According to separation of power, constitutional review by [CC] erodes legislative and executive powers leading, inter alia, to unacceptable 'blending of judicial with legislative power'.⁸⁶ Moreover, Waldron argues that given that there is always to be a reasonable and good faith disagreement on the content of rights, only a representative and majoritarian entity in which 'everyone affected by the problem has a right to say in its solution' should be allowed to settle issues of rights-action-in-concert in the face of disagreement.⁸⁷ What the opponents have in common is that the majoritarian entity- the legislature is the one with whom the function of constitutional review should reside with because CC is illegitimate. They further argue that constitutional review cannot be justified as it is impossible to determine whether CC is better than the legislature in protecting the rights.⁸⁸

⁸⁶ Patrick Lenta, 'Judicial Restraint and Overreach', (2004), South African Journal On Human Rights Volume 20 at p. 544, 546

⁸⁷ Jeremy Waldron, 'The Core of the Case against Judicial Review', (2006), Yale Law Journal Volume 115, at pp. 108-110

⁸⁸ See Adem Supra notes 20 at p. 113

They even go to argue that legislature is the most appropriate body to determine the contents of rights.⁸⁹ The WWII atrocities dictated the need to limit parliamentary sovereignty with human rights. To this effect, CC was created and conferred power upon to conduct constitutional review with a view to protect human rights against majority whim. Consequently, for laws to be considered constitutional, they should both procedurally right and substantively be compatible with constitution embodying human rights norms.

The allegation that parliaments are the most appropriate body in protecting human rights is unfounded. Rather, they are one of the most potential violators of human rights. That is why they should be placed under the scrutiny of CC. Constitutional review by CC would not and should not go against the principle of separation of power rather it strengthens its functioning by making sure that no government organ is allowed to intrude the other organ's sphere. It gives them freedom to act within their constitutional spheres as it controls ultra-viruses. The power of CC is very limited and it does not extended into the areas reserved for the governmental wings. Rather, it supervises whether they are functioning in accordance with the constitution. Thus, it monitors whether their actions are compatible with human rights norms and standards. It checks them all and protects power trespasses against one another.

Therefore, the argument which states function of CC doing constitutional review violates separation of power is unfounded and based on reductionists' democratic view and parliamentary sovereignty conception.

2.4. Models of Constitutional Review

Democratic countries have employed different mechanisms of constitutional review based on their own types of legal systems, conception of constitutional law, and political histories. Accordingly; there are two major constitutional review systems in this world. Generally speaking, one may distinguish an older *American system* of a uniform and decentralized judicial review, in which all courts participate, from a younger *Austrian system* of specialized and

⁸⁹ Ibid

centralized constitutional review, which is exercised outside the regular court system by a separate CC.⁹⁰

2.4.1. American Judicial Review System

American model is referred to as ‘diffuse’ or decentralized judicial review. In this model, control of constitutionality of legislative acts and executive conduct is exercised by all regular courts of all tiers.⁹¹ In other words, the supremacy of the constitution is controlled solely by the regular judiciary, and questions of constitutionality of a legislative or executive act or decision arises *incidenter*, that is, in the context and during a specific litigation between parties.⁹²

In the incidental judicial review, the court rules on the (un)constitutionality of a law or act just as a matter of course alongside all other factual and legal disputes involved in a case pending before it.⁹³ The effect of the judicial determination of the (un)constitutionality of a dispute is therefore *inter-parties*.⁹⁴ However, as a matter of exception, the effect of (un)constitutionality of a dispute becomes *erga omnes*, binding upon all entities in the country’s territory, if the case has been appealed to the Supreme Court and is given a final decision thereby.⁹⁵ Hence, American model follows ‘case and controversy approach’.⁹⁶ In *Marbury v. Madison* case, Marshall CJ stated that ‘judges by taking oath, as directed by the constitution, bind themselves to uphold the sanctity of

⁹⁰ Louis Favoreu, ‘*American and European Models of Constitutional Justice*’ in David S. Clarke (ed.) *Comparative and Private International Law: Essays in Honor of John Henry Merryman*, (1990), Duncker and Humblot at pp. 105-120.

⁹¹ Herbert Hausmaninger, ‘Judicial Referral of Constitutional Questions in Austria, Germany, and Russia’, (1997), *Tulane European and Civil Law Forum Volume 12* at p. 25.

⁹² Ibid

⁹³ Mauro Cappelletti, ‘Judicial Review in the Contemporary World’, (1971), Indianapolis: Bobbs-Merrill publisher, at p viii.

⁹⁴ Hausmaninger Supra notes 91 ibid

⁹⁵ Cappelletti Supra notes 93 at pp. 85-86

⁹⁶ Allan Brewer-Carías, ‘Judicial Review in Comparative Law’, (1989), Cambridge University Press, at pp. 1, 125-37, 185-94

the constitution and any act or action that violates the paramount law will be declared void by the court'.⁹⁷

Generally, under this model, judicial review is conducted by regular courts under the normal courts' procedures. Accordingly, there is no abstract review/preventive review under which laws usually reviewed before they promulgated and after being effective. Thus, courts do only incidenter review once the case reaches them and when constitutional controversy arises out of concrete cases. Like any other matters, the decision of any court is appealable to higher courts till it ends with the final decision of [federal] Supreme Court, whose decision has 'erga omnes' and binding upon all lower cases and future similar cases to come due to principle of precedent.

2.4.2. European Model of Constitutional Review

In the more centralized European system of constitutional review, the power to pass judgments on the constitutionality of a law or conduct is vested exclusively in a separate body, CC, whose sole duty is to act as a constitutional judge.⁹⁸ The purpose of such special institutions is invariably to judge the validity of a law or act 'with simple and rational logic, completely separate from the need to settle disputes in specific cases and acting as a negative legislator'.⁹⁹ Under this system, constitution is regarded as both legal and political document. Thus, constitutional review being a quasi-legislative function, it is considered to differ substantially from "regular" judicial work.¹⁰⁰ It is, therefore, assigned to a special procedure before a separate constitutional organ with justices particularly selected for this politically sensitive activity.¹⁰¹

The main reasons why Europeans rejected the American model are due to the profound differences in the political and constitutional culture on the both side of Atlantic Ocean.¹⁰² The centralized system of judicial review corresponds better to the European understanding of separation of law, to the civil law approach to the role of judicial precedent, and, to the authority

⁹⁷ See Durga Basu, 'Comparative Constitutional Law', (2014) Lexis Nexis

⁹⁸ Brewer-Carías Supra notes 96 at p. 185

⁹⁹ Ibid at 192

¹⁰⁰ Favoreu Supra notes 90 at 109

¹⁰¹ Ibid at pp. 111-112

¹⁰² Mauro Cappelletti and William Cohen, 'Comparative Constitutional Law', (1979), Bobbs-Merrill, pp. 76-83

of the traditional civil law courts and the psychology of their judges.¹⁰³ Under this model, CC's role is to review laws, executive acts and decisions as to whether they are constitutionally valid and to provide remedies in cases they are not. It exercises this power exclusively: no other court or body can engage in constitutional review.¹⁰⁴

Moreover, unlike general courts, they are often empowered to decide abstract questions that do not arise as a set of facts giving rise to a specific or 'concrete' legal dispute between parties.¹⁰⁵ Therefore, the primary function of CC is confined to abstract review. This mode of constitutional review, therefore, 'is not to adjudicate controversies between individuals or between them and their government, but rather to guide interpretations of that nation's constitution, regardless of how the interpretational issue arises'¹⁰⁶

