Enforcement of Fundamental Rights and the Role of the House of Federation (HOF): Jurisdiction and Limitations

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Acronyms

ACHPR-African Charter on Human and Peoples' Rights

CCI-Council of Constitutional Inquiry

FDRE- Federal democratic Republic of Ethiopia

HOPR-House of Peoples' Representatives

HOF-House of Federation

ICCPR-International Convention on Civil and Political Rights

ICSEC-International Convention on Social Economic and Cultural Rights

PDRE-People's Democratic Republic of Ethiopia

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Abstract

This is an era of human rights. In the aftermath of the Second World War and particularly following the fall of communist regimes in the former Soviet Union and Eastern Europe, courts have assumed a central role in serving as guardians of human rights. Mankind has witnessed popular governments turning into totalitarianism which, in turn, resulted in widespread human rights violations. Ethiopia, too, experienced the bitterness of dictatorial rule under a socialist government. Four years later after the change of government in 1991, Ethiopia adopted a federal constitution which has recognized a wide-ranging list of human rights. As to enforcement, the House of Federation, the second chamber of the federal legislature, has been authorized to be the adjudicator of constitutional cases. In this regard, the HOF is assisted by the Council of Constitutional Inquiry which has eleven members the majority of whom being lawyers by profession.

However, the current institutional system has created confusion regarding the respective role of the courts and the HOF in the implementation of the Constitution. Apart from that, the empowerment of a political organ (i.e. the HOF) to decide on constitutional disputes has inherent weaknesses for it lacks the essential qualities required from an adjudicatory organ. To be more specific, the principles of judicial independence, impartiality and competence do not feature in the interpreter of the Constitution. Hence, the need for change in the current institutional set up by way of establishing a full-fledged constitutional court.

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Chapter One

1. Introduction

In an attempt to control the use of power by public officials, societies have employed constitutional law as a means to check and control the excesses of such power. To realize this objective, among others, different institutions are created to handle different functions and human rights are incorporated in the Constitution. Constitutions also provide the means by which those rights are to be protected and enforced. But we do not have the same institutional system across all countries. While in some countries ordinary courts adjudicate constitutional cases, in others there are special courts. Ethiopia is an example for the second group of countries.

This thesis makes an assessment of constitutional rights enforcement mechanisms in Ethiopia. The essence of the study is to explore whether Ethiopia has a proper institutional arrangement that can serve as the custodian of rights and freedoms enshrined in the Constitution. As such we shall evaluate appropriateness of the current institutional structure in terms of ensuring the realization of basic rights. The analysis basically starts from a comparative point of view to see the theoretical and practical constraints associated with the Ethiopian justice administration system and in particular the role of the judiciary and the interpreter of the Constitution i.e. the HOF; and the impact of this power relation between the two organs on the question under discussion.

1.1 Background

The year 1991 heralded a new direction in the Ethiopian political system. Following the change of government in that year a transitional charter was enacted whereby central and regional governments were constituted.

Pursuant to the Charter the central government was responsible for the governance of the whole country.[1] Regional governments were also vested with the power to exercise self-determination and administration and participate in the central government.[2] The decentralization process of the transitional period has been reaffirmed by the Federal Constitution of 1995. Basically the Constitution centers on the idea of sovereignty of nations, nationalities and peoples of Ethiopia. Accordingly, states have been created taking into account language, culture and identity and consent as criteria.[3] The upper chamber of the legislature, which represents the different linguistic groups, is responsible for the interpretation of the Constitution and decides on issues of constitutionality.

The federal Constitution guarantees a comprehensive list of human rights ranging from the most classic civil and political to the most recent ones (e.g. the right to clean environment). Furthermore, the Constitution declares itself to be the supreme law of the country and any law, practice and decision incompatible with it to be of no effect.[4] The Constitution also imposes on all state organs the duty "to respect and enforce"[5] the constitutional provisions on fundamental rights.

With respect to enforcement of basic rights, as the ultimate interpreter of the Constitution and adjudicator of controversies arising under the Constitution, the HOF has a special power and duty. In exercising its constitutional interpretation power, the House is assisted by the Constitutional Inquiry Commission (CCI)-an organ responsible for making recommendations as to how a constitutional case should be

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[1] *Transitional Government Charter* Negarit Gazeta 50th year No 1 Art 8
[2] Ibid Art 3 (2) (c)
[3] *Constitution of the Federal Democratic Republic of Ethiopia Proclamation 1/1995,* Art 46(2) (Hereafter referred to as the (Ethiopian) Constitution.
[4] Ibid art 9(1)
[5] Ibid art 13(1)

resolved. And the HOF is at liberty to approve (or reject) such recommendations.

1.2. Statement of the Problem

The Ethiopian Constitution is acclaimed for recognizing a wide range of human rights. It also recognizes the right to access to justice[6] and vests judicial power in the courts.[7]The courts have, however, limited power in the application of the Constitution. By conferring the authority to decide on constitutional disputes to a political organ, the framers of the Constitution have adopted a unique institutional system of constitutional enforcement.

Having a catalog of constitutional rights and freedoms is one thing and designing the right institutional system for their enforcement is quite another. In Ethiopia we have serious institutional constraints in the vindication of constitutional rights as the power to decide on constitutional disputes is entrusted to a political body. This has also created confusion whether the judiciary has also a say in constitutional interpretation and, if so, where the line demarcating the jurisdictions of the HOF and the judiciary is to be drawn.

The nature of the HOF and the responsibility given to it raises many questions. Chief among them: is the HOF (being a political organ) the right institution to protect and enforce basic rights of the powerless and the individual. From the wording of Art 84(2), the HOF's constitutional adjudication power seems to be confined to see the validity of legislative enactments *vis-à-vis* the Constitution. Of course, it has also authority on disputes between high government officials at the federal level, between state governments themselves and between states and the federal

[6] Ibid art 37
[7] Ibid art 79(1)

government.[8] Art 84(2) seems to imply that the constitutionality or otherwise of executive actions can be reviewed by ordinary courts.

However, this issue has been further complicated by the enactment of two proclamations in 2001 that have extended the HOF's mandate. By virtue of the two laws the HOF is the sole authority to see the validity of not only legislations but also executive regulations, directives and decisions. This study will look into the following key questions.

1. Do we have an appropriate institutional set up in terms of protecting, promoting and enforcing constitutional rights?
2. What are the theoretical and practical constraints, if any, to the enforcement of basic rights and freedoms in Ethiopia? (Here the emphasis is on constraints associated with our institutional arrangement.)
3. To find out the level of human rights enforcement practice by the HOF and the courts.

1.3 Scope of the Study

The enforcement of constitutional rights cannot be the sole job of the HOF. Executive organs, civic organizations, the Human Rights Commission, the Office of Ombudsman, etc may a play significant role in ensuring the observance of the Constitution. This research will not cover all of these bodies. The role of regional institutions is also beyond the scope of this study. Also we will not consider matters pertaining to approaches and techniques of constitutional interpretation, and procedural issues such as standing and remedies.

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[8] Assefa Fiseha, Constitutional Interpretation: The Respective Role of Courts and the House of Federation In *Proceedings of The Symposium on the Role of Courts in the Enforcement of the Constitution* (Addis Ababa: Birhanena Selam,2001) at 14

This study rather focuses on the nature, role and appropriateness of the HOF (and its assistant the CCI) and the judiciary. Though it is essentially about the role of the HOF, we cannot set aside the judiciary's contribution to serve as protector of basic rights in its day to day business i.e. resolving disputes according to the law, including the Constitution.

1.4 Objectives of the Study

1. To find out whether Ethiopia has an efficient, effective and acceptable institutional system of human rights protection and enforcement. We shall specifically investigate the nature of the HOF and its constitutional adjudication mandate and see whether its nature and mandate are compatible to each other. In dealing with this issue we shall use principles pertaining to an adjuratory body as points of reference.
2. To determine the respective jurisdiction of the HOF and judiciary in the area of constitutional interpretation and application.
3. To assess and evaluate the practice and capacity of the HOF and the courts.
4. To evaluate whether the principles of separation of powers and checks and balances are adequately provided for in the Constitution as they are also essential conditions for ensuring the respect for the rule of law and human rights.

1.5 Hypothesis

This study starts with the assumption that the organs charged with the protection and enforcement of fundamental rights in Ethiopia are not effective and efficient in discharging their responsibilities. The fact that a political organ is conferred with constitutional adjudication power is a bottleneck to the realization of basic rights.