CCs are often empowered to decide on abstract questions. For instance, CC may have power to examine the constitutionality of a law before issuance.¹⁰⁷ Disputes necessitating direct interpretation of constitutional provisions and testing other legislations and/or executive conduct against the same can be channeled to the special constitutional body either by virtue of a direct action (*principaliter*) by interested parties or through specified state bodies or a referral by the court.¹⁰⁸

Judicial referral in the concentrated systems is discretionary, leaving the regular judge to decide whether it is warranted. The constitution-interpreting body does not have the power to initiate a constitutional issue.¹⁰⁹ Its decision should be limited to the question of constitutionality of a law or decision, and excludes concrete constitutional adjudication, which remains within the jurisdiction of the courts.¹¹⁰ Once given the decision of the CC produces *erga omnes* effects.¹¹¹

¹⁰³ Ibid

¹⁰⁴ Harding Supra notes 1 ibid

¹⁰⁵ Ibid at p. 2

¹⁰⁶ Schwartz Supra notes 8 at 741, 743

¹⁰⁷ Harding Supra notes 1 at 2

¹⁰⁸ Takele Supra notes 11 at 104

¹⁰⁹ Brewer-Carías Supra notes 96 at 193

¹¹⁰ Ibid at 194

This system is built on two basic assumptions. It concentrates the power of constitutional review within a single body, CCs, and it situates that court outside the traditional structure of the judicial branch.¹¹² Accordingly, they are an entirely separate institution from the traditional judicial branch of the state. Nor are they part of the political wings.¹¹³ As Crisaffuli maintained that:

[The European CC] is neither part of the judicial order, nor part of the judicial organization in its widest sense... [It] remains outside the traditional categories of state power. It is an independent power whose function consists in ensuring that the constitution is respected in all areas.¹¹⁴

Currently, this model is attracting and influencing many states around the world. One reason of such attraction is the implied elevation and the importance of constitution.¹¹⁵ That is, by creating CC, the constitution is seen as distinct and important.¹¹⁶ However, if the constitutional review occurs at all levels, there is a risk of “dragging the prestige of the constitution down to the level of adjudicators in the public eye”.¹¹⁷

The Kelsenian model differs from the diffuse system in many ways: structurally, CC does not belong to the traditional judiciary. It isolates itself from the traditional wings of the government. Functionally, it entertains only when the matter has a constitutional element. It has a limited jurisdiction: constitutional review and constitutional interpretation. It does abstract review/preventive review and decides on constitutional issue in case of incidenter once referral is made by the ordinary court. It also receives constitutional complaints once principle of exhaustions is met. Procedurally, it has its own especial rules of procedure. As its jurisdiction is special, it needs different rules of procedure. Its decision is in appealable and has of erga omnes effect.

¹¹¹ Ibid

¹¹² Garlicki, Supra notes 29 at p. 44

¹¹³ Takele Supra notes 11 at 104

¹¹⁴ Quoted in L. Favoreu’s Supra notes 90 at 105 and 112.

¹¹⁵ Samantha Supra notes 50 at pp. 1-2

¹¹⁶ Ibid

¹¹⁷ Garlicki Supra notes 29 at p. 44

In terms of composition, unlike ordinary judges of decentralized system, CC judges are not purely legists. They do entertain political questions. Ordinary courts of diffuse system cannot because of ‘prohibition of judicialization of politics.’

With the constitutionalisation of human rights, the presence of CC offers protection and effective realization to human rights. Given that it is a defender of constitutional supremacy, it would offer effective enforcement to the entrenched human rights by doing constitutional review and interpretation. Accordingly, no unconstitutional law enacted and decision passed to that effect and if enacted/passed as such, it would be nullified. CC checks separation of power and monitors government’s acts and actions in line with preset constitutional dictations. It also gives ordinary courts a confidence and moral boasting in carrying out their constitutional mandate to protect and enforce human rights by protecting power transgresses. Thus, it follows that the European model offers strong protection and effective enforcement to human rights.

2.5. Constitutional Review and Human Rights: Interface and Interplay

Constitutional review and human rights have a strong connection. The protection and realization of human rights presuppose on the existence of strong and competent constitutional reviewer conducting constitutional review. They are mutually-inclusive. By conducting constitutional review, CC filters out [potential] substantive and procedural barriers to human rights protection and enforcement. The implementation of human rights dictates how the system of constitutional review operates in a given country. Hence, given that the system of constitutional review is strong would mean that human rights get high protection and enforcement. To this effect, CC plays a vital role.

Adem noted that the justification for constitutional review lies on its potential role in the protection of human rights.¹¹⁸ Thus, constitutional review is justified on its instrumentality in protecting human rights which are counter-majoritarian by design.¹¹⁹ In a country where parliamentary supremacy is maintained there must be constitutional review performed by CC with a view to protect human rights. Conversely, Dicey observes that ‘legislature has the right to

¹¹⁸ Adem Supra notes 20 at 120

¹¹⁹ Ibid

make or unmake any law whatever’ and no person, body or court outside parliament ‘is recognized by the law [of England] as having a right to override or set aside the legislation of parliament’.¹²⁰ Supplementing this, Walter Bagehot¹²¹ quoted, “[t]here is nothing the British Parliament cannot do except transforms a man into a woman and vice versa.” This reflects so long as the parliament is sovereign it can do anything it pleases, regardless of its consequences [on human rights].

Unless controlling mechanism is there to hold the parliament back from enacting laws as it wishes human rights would be at real stake. This is against their very real existence. Out of necessity, there must be CC exercising constitutional review to that end. In addition, human rights should also be constitutionalised. It has been stated that the constitutionalisation of rights is seen as one of the main drivers for the proliferation of constitutional review.¹²² Experiences from around the world reveal that CC can play a considerable role in the protection of human rights.¹²³ Accordingly, constitutional review has become an important tool to ensure the realization of human rights and other constitutional limits.¹²⁴ Hence, as much as constitutional review is important inhuman rights protection, so does the body that conducts it.

Generality is one feature of the constitution. Constitutional human rights are not immune from this. Hence, they are general in a sense that they are broad, esp. SERs, and due to the nature of words, they are ambiguous and at times, incomplete. Thus, they need to be determinate and specified so that their contents and scopes can easily be known and asserted in courts. This necessitates the need for constitutional interpretation. To this end, CC interprets the constitution with the intention of making those rights determinate so that right-holders can enjoy exercising them by asserting them in judicial decision making process. On the other hand, it has to be borne in mind that the existence of constitutional review system by itself cannot guarantee the effective

¹²⁰ Mauro Cappelletti ‘Judicial Review in Comparative Perspective’, (1989), Oxford Clarendon Press, pp. 136-146

¹²¹ Meny Y. and Knap A, ‘ Government and Politics in Western Europe’, (1998) , Oxford Clarendon Press at p. 317

¹²² See Adem Supra notes 20 at vi

¹²³ Ibid

¹²⁴ Erwin Chemerinsky, ‘Losing Faith: America Without Judicial Review?’, (2000), Michigan Law Review Volume 98 at p. 1416

protection to human rights. Thus, there should be strong institution capable of functioning it independently and impartially. CC fits for this role.

Constitutional review is being used as a filtration mechanism. Indeed, abstract review has been used as a preventive measure, of laws that could go against human rights. A constitutional complaint mechanism provides another opportunity to protect human right and to defend the constitution. Generally, CC must exist to determinate the meaning, contents, character and scopes of rights in accordance with international human rights norms. During emergency declaration, it shall appraise the legality, necessity and proportionality requirements. Its structural uniqueness provides effective protection to human rights. It also paves the way for its independence, impartiality and integrity. The composition and manner of election of constitutional judges is another reason that adds public confidence towards the institution. Likewise, the terms of the judges are limited and in most cases non-renewable. This makes the system in amenable for abuse and manipulation and offers better protection and enforcement to human rights.