1.6. Significance of the Study

The central objective of this study is to show the theoretical and practical institutional constraints in the realization of human rights in this country and to encourage debate as to the appropriateness of the current organizational structure and ultimately bring about institutional reform so that we will have independent and able institutions.

The literature on the constitutional rights enforcement in Ethiopia has been so far confined to the determination of the jurisdiction of the two principal institutions, namely, the judiciary and the HOF. From the literature it is possible to discern that there are two major groups of writers. One group argues the courts do not have a say in determining what the Constitution does or does not say. This proposition is premised on the assumption that the HOF is the sole authority to interpret the Constitution. According to this group since the Constitution does not explicitly provide for judicial review, courts have no power to interpret text of the constitution.[9]

The majority of scholars, on the other hand, argue that judges can also interpret the Constitution.[10] With the second group the issue is the extent of judicial power and where to draw the line between the power of the courts and the HOF.

This research is unique in two aspects. First it will evaluate our institutional arrangement at a macro level. As such we try to evaluate whether we have appropriate institutions in terms of enforcing human rights and redressing their infringements. Second, we assess the gap

[9] Yonatan Tesfaye, *Who Interprets the Constitution: A Descriptive and Normative Discourse on the Ethiopian Approach to Constitutional Review* (LLM thesis, 2004) http://www.up.ac.za/dspace/bitstream/2263/1079/1/fisseha_yt_1.pdf (as accessed on September 10,2007) at 30

[10] The list of scholars supporting this view includes Assefa, Donovan, Ibrahim, Sholler and Tsegaye.

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between theory and the practice of the principal institutions authorized (explicitly or otherwise) to protect constitutional rights.

1.7 Methodology

In this study both quantitative and qualitative approaches are employed. While the first four chapters are primarily based on secondary and primary data (literature review, analysis of the Constitution, legislations, and regulations) the last chapter is predominantly based on primary data. The strategies of data collection include interview, administering questionnaire, case analysis and personal observation. Through the use of books available in several libraries and the internet, the literature is extensively used to make a comparison as to the nature of constitutional interpretation mechanisms put in place in some selected countries.

1.8 Problems and Limitations of the Study

The level of human rights protection and enforcement is a function of multiple factors. Level of political commitment, economic development, civic organizations participation, public awareness about human rights and confidence in the adjudicatory organs, the role of the media, etc, are some of them. An investigation into the impact of multitude forces is not manageable due to time and resource constraints. Thus, we limit our study to the nature, impact, appropriateness and practice of two constitutional enforcement organs only.

The other problem is the finding of relevant court cases owing to poor case filing system in the courts. To minimize the effect of this problem, it was found necessary to seek the assistance of judges and registrars in locating relevant decisions. With such help some cases have been obtained.

1.9 Structure of the Study

This thesis contains five chapters. The first chapter is introductory. Chapter Two describes the nature of constitutional interpretive organs of five countries. It is believed that a comparative study will enable us to see the strengths and weaknesses of the political institutions in Ethiopia. In this chapter the arguments for and against the institution of judicial review are also considered. Arguments forwarded by proponents and opponents of judicial review go to the heart of the role of courts in determining the meaning of a constitutional text and invalidating legislative as well as executive actions considered as having failed to meet constitutional standards.

Chapter three is devoted to highlighting the development of constitutional enforcement mechanisms in Ethiopia. The institutional arrangements introduced by the last two regimes are examined to assess the impact of our tradition on the current institutional system and practice.

In Chapter Four, we try to delimit the role of the HOF and the courts regarding constitutional interpretation. The principles of separation of powers and checks and balances which are essential to ensure constitutionalism and human rights protection are discussed. For this study, perhaps, more important than other issues is an examination of the nature and functions of the HOF.

Chapter Five takes up an evaluation of human rights enforcement practice in Ethiopia and the attitude of judges towards their role in safeguarding the rights under discussion-whether our constitutional rights enforcement organs are doing what is expected of them.

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Chapter Two

2. Constitutional Interpretation and Human Rights Protection: A Comparative Perspective

2.1 Who Interprets a Constitution?

In this section we dwell upon the institutions in charge of interpreting and enforcing constitutions in general and human rights provisions in particular. Since it is unnecessary to discuss about institutions from every country, we shall confine our study of judicial review as practiced in the United States, England, France, Germany and China. The sample chosen is not random but deliberate as each institutional system in these countries has some peculiar features.

2.1.1 United States of America

The American Constitution does not expressly recognize judicial review. However, the Supreme Court has asserted its power of judicial review since the land mark case of *Marbury V. Madison.* The Court reasoned that the judicial power extends to all cases arising under the constitution.[1] Judges inevitably expound and interpret the law. And when the laws of the legislature and the Constitution conflict to each other, the court must give precedence to the latter. The Supreme Court asserted, "It is emphatically the province and duty of the judicial department to say what the law is."[2]

In fact the position of the Supreme Court in *Marbury v. Madison* did not convince everyone. For a long time judicial review has been a contentious issue. Be that as it may, the American courts, specially the Supreme

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[1] *Marbury v. Madison* reprinted in Walter Murphy *et al*, *Comparative Constitutional Law: Cases And Commentaries* (New York: St. Martins Press, 1977) at 108-110

[2] Id

Court, play active role in examining the constitutionality of congressional and administrative acts and ruling on their validity. The idea is when a court is faced by a conflict between legislative and constitutional provisions, it must give precedence to the higher law. This practice has attracted the attention of proponents as well as opponents. We will consider this issue in detail later. "The power of judicial review is held by courts in the United States, which is based fundamentally on the tripartite nature of governmental power as enunciated in the United States Constitution."[3](Emphasis added)

As opposed to abstract review, the US Supreme Court examines the merit of legislations whose validity is questioned by parties to a real case. When the law is considered inconsistent, courts declare it to be unconstitutional and, hence, inapplicable to the case. In the other words, the court entertains cases only when there is a real case or controversy.

2.1.2 United Kingdom

In the UK the story is different. In the long struggle between the crown, parliament and the courts, parliament emerged victorious and established its supremacy. As a result the theory of parliamentary supremacy has prevented judges from questioning the validity of statutes as an oft-quoted saying goes: "The English parliament can do everything except transforming a man into a woman and a woman into a man."[4] In the words of Dicey the legislature "has the power to make or unmake any law whatever."[5]

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[3] Albert Chen, *The Interpretation of the Basic Law: Common Law and Mainland Chinese Perspective, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925212* (as accessed on October 2, 2007)
[4] Henry Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England and France* (6th ed. New York, Oxford: Oxford University Press, 1993) at 289
[5] Yonatan Tesfaye, *Who Interprets the Constitution: A Descriptive and Normative Discourse on the Ethiopian Approach to Constitutional Review* (LLM thesis, 2004) http://www.up.ac.za/dspace/bitstream/2263/1079/1/fisseha_yt_1.pdf (as accessed on September 10,2007)

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When the Glorious Revolution established the supremacy of the English parliament, courts were deprived of the power of judicial review.[6] The British have, instead, put their trust in the wisdom of their parliament in the protection of their freedoms. This does not rule out the role of other forces that have significant contribution in checking and controlling the parliamentary power such as the political parties, public opinion, the media and the political process. Even if judicial review (in the sense that courts do not have the power to invalidate parliamentary legislations) is not practiced in UK, it "was conceived there and applied in the former British colonies including the United States."[7] Thus, colonial judges were in effect empowered to strike down the law of colonial legislatures when they contradicted with the laws of the British parliament.[8]

The English judge can, however, decide on the legality of administrative laws and decisions applying what are known as principles of natural justice. The courts have authority to interpret acts of parliament and determine the legality of administrative actions in light of parliamentary statutes. By using this power they hold public officials accountable to them.[9]

However, the principle of parliamentary supremacy has changed in recent years since UK's membership in the European Union. Pursuant to the supremacy clause as applied by the European Court of Justice, European Union laws prevail over inconsistent national laws on matters falling under the Union's jurisdiction.[10] In other words, laws issued by British parliament can be reviewed and invalidated by the European

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[6] Minasse Haile, The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development in *Suffolk Transnational Law Review* (Vol. 20, No.1,1996) at 56
[7] Ibid at 55
[8] Id
[9] Abraham supra note 4, at 289
[10] Merry and Gledon, *Comparative Legal Traditions* (West Publishing Co., 1982) at 76

Court of Justice and the English parliament can no longer enjoy its traditional supreme power.