2.6. The Co-relationship between Constitutional Court, Democracy and Rule of Law

There are also strong links between democracy, rule of law and CC. Rule of law is one of the pillars of democracy and constitutionalism. It dictates that valid positive law should govern the governor. It is against rule by the law. As has been mentioned, democracy should be something more than just deciding on popular majoritarian terms/whims. It must also be seen from the perspective of validity of its normative contents. It is a mandate of a parliament to enact laws. During such, apart from observing procedural regularities the legislatures should be required to observe substantive validity of contents of their enactments. The latter refers to the fact that the normative contents incorporated in the legislation should be compatible with the constitution and human rights norms. To this effect, there should be an institution that observes whether the parliament acts are in line with the constitution that incorporated human rights standards and norms.

Corollary, CC oversees laws, executive actions and judicial decisions to examine whether they are in line with constitution and their limitations thereof. It orders their annulment to the extent they are incongruent with the constitution. By so doing it maintains constitutional supremacy,

democracy and rule of law. This is what constitutionalism is all about. Abraham Lincoln observed democracy as “a government of people by the people for the people.” Democracy is thus a reflection of popular sovereignty expressible via election. According to this assertion, people are the fountain of all governmental powers and government exercises them on the behalf of and in the interest of the people. To exercise those powers, government needs electoral legitimacy. To this effect, the right to election should be guaranteed and so should the body that protects electoral wills.

Accordingly, CC observes and protects peoples’ will by making certain that electoral law is constitutional at the first place and voting count and electoral result is correct. Election is one element of rule of law on one hand and democratic/political right of citizens on the other. Thus, they all are mutually-inclusive and have the same end. It has been said that the people are the makers and breakers of their government. Accordingly, they make the government, their agent, via election and break by recalling the government via the modality of electoral accountability. When government exercises those powers against the popular will as positivised under the constitution, CC removes the government/officials from the public office via the instrument of impeachment, should conditions met.

The constitutional framers normally limit the government’s powers for the good operation of the (constitutional) democracy. One of the bases for such limitations is human rights. Therefore, CC has to make sure that government is acting intra-virus and in accordance with the limitations provided in under the constitution. By doing so, it promotes rule of law. It goes without saying that CC enhances both democracy and rule of law so that human rights can be protected. In conclusion, democracy, rule of law and CC are a side of a coin. They all are the distinctive features of constitutional democracy and key to effective protection and enforcement of human rights.

2.7. Organizational Structure of Constitutional Court: A Comparative Perspective

There are 85 countries that have created CCs around the world.¹²⁵ Let's see their organizational and functional structure. Composition: constitutional judges are composed of individuals having different professional backgrounds such as lawyers, politicians and law professors.

Method of selection: Nomination/appointment of constitutional judges involves political process.¹²⁶ In this regard, there are three means of constitutional judges' selections.¹²⁷(A) Direct appointment system: the appointment involves no election/vote at all.¹²⁸ This system can be divided to two sub-groups: For the first subgroup, the power of appointment is a discretionary right of a given institution.¹²⁹ For the second subgroup, the power of nomination of candidates for constitutional judges is related with previously submitted proposals coming from other bodies.¹³⁰ (B) The electoral system: the election of constitutional judges is most often executed by the parliament.¹³¹

(C) The hybrid system: it is a combination of both systems.¹³² Tenure: (a) appointment for indeterminate period: serving until the age of retirement.¹³³ (b) Appointment for non-renewable term.¹³⁴ (c) Appointment for renewable term.¹³⁵

¹²⁵ Harding Supra notes 1 at 1

¹²⁶ Schwartz Supra notes 8 at 759

¹²⁷ Jovanovska Supra notes 4 at 5

¹²⁸ Ibid

¹²⁹ Ibid

¹³⁰ Ibid at 6

¹³¹ Ibid

¹³² Ibid

¹³³ Venice Commission: Composition of Constitutional Courts, 1997, Science and Techniques of Democracy, at 13.

¹³⁴ Ibid

¹³⁵ Ibid

2.8. Ethiopian Legal History of Constitutional Review

Constitutional review is a mark of the presence of constitutional supremacy. Its function is futile in a situation where a government's power is unlimited and there is no strong constitutional adjudicator. Historically, there was no constitutional review mechanism during aristocratic monarchy as the powers of the majesty were neither undisputed nor unlimited. During the 1955 revision, the supremacy of the constitution was proclaimed per Article 122, although which responsible institution to do so was unknown. Given all those powers exercised by his majesty, it was difficult to assume that it was effective. Under the dergue's PDRE Constitution, the function of constitutional review was given for the state council despite never been implemented due to its political ideology.

Under the 1995 FDRE Constitution, the function of constitutional review is given to HoF/CCI under the proclamations of No. 798/2013¹³⁶ and 251/2001.¹³⁷ Despite this, HoF/CCI has never been a proper venue to entertain such functions seen from human rights protection viewpoint. This is due to its composition, structure and other additional functions/commitments. Members of CCI/HoF are composed from among federal and regional states officials. Hence, how can they make their enactments' unconstitutional?

It has been giving (tacit) permission of political wings to violate human rights via their actions. There are laws, regulation, actions, measures and decisions that have gone against the constitution and human rights. Unfortunately, many of them declared constitutional. The so called "Siye's Law"¹³⁸ is the best example. In this case, the parliament enacted the law (retrospectively) that denied constitutional right to bail for corruption crime, after the case had been instituted and Federal First Instant Court issued order of release on bail and the order was

¹³⁶ Council of Constitutional Inquiry Proclamation No. 798/2013, Federal Negarit Gazeta, 16th Year No. 65, Addis Ababa 30th August, 2013. See also Article 62 and 83 of the Constitution.

¹³⁷ Proclamation No. 251/2001, A Proclamation to Consolidate the House of the Federation of FDRE and To Define Its Powers and Responsibilities, Federal Negarit Gazeta, 7th Year No. 41, Addis Ababa 6th July, 2001

¹³⁸ Federal Ethics and Anti-Corruption Commission Establishment Proclamation No. 235/2001, Federal Negarit Gazeta, 7th year No. 23, Addis Ababa 24th May, 2001 and Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 236/2001, Federal Negarit Gazeta, 7th Year No. 24, Addis Ababa 6th July 2001; see also, Awol Allo and Beza Tesfaye, 'Spectacles of illegality: mapping Ethiopia's show trials', (2015), at pp. 12-15

confirmed by the appellate court. Despite the fact that the question of constitutionality of the law was raised and in fact was unconstitutional, the council rejected and ruled that parliament has a power to determine the conditions under which the right to bail may be refused and totally precluded for some crimes.¹³⁹

Similarly, in the case between Ashenafi Amare et al vs. ERCA, it ruled Article 37(2) of Regulation No. 155/2000 constitutional which reads: (1) *...the Director-General may, 'without adhering to the formal disciplinary procedure, dismiss any employee from duty whenever he has suspected of him 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'.*

In this case, the council held that the parliament can limit the jurisdiction of the courts for the fact that Ethiopia follows parliamentary form of government and this does not amount to violation of constitution.¹⁴⁰ It also ruled constitutional the declaration issued by (then) Prime Minister to ban demonstration for a month after the math of 2005 nationwide election. The order was actually unconstitutional as it went against constitutional right to demonstration and the power to issue emergency declaration in one hand and 'Demonstration and Political Meeting Proclamation No. 3/1991' on the other.

Conversely, there are pro-human rights cases decided by CCI/HoF. For instance, In *Civil servants Administrative Tribunal vs. ERCA and its Moyale Branch Office*, File No. 2189/09, CCI decided that regulation No. 155/2000 Article 37(2) is unconstitutional as it violates Article 37 of the constitution in 2019. It successfully reversed its previous decision. *Benishangul and Kadija Beshir* cases are other groundbreaking decisions.¹⁴¹

¹³⁹ See Constitutional case concerning constitutionality of laws which excluded bail rights in relation to corruption offences, CCI, (2004); see also Adem Supra notes 20 at p. 87

¹⁴⁰ See Ashenafi Amare et al vs. ERCA Supra notes 19

¹⁴¹ See Decision on the right to vote and to be elected in Benishangul in the HoF, 2000, Journal of Constitutional Decision, (2008) volume 1, pp. 14-34; Kadija Beshir, in the HoF, 2004, Journal of Constitutional Decision, (2008) volume 1, pp. 35-41

Generally, under current Ethiopian legal system, as abovementioned cases/laws illustrate, even though constitutional review is there, it has barely been properly functioning in a way that it bolsters human rights protection and defends constitutional order. It can be maintained that CCI/HoF renders pro-human rights decisions as long as the government has no interest in the cases. When the government is a party to the case, however, the decisions always favors it especially in politically sensitive cases. The outcome of the Kedija and Benishangul cases would have been different had the government was the party to the case. The CCI/HoF decisions move the same way and in the same motion as the political weather of the country. This however does not guarantee the protection and enforcement of constitutional human rights.

CHAPTER THREE: THE APPROPRIATENESS OF CONSTITUTIONAL COURT IN THE PROTECTION AND ENFORCEMENT OF HUMAN RIGHTS IN ETHIOPIA.

Introduction

Ethiopia is a country where systematic and gross violations of human rights have been common. This is highly attributed to lack of strong institution committed to protect human rights. In this regard, our courts should be blamed. Protecting and enforcing human rights is not the primary objective of the CCI/HoF. The role of the CCI/house comes to scene when the constitutionality of law is questioned and constitutional interpretation has arisen. HoF/CCI has never given effective remedies in cases of violations of human rights, when it takes question of unconstitutionality of laws and constitutional interpretation. This is due to the institutional and functional inappropriateness. Hence, under this chapter we will see why the house is inappropriate for protection of human rights and defense of constitutional order on one hand and why CC is appropriate for such tasks on the other hand.

3.1. The Performance of HoF in terms of Human Rights Protection and its Shortcomings

Initially, HoF/CCI was chosen to entertain constitutional adjudications and conduct constitutional review because the framers of FDRE Constitution desired to avoid counter-majoritarian problem. Thus, ‘the undemocratic nature of courts’ was the main reason behind its selection in preference to courts (including CC).¹⁴² In this regard, the secretary of the constitutional commission noted that:

How can a constitution that has been ratified by the people’s assembly be allowed to be interpreted by professionals who have not been elected by the people. To allow the courts to do the interpretation is to invite subversion of the democratization

¹⁴² Yonatan Supra notes 22 at p. 34

process. Since the constitution is eventually a *political contract of NNP*, it would be inappropriate to subject it to the interpretation of judges...¹⁴³

Accordingly, the counter-majoritarian problem and the status of the constitution were the two main reasons behind the HoF/CCI's selection to entertain constitutional adjudications and to do constitutional review. To that effect, in Ethiopia, constitution has never seen as a legal document but political contract. Although, the decision to subject constitutional review and interpretation under the CCI/HoF seemed sound, it is affecting the protection of human rights in Ethiopia for the fact that constitutional rights guaranteed by the constitution are left without being implemented to that effect.

The house is barely discharging its constitutional duty to conduct constitutional review so as to ensure the protection of human rights. Only in a very few cases, the house has restricted the law and decision making powers of political wings in accordance with the constitution and their limitations thereto. Although human rights are a limitation to government's power, they are not to the extent they ought to be in Ethiopia due to the house's inappropriateness for such functions. All along, the house was not entrusted to protect human rights and thereby to defend the constitution. It was rather political decision to get political advantages. There are many instances in which the HoF/CCI were failed to uphold constitutional order and to protect and realize human rights.

As a result, we have not had robust constitutional jurisprudences related to constitutional law and human rights. The contents of human rights incorporated under the constitution have not yet known, especially those of SERs, to courts, litigants and individuals. Likewise, the scope of each of the rights guaranteed by the constitution is still far from being clear to that end.¹⁴⁴ The protection of constitutional rights would have been different had it not been for the house's low performance.

¹⁴³ Meaza Ashenafi, ' Ethiopia: Process of democratization and development', in A An-narim (ed.) *Human Rights under African Constitutions*, (2003), New York: University of Pennsylvania Press at p. 30 (emphasis added) by Yonathan Supra notes 22

¹⁴⁴ Yonatan Supra notes 22 at 46

3.1.1. The shortcomings: The Nature of CCI/HoF as constitutional adjudicatory bodies in Ethiopia

3.1.1.1. Organizational Structure

The 1995 FDRE Constitution is the first federal constitution. It establishes ethnic-based federal form of state structure under its Article 1 in tandem with 46(2). In federal state, the existence of bicameral legislative is a prerequisite. In this line, Article 45 of the same constitution establishes two federal houses/bicameral parliament. These two bicameral parliament are named as, HPR, lower house, and HoF, upper chamber. While all power to enact laws under the federal jurisdiction is given to the lower house, the upper house, the political body, is given, inter alia, the power to interpret the constitution and to examine constitutionality of acts of the government.

In order to discharge its constitutional mandate of these functions, it shall be assisted by the CCI, whose members are composed from both political and judiciary organs and chaired by the President of the Federal Supreme Court. It has to be note that the President and vice-president of the Federal Supreme Courts are appointed by the Prime Minister subject to approval from the parliament.

The decision of the council shall be passed by majority vote in accordance with CCI's Proclamation No. 798/2013 Article 11(2). Actually, the nomination/appointment process of the members of CCI and HoF is purely political. Given the parliamentary form of government's nature where there is a fusion of legislative and executive branches into parliament; the fusion of the ruling party and the state and the decisions of CCI being merely recommendations that can easily be rejected by the house, it is hard to assume that the constitutional review mechanism and constitutional adjudications in Ethiopia operates in a scenarios that are friend to human rights. Constitutional review, inter alia, involves the appraisals of government policies, measures and actions in line with constitution. In such scenarios, it is being naive to think that the CCI/HoF would render them unconstitutional against government's interest, should they incompatible with the constitution.

Generally, HoF being political upper body of the federal house, it is against separation of law doctrine to empower it to conduct constitutional review and constitutional interpretation. Besides, there are both fusion of executive branch into legislative branch, where the Prime

Minister is a member and has a seat in the parliament and the government's policies, laws and appointments easily get parliamentary approval due to party-system in one hand and where the members of CCI nominated through pure political process that involves only political wings and its decision has only of recommendatory effect on the other hand provides that the nature of HoF and CCI is not suitable for the effective protection and enforcement of human rights via conducting constitutional review and entertaining constitutional disputes.

3.1.1.2. Composition

HoF is the upper chamber institution where each NNP is represented. It is composed from each NNP. Any NNP shall be represented by one additional representative for each one million of its population. Members of the house are elected via two modes: election and direct appointment by the states councils. No election has been conducted thus far. Currently, it has 135 members. Although the importance/presence of the upper chamber in many federations is to protect the minorities from the majoritarian houses, lower chambers, in Ethiopia, the house is not the protector of minorities against threat from majoritarian as its composition is based on total number of population and its decision passes on majority vote like the lower chamber. In effect, the house is majoritarian institution.

Moreover, it has no/less law making power. Thus, there is no/little way in which it can protect the minorities against the decisions of the majorities. The nations that have more total population would rule the game, should they vote together on any matter as much as they do in the lower house. Mathematically, Oromo and Amhara representatives at the house have the ability to determine the every decision of the house as much as they can do in the parliament, should they both vote for/against regardless of all other votes for/against that matter.

In order to be a member at the house, no qualification is required. Thus, members are not expected nor required to be a qualified constitutional expert. Conversely, the power/mandate to appraise the constitutionality of government acts and to interpret the constitution needs constitutional knowledge, skills and experiences. To fill the gap, the constitution establishes the CCI composed of 11 members the first two being the chief justice of the federal Supreme Court and its deputy as the chair and vice-chair of the CCI. Six members are legal experts in

constitutional law area appointed by the head of the Republic upon the recommendation of the lower house. The left three members are selected by the house itself from its own members.

It is this house that ultimately decides on the constitutionality of laws, actions, decisions and measures and interprets the constitution so as to give effective meanings to the constitutional provisions during constitutional adjudications. The decision of the council only bears a recommendatory effect. The house is not required to accept the recommendation of the CCI. This makes Ethiopian system of constitutional review amenable for abuse since the final decision rests on the political body appointed by the political body for the political body.

As the house is composed from all NNP and each NNP has its own legal/political interest in the constitution and it is natural that the interest of one NNP can go against the interest of the other NNP, it is difficult for the house to determine the constitutionality of laws and actions in one hand and entertain constitutional adjudications on the other hand with a view to protect and enforce constitutional rights. Actually, it is very difficult and practically boring to conduct constitutional review and constitutional interpretation with such large amount of individuals. It also makes the issue on the table senseless. In Germany, the Federal constitutional judges are 16 in number and in South Africa, they are 11.

It goes without saying that members of the house are government officials at different levels. Many of them are federal government ministers, state ministers, regional states Presidents, executive leaders, council of states whips and ruling party officials. So do many members of CCI. Currently speaker of the house is the vice-president of Somali Regional State and one member of the CCI is the Minister of National Defense.

Generally, the manner of the composition of the members of the house and council and their political affiliation with the ruling party is another shortcoming and reason for the ineffective protection of the constitutional supremacy in general and constitutional rights in particular.

3.1.1.3. Functional unsuitability

HoF is entrusted to conduct many functions as mentioned in under Article 62 cum 83 of the constitution. It interprets the constitution, conducts constitutional review, umpire the federation, act as a mid-wife to new regions/countries, it orders constitutional intervention and organizes

CCI, among many other functions. Besides those functions, members of the house do also have other mandates as their capacity as either regional or federal government's top executive officials. The same holds true for CCI whose chairs are both Federal Supreme Court President and vice-president, and other three members are regional/federal governments' top officials and the remaining six are either well distinguished University professors or active attorney of laws.

Normally, the members of the house meet twice a year despite the fact that they have a constitutional mandate to entertain constitutional adjudications that take a lengthy of time and could actually happen daily. So, how could they discharge all these constitutional mandates for being members of the house and the council and their personal commitment to regional/federal governments' offices? Constitutional adjudication and determining constitutionality of laws, actions, policies, judgments and measures need critical consideration and enough time. On the top of that, they need to be functioned independently and impartially. One cannot expect the latter when somebody is a top official of either government. The Federal Supreme Court President is a chairperson of the CCI. How could it even possible for one person to lead two different yet burdensome offices at the same time given the nature and functions of these offices? It is humanely impossible for an individual to lead two different yet difficult offices, if we are serious about the effectiveness and efficiency of the functioning.

The function of the CCI is to help and assist the house in constitutional adjudication and ruling on constitutionality of acts of government. Yet, their decisions have only a persuasive effect. One has to note that members of the house are not required to have a necessary expertise in constitutional law area nor in human rights related. They, however, can reject the decisions of the expertise (CCI). This would be helpful in understanding the political nature of constitutional review and adjudications in Ethiopia. This can be corroborated with many practical cases having political elements/interests. On the other hand, members of the house are appointed and removed by the wishes of states executives (under ruling party umbrella order). The cases of Lemma Megersa, Tayiba Hassan and Milkesa Midaga (PhD) illuminate how the system works (when they were removed and replaced by Oromia Prosperity Party officials). There is also a legal gap as it cannot conduct pure abstract review.

Generally, the existing Ethiopian system of constitutional review and constitutional interpreting bodies suffer from structural inappropriateness, functional unsuitability and compositional

problems. The questions of independency, impartiality, competence, commitment to constitutionalism and conflicts of interest are also there. As the constitution is both legal and political document, it needs the institution capable of entertaining both matters simultaneously. Therefore, it a time to follow a new path and journey towards constitutionalism and effective protection and enforcement of constitutional human rights by constituting Constitutional Court in Ethiopia. Next, we will see what makes CC appropriate in protecting human rights.

3.2. The Appropriateness of Constitutional Court in the Protection and Enforcement of Human Rights in Ethiopia

In many jurisdictions CCs have come out victorious in protecting human rights. Protecting human rights and defending constitutional order is the basic essence of the CCs. They conduct constitutional review and interpret constitution. In so doing they safeguard constitutional supremacy and expand the scopes and contents of constitutional rights via (liberal) right-based interpretation. So, it provides enough space for the protection and enforcement of human rights. Once government's power is limited compliant with constitution, the prospect of human rights protection is likely high.

By their nature human rights are indivisible, inseparable, interrelated and universal. Nonetheless, they can be catalogued. One catalogue is arranging them as per their generations, civil and political rights being the first. These rights are essential for the human being existence. Aristotle observed "human being as a social animal" and as such he/she needs to take part in different social lives. To this end, the importance of civil and political rights is beyond contest. Therefore, these rights must be able to get effective protection so that they can better be enjoyed by rights-holders. CC gives them the protection they need by asserting constitutional limitations on the powers of the government and by broadly interpreting them. By their nature, these rights first impose duty on government not to interfere with. Though they are negative rights, most of them need positive actions in order to be realized. In this regard, CC's duty is of two folds: one it makes certain that the government is not inferring with these rights by taking constitutional review and interpretation and makes redresses when they interfered with. The second is it pushes government to take positive actions with a view to make them enforceable and ensures it. By interpretation, CC broadens their contents and scopes. By so doing thus it gives them real meanings.

Under separation of power purview, the legislator has the right and power to enact laws. These laws have consequences with human rights. They restrict, limit, precondition and/or bolster them. In case they restrict, limit and/or precondition human rights other than those already constitutionally provided, CC cut them down all via the instrument of constitutional review. This in turn guarantees the protection and paves the way for their enforcement. Likewise, by requiring the actions of the executive to the constitutional requirements, it checks executive decisions in line with the constitution and in case it finds incompatible, it renders them unconstitutional and order redress for the sustained damage. In this relation, it takes both preventive and reparation measures.

The right to freedom of expression is one of political rights guaranteed by international human rights and FDRE Constitution. This right protects freedoms of expressing ones' view. Opinions can be expressed via different social media platforms. For various reasons, government may limit the access to those social media platforms. In one case, the Turkish authorities blocked access to Twitter and YouTube.¹⁴⁵ And, the Turkish CC ruled that blocking Twitter and YouTube is the violation of freedom of expression because in democratic society freedom of expression is exercised via social media platforms.¹⁴⁶ Similarly, two well-known journalists were arrested by Turkish authorities for taking outrage in public and political opinion. CC stated that detention was merely based on journalistic activities and as such, constituted a violation of both the right to personal security and freedom of expression.¹⁴⁷

These cases illustrate how CC can protect political rights by giving remedy in case of violation. The right to election is also a political right. It has guaranteed under international human rights instruments and FDRE Constitution. Under Germany legal system, the Federal CC has a jurisdiction over the outcome of election. By so doing, it protects the right to election. Thus, foreign experiences display that CC plays overriding role in protecting of civil and political rights. Fortunately, CCs have a story of success even in the autocratic regimes of Russia and

¹⁴⁵ Yaman Akdeniz et al, App No: 2014/3986, 2/4/2014; YouTube LLC Corporation Service Company and others [Plenary], App. No: 2014/4705, 29/5/2014.

¹⁴⁶ Ibid

¹⁴⁷ Erdem Gül and Can Dündar [Plenary], App. No: 2015/18567, 25/2/2016.

Egypt. This can be done in Ethiopia too. Generally, CC determines the scopes and contents of rights and conducts constitutional review. This offers human rights effective protection and enforcement. Unfortunately, these rights are highly limited and restricted by legislations and the executive measures in Ethiopia. Additionally, there have been systematic and gross violations on these rights and these all calls for the need to establish CC in Ethiopia.

SERs are second-generational rights. They put positive obligations on the government to take actions for their realization. Hence, they are obligation of conduct while civil and political rights are obligation of result. Solidarity rights are third-generational rights. Usually, both SERs and solidarity rights are framed in vague, as goal and in more general terms. Due to this fact, their justiciability can be questioned. Despite this concern, the committee of ICESCR has done extensive endeavor in making and shaping SERs justiciable in domestic jurisdiction. To this effect, it has issued 25 general comments thus far. Further, Individual complaint mechanism has been adopted by UN General Assembly resolution to entertain violations related to SERs.

In spite the way SERs framed, there are still numerous SERs that are of immediate application and thus, justiciable.¹⁴⁸ The FDRE Constitution lists SERs and solidarity rights from Article 40-44. Actually, they are not framed in a clear manner. This necessitates constitutional interpretation. By interpretation, their scope and contents be determined.

Lack of specificity regarding the exact content of SERs and solidarity right, and therefore of the legal obligations that stem from them, would certainly seriously impede their judicial enforcement.¹⁴⁹ In identifying the scope and contents of SERs and solidarity rights it is necessary to define legal obligations with precision, to define clearly what constitutes a violation, to specify

¹⁴⁸ Committee on Economic, Social and Cultural Rights, CESCR, General Comment no. 3 ‘The Nature of State parties Obligation’, (adopted at its fifth session, 1990), U.N.DOC. E/1991/23, Annex III at 86 (1991) Para 5

¹⁴⁹ International Commission of Jurists, ‘Courts and Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability’, (2008), Human Rights and Rule of Law Series No. 2 at p. 15; for solidarity rights see Zelalem Shiferaw, ‘The Right to Development Under the Constitution of Federal Democratic Republic of Ethiopia: Some Reflections’, PROLAW Student Journal of Rule of Law for Development, No. 5.

the conditions to be taken as complaints, to develop strategies for dealing with abuses and failures, and to provide legal vehicles for their realization.¹⁵⁰

Usually, in many countries SERs and solidarity rights are framed in general terms. But, the difference is on the existence of strong and competent constitutional interpreter. Many of those countries have strong and competent CCs. Hence, CCs can interpret SERs in many ways and as a result be able to determine the scope and contents of those rights. In this regard, the South Africa's CC takes a prominent place. Despite the fact that South Africa is not a party to the ICESCR, it has been using CESCR's general comments while interpreting the SERs enshrined in the South African constitution.¹⁵¹

In *South African Minister of Health vs. Treatment Action Campaign (TAC)*,¹⁵² South Africa's government refused to provide 'anti-retroviral drug Nevirapine', a drug that prevents the spread of HIV/AIDS from mother to their babies, at public health facilities. The CC held that state's refusal to make Nevirapine available more broadly, and its failure to have a comprehensive plan to deal with the mother-to-child transmission of HIV, was unreasonable and breached the right of indigent mothers and their new-born babies to have access to health care services, provided by Section 27(1) of the South African Constitution.¹⁵³ Likewise, in *Grootboom case*¹⁵⁴ the South African government evicted a group of homeless people who informally settled in Oostenberg, Western Cape, South Africa, without giving them a temporal shelter. The court declared the state's housing policy as unreasonable, and thus unconstitutional, to the extent that it failed to make adequate provision for homeless persons.¹⁵⁵

¹⁵⁰ International Commission of Jurists' 'Bangalore Declaration and Plan of Action', (1995), Para 18(2) (Emphasis added)

¹⁵¹ See Constitutional Court of South Africa, *The Government of the Republic of South Africa and others v. Irene Grootboom and others*, 2001 (1) SA 46 (CC), October 4, 2000, Para 29-31 and 45.

¹⁵² Constitutional Court of South Africa, *South African Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721, July 5, 2002.

¹⁵³ Ibid

¹⁵⁴ Grootboom Supra notes 151

¹⁵⁵ Ibid

Finally, in *Jaftha v. Schoeman* and *Van Rooyen v. Stoltz*,¹⁵⁶ the South African CC decided that provisions of the *Magistrates' Courts Act* that allowed, without adequate judicial oversight, the sale of a person's home to make good a judgment debt, breached the duty to respect the right of everyone to have access to adequate housing. For the same reason, the house should have declared the foreclosure proclamation unconstitutional.

Above provided cases display how the South African CC realizes SERs. The question to be asked here is what hindered the CCI/HoF to give such protection to SERs? The Answers would be: besides structural inappropriateness, compositional factor and functional unsuitability of the CCI/HoF, the way the human rights were articulated under the constitution itself provides another challenge to their protection and enforcement. They were not crafted in a way that they can be asserted in judicial adjudication, esp. SERs. They lacked specification and determination both in terms of their contents and scopes. This on the other hand necessitates constitutional interpretation.

The CCI/HoF has always hesitant to interpret constitutional rights particularly SERs.¹⁵⁷ The other reason is that CCI/HoF has no legal power to conduct abstract review, i.e. in absence of concrete cases. Concrete constitutional case should be existed for the house to interpret the constitution. This displays how law itself limited the CCI in interpreting the constitution. There is also gap in legal awareness creation as to the justiciability of SERs on the part of right-holders. Individuals are not in a position to assert their SERs to courts of laws when they have been violated.

Conversely, the organizational structure of CC, being isolated from any governmental wing, makes it appropriate for conducting constitutional review and to interpret the constitution independently and impartially, without having any interest in the outcome of the decision. Its composition provides another rationale for effectiveness and efficiency of the functioning. Constitutional judges are legal and political professionals with high caliber. They possess the necessary knowledge, skills and experiences in dealing with those functioning. The manner in

¹⁵⁶ Constitutional Court of South Africa, *Jaftha vs. Schoeman; Van Rooyen v. Stoltz*, (2005) 1 BCLR 78 October 8 2004

¹⁵⁷ See Journal of Constitutional Issues Supra notes 18

which they come to office provides a guarantee to institutional and personal independency. They stay in office for a limited period of time mostly non-renewable term. Usually, they are selected via election that involves all organs of government and opposition political parties. This makes CC suitable for the functioning. CC is not part-timer like CCI nor could they meet twice a year as the house. Usually, CC conducts abstract review and in that it does not need concrete case.

Therefore, structural organization, functional suitability and the manner of the composition of constitutional judges and their term-limits, their competence and political disaffiliation make CC appropriate organ to entertain constitutional disputes and to interpret the constitution, inter alia.

3.3. Mechanisms in which Constitutional Court Protects and Realizes Human Rights in Ethiopia

Under this topic, the manner in which CC protects and realizes human rights is discussed. It is a public secret that constitutional rights under the FDRE Constitution have never interpreted nor constitutional review been conducted so as to ensure the protection and realization of human rights. These results lack of enough constitutional law and human rights jurisprudences. This presses the need to have CC.

3.3.1. Individual Complaint Mechanism

As abovementioned, individual complaint mechanism is one of the main mechanisms that CCs employ to protect and realize human rights. Most CCs have this mechanism. Individual complaint mechanism is the most important procedure for the protection and realization of human rights in national and international human rights instruments and many (UN based) human rights treaties have employed this mechanism. It is also guaranteed under Ethiopian statutes.¹⁵⁸

¹⁵⁸See Article 5 of the CCI Proclamation No. 798/2013 and Article 5(2) of the Proclamation No. 251/2001 respectively

Patrono clearly notes that ‘individual complaint of infringement of the fundamental rights’ is very important mechanism to protect human rights, as enshrined in the constitution.¹⁵⁹ A very important aspect of the individual's right of constitutional complaint relates to its object-that is the acts against which recourse can be taken. Thus, the broader the range of actions covered, the greater the protection of individuals.¹⁶⁰ To this effect, the subject-matters covered by such complaint procedure must be broad. Therefore, via this right CC gets the opportunity to penetrate into the spectrum of problems of implementation of these rights.¹⁶¹ It therefore follows that CC serves as the last instance for prevention of violation of rights.¹⁶²

As a matter of general rule, the protection and enforcement of human rights fall on the shoulder of ordinary courts. For many reasons, ordinary courts may fail to discharge their constitutional duty to protect and enforce human rights to the great extent they ought to be. In such scenarios, individuals should be given an opportunity to access to and their cases be heard by the highest tribunal as a means to last resort. To this effect, ‘individual complaint mechanism’ should constitutionally be guaranteed. It enables individuals to reach out to CC so as to get remedy for the damage sustained. Thus, this mechanism offers double protection and effective enforcement to human rights. Accordingly, CC takes human rights complaints as matter of last resort.

In order to set into motion this procedure, there are certain preconditions. The first one is related to the nature of the harm alleged by the petitioner and the second is about the subsidiarity of the remedy.¹⁶³ For instance, in Germany, in order to get access to Federal CC, a petitioner should show that the harm has not only violated his/her fundamental rights, but also has a duty to show that the harm is personal, real and immediate.¹⁶⁴ The second is all about the principle of exhaustion.

¹⁵⁹ Mario Patrono, ‘the Protection of Fundamental Rights by Constitutional Courts: A Comparative Perspective’, (2000), VUWLR Volume 31, at p. 409.

¹⁶⁰ Ibid at 411

¹⁶¹ Khanlar Hajiyevev, ‘The Role of Constitutional Court and Ordinary Court in the Protection of Human Rights’, (2002), Venice Commission, CDL-JU, P. 3

¹⁶² Ibid

¹⁶³ Patrono Supra notes 159 ibid

¹⁶⁴ Ibid

Generally, the protection and realization of human rights is, *inter alia*, preconditioned on the availability of the right to constitutional complaint. Individuals should be given a right to access to CC provided that their human rights have been violated by government authorities and they have exhausted all available remedies. It is by this mechanism that the CC directly implements constitutional human rights as it can easily reach individual right-holders. It can be submitted that through this mechanism, CC can be able to make the constitution self-execute document. Let me close this topic with quote: “the way of organizing the weapon of constitutional complaint can be discussed, but its necessity cannot”.¹⁶⁵

3.4. Constitutional Court and Ordinary Courts: Setting Jurisdiction

CC is subsidiary to ordinary courts in protecting human rights. Hence, CC is neither appeal nor cassation instance.¹⁶⁶ Put differently, unlike ordinary courts that have general jurisdiction, CC has only limited/specific jurisdiction. Constitutional matters are the only subject-matter of CC. All other cases are ordinary courts’ jurisdiction.

In contrast to ordinary courts, CC does abstract review, decides on political questions, separation and division of powers, impeachment, on competence to hold or to continue in public office and other related constitutional cases. What ordinary courts do when they come up with constitutional question while entertaining concrete case, is referring it to CC for interpretation or review of constitutionality.

To generalize, while ordinary courts have a general jurisdiction over civil and criminal cases, CC has exclusive jurisdiction over constitutional matters. Therefore, CC has a specific jurisdiction over limited matters given to it by the constitution or statute. Regarding their relationship, CC complements ordinary courts. In such, CC rectifies the defects of ordinary courts with respect to human rights issues. CC shall enjoy supremacy over its jurisdiction.

¹⁶⁵ R. Llorente, as quoted in Patrono *Supra* notes 166 at p 425

¹⁶⁶ Hajiyev *Supra* notes 161 at p. 3

3.5. The Prospects and Challenges in establishing Constitutional Court in Ethiopia.

3.5.1. Prospects

There is no better time to establish CC in Ethiopia than now. Currently, the country is undergoing legal revisions. There is a high popular demand for constitutional reform. Further, there is a consensus on the part of elites on the importance and the need to establish CC for the purpose of smooth democratic transition, strong federalism and protection of human rights, inter alia. Furthermore, there are also political parties who have officially asked for the establishment of CC. Then again, the government itself has officially recognized the existence of systematic and gross violations of human rights in the country. The cumulative of all these offer us hope that there is no reason why we do not have our own CC.

Once the legal reforms are done, constitutional reform could follow. Normally, establishment and legitimacy of CC needs constitutional amendment. As has been stated, Ethiopia is yet to make constitutional reform after for more than 3 decades. This presses the need to make constitutional reform so as to cope up with recent developments in relation to constitutional law, technological advancement, human rights and political changes. Once, the government and all stakeholders decide to conduct constitutional reform, there could be no reason why Ethiopia should not establish CC so as to ensure a smooth democratic transition, to protect and realize human rights and to strengthen federalism.

Generally, underperformance of the CCI/house in protecting and realizing human rights, high popular demand, elites' consensus and political parties quest for demanding major constitutional reform including the need to establish CC could pave the way for the establishment of CC for the first time in Ethiopia's legal system history.

3.5.2. Challenges

Coming to challenges, despite acknowledgment and existence of systematic and gross violations of human rights in Ethiopia, government might be reluctant to establish the system that limits its powers. The presence of CC does that. Truly, in a system dominated by one person/political

party, rulers have little incentive to construct a review system that would constrain them.¹⁶⁷ When they do (establish CC), it is often to consolidate a regime meant to benefit them while disadvantaging their opponents.¹⁶⁸

Accordingly, the government could lack willingness to entertain the question for the establishment of CC. There is a fear that the ruling party, Prosperity Party, is committed to establishing centralized federalism. By doing so it could be able to assume more powers at the centre. The more power federal government assumes, the more it is reluctant to the system that limits it. Constitutional amendment provides another challenge. For good or bad, government may not need it. It also takes lengthy time and has to pass via stringent procedures. Thus, there could be resistance thereto. Furthermore, there could also be disparity among stakeholders regarding the structure, function, composition and etc. of CC. The current political environment provides another huge challenge.

In short, the existing political landscape, the country's long lasted history of political conspiracy, divergence among stakeholders, lack of willingness and resistance to constitutional revision, the prevalence of single party system and reluctance for change could be challenges in endeavor to establish CC in Ethiopia.

3.6. The Legitimacy Question

The legitimacy of any institution is derived from an act that institutes it. Such act is referred to as 'enabling or parent act'. As it is known, depends on the mode of establishment, institution can either be constitutional or executive. Constitutional are those which their establishments are (pre)ordered by the constitution and not accountable to the executive. Consequently, Ethiopia has five independent constitutional institutions.¹⁶⁹ Conversely, dependent institutions are those which their establishment is ordered by the executive with an intention to provide essential services to

¹⁶⁷Alex Stone Sweet, 'Constitutional Courts, In Michel Rosenfeld and Andras Sajó (Eds.) 'The Handbook of Comparative Constitutional Law', (2012), Oxford University Press, at pp. 820-21

¹⁶⁸ Ibid at p. 821

¹⁶⁹ They are (a) Human Rights Commission (Art 55(14)), (b) Office of Ombudsman (55(15)), (c) The Auditor General (101), (d) The Election Board (102) and finally, The Population Census Commission (103) of the FDRE Constitution.

the people. Since they are not constituted by the constitution, they can be dissolved anytime as the executive deem them necessary.

With respect to CC, in order to get its legitimacy to carry out those functions in a bid to protect and enforce human rights, it should constitutionally be provided. Once, this has been done, it has got its legitimacy to carry out those functions that the constitution/statute would state for. To this effect, the FDRE constitution should be amended.

3.7.

3.8. The Foreign Experience: The South African Constitutional Court.

The Republic of South Africa's CC was first established in 1993 under the IC.¹⁷⁰ The court was called upon to establish the legal framework for the recognition and protection of the "Fundamental Rights" enumerated in chapter 3 of the IC.¹⁷¹ The IC was replaced by the new constitution in 1996 via Act No. 108/1996.¹⁷² Since then, CC has decided many breakthrough cases that paved the way for the protection of human rights. In a case between *State vs. Makwanyane*,¹⁷³ CC ruled death penalty unconstitutional and held that the very reason for establishing the new legal order was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. With respect to SERs, TAC, Grootboom, Jaftha vs. Schoeman, Van Rooyen vs. Stoltz and *Social Assistance Act*¹⁷⁴ are some of the groundbreaking decisions rendered by the court.

¹⁷⁰ See, South Africa's Constitution of 1993 (Interim Constitution), Chapter 7.

¹⁷¹ Hoyt Webb, 'The Constitutional Court of South Africa: Rights Interpretations and Comparative Constitutional Law', (1998), Journal of Constitutional Law Volume 1, p. 206

¹⁷² See, Proclamation No. R. 6, 1997; South Africa's Constitution of 1996, Chapter 14, Schedule 243.

¹⁷³ See Constitutional Court, *State vs. Makwanyane*, 1995, (3) SALR 391; 401; 431, 439-52

¹⁷⁴ The government restricted access to social assistance benefit to its citizens only. CC held that since it discriminated against permanent residents, it violated Section 9(3) and 27(1) of the constitution and declared unconstitutional. See, CC of South Africa, *Khosa and others v. Minister of Social Development and others*, 2004 (6) SA 505

Lessons to be taken

There are many lessons Ethiopia can take from the South Africa's CC. Prior to 1993 South Africa have not had enough constitutional jurisprudence. It was after the establishment of the CC that they have started to get robust constitutional and human rights jurisprudences. By establishing CC, South Africa has able to determine the scope, character and contents of human rights. CC is taking human rights, esp. SERs, to another level of protection via extensively interpreting and striking down legislations that are inconsistent with the constitution. Under Ethiopian legal system, despite the fact that SERs are constitutionally justiciable rights, no effort has been made to make them enforceable. Their scope is indeterminate and their contents are unknown to anyone. They are articulated as a duty of government not rights of individuals. This makes them difficult to execute.

Ethiopia is a party to both ICCPR and ICESCR. Besides, the constitution provides that Ethiopian bill of rights shall be interpreted and implemented in accordance with these core international human rights treaties, inter alia. The committees of both covenants have issued numerous general comments regarding the applications, scopes, characters, contents and their limitations. As is known, South Africa is yet to be a member-party to the ICESCR. Their CC however made numerous references to the covenant when interpreted the constitutional rights of individuals relating to SERs. Such reference to international human rights instruments and jurisprudences has been provided under the CCI and HoF proclamations though it is yet to be applicable (in human rights cases). The South Africa's CC has been deciding on the government policies' reasonableness, adequacy and proportionality esp. those SERs.

Generally, the South African CC has able to determinate the contents, scopes and characters of constitutional rights by taking in to account international human rights instruments and jurisprudences. It ruled out legality of death penalty. It has a power to declare the parliament incompetent, impeaches the president, decides on the separation of power, decides on the constitutional amendment, constitutionality of any law, interpret and defend the constitution. By taking all these into account, therefore, Ethiopia should establish CC.

CHAPTER FOUR: CONCLUSION AND IMPLICATION

In protecting and realizing human rights, powers of the government should constitutionally be limited. This necessitates the existence of a strong constitutional review system under which those powers are scrutinized by independent constitutional reviewer so as to ensure that the protection and enforcement. To this effect, CC reviews the law making power of legislator so that the latter cannot enact unconstitutional law and in case it enacts, to render unconstitutional. With respect to the executive, CC evaluates actions and decisions of it in line with the constitution and their limitations thereto. When it finds them unconstitutional, it would then order their unconstitutionality and remedy for the sustained human rights violation/s.

In similar vein, courts decisions are also subject to review by CC. There is no guarantee that courts would not violate the constitutional rights. As a result, CC makes redress whenever there are violations of constitutional rights via complaint mechanism. It can be submitted that CC plays inimitable and fitting role in the protection and realization of human rights. Despite the fact that FDRE constitution recognize bulky of human rights and ratified core international human rights treaties, their applications are very much limited due to the fact that their scope, contents and character have not been determined by the body entrusted to interpret the constitution, CCI/HoF. Similarly, in spite the fact there are legislations that are restricting, limiting and preconditioning human rights in Ethiopia, they all have given a green light to operate, regardless of their consequences on human rights.

Consequently, Ethiopia has been remained devoid of constitutional review system. Corollary, there have been systematic and gross human rights violations. Constitutional and statutory guaranteed human rights have never been protected and realized, especially SERs, to a great extent. Therefore, it is a time to change the due course of things by establishing CC and empowering to interpret the constitution, conduct constitutional review, supervise election, decides on impeachment, separation and division of powers, constitutional amendment and defend the constitutional order.

Generally, constitutional reform must be taken and due attention should be given in paving the way to establish and legitimize CC. Human rights should be protected and realized so that right-holders can able to enjoy exercising them to the best possible. To this effect, there should be a

strong, competent and constitutionally provided CC exercising constitutional review of legislations, executive actions and judiciary's decisions in line with constitution so that laws, actions and courts' judgments cannot be inconsistent with constitution. CC should be empowered to conduct constitutional review and interpretation; abstract review, to oversee vote counting and electoral result, and to receive constitutional complaint. The good operation of CC needs a welcoming environment and as such, the existing political landscape should be changed.

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