2.1.3 Germany

For a long time in Europe popular sovereignty and parliamentary supremacy have acted as powerful checks on the adoption of external and independent control over legislation, especially one vested in a judicial body.[11]The relationship between the courts on the one hand and the legislative and executive branches on the other depicts a political theory Europe had followed before the Second World War.[12] The lessons learned from experiences that took place in the first half of the last century showed that popular governments may degenerate into dictatorship unless put under control. The three countries that orchestrated the Second World War, namely, Germany, Japan and Italy, have now established constitutional courts.

The fathers of the German Constitution rejected the empowering of courts to decide on the constitutionality of acts of the political organs of government. This is "because of an inherent and endemic bias against" [judicial review] and "because of what they regarded as the 'stultifying actions' of the US Supreme Court."[13]

The Basic Law of Germany has established a special constitutional court which has the authorization to enforce the Constitution against any other government body. With respect to the enforcement of the Basic Law, the Court can be approached by government institutions-federal,

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[11] Carol *Guarnieri, Courts and Marginalized Groups: Perspectives from Continental Europe*, (accessed from the internet on October 6, 2007)

[12] Id

[13] Abraham supra note 4, at 291

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land, members of the legislature, or by an ordinary court.[14] Individuals who allege rights violation by the application of a given law are also entitled to request the Constitutional Court for remedy, provided that they first exhaust all other available avenues of redress.[15] Against the initial skepticism, over the years the Court has become more assertive. By mid-1990s, its case load reached well over 5000 annually.[16]

Regarding its composition, half of the judges are elected by the lower house of the legislature on the basis of the proportional seat of political parties in the lower house and the other half by the upper house by a two-thirds majority.[17] Members of the court are chosen by the legislature in a manner that ensures that they "are acceptable to the established political parties and be broadly representative of established political interest including the interests of the states"[18]

Unlike the practice of the American courts, European constitutional courts exercise both abstract and concrete reviews. In Germany, high government officials resort to the Constitutional Court to dispute the constitutionality of legislative norms. Compared to the American Supreme Court, the German Constitutional Court has boarder power for it entertains what US courts would defer to the other branches of government.[19]

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[14] Ibid at 74
[15] Id
[16] Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany.*(2nd ed. Durham, London: Duke University Press, 1997) at 15
[17] Ibid at 54
[18] Id
[19] Mekonnen Frew, *Judicial Review in Ethiopia: A Comparative Appraisal* (LLM thesis, the softcopy of this thesis was made available to me by the writer, 2007) at 75

2.1.4 France

In France the concept of separation of powers is understood differently from the way it is applied in most western democracies; a difference attributable to a historical reason. In that country the judiciary has been made subordinate to the other state organs. This has got a historical justification. The French tradition has been characterized by public distrust towards the courts which were considered antagonistic towards government reforms and sympathetic to the monarchical system. In the continental system, "mistrust of the judiciary has always been high and judicial power has been regarded as an important power to be checked"[20] and judicial subordination was accompanied by "the supremacy of the legislature, which became synonymous with popular sovereignty."[21] This thinking resulted in the prevention of the courts from controlling legislations.

Judicial review in France is performed by the Constitutional Council. Article 61 of the French Constitution states that all organic laws as well as those proposed statutes that gather sufficient parliamentary opposition must pass before it at the end of the legislative process. The Constitutional Council can strike down a controversial bill in full or in part, and its decisions cannot be appealed.

The problem with this mechanism is that in France, the Constitutional Council is the *only* judicial body having authority for judicial review. It cannot be seized by ordinary citizens, who also cannot invoke unconstitutionality of a law as a defense. This means that unconstitutional laws cannot be challenged anymore if they somehow evade the Constitutional Council (for instance, if it is not seized by the Parliament during the one-month delay allowed by the Constitution).

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[20] Carol Guarnieri, *Courts and Marginalized Groups* supra note 11
[21] Id

In practice, the French supreme courts who deal with individuals' cases (*Conseil d'état* and *Cour de Cassation*) do their best to interpret the law in a manner consistent with the Constitution.[22] In particular, French administrative law defines a category of case law known as principles of constitutional value such as human dignity and continuity of the state, that rule over the executive branch of the government even if the legislator omits to say so in statute law.[23]

2.1.6 China

Unlike the greater majority of countries around the world, China has still retained the socialist political system. The country is still a one-party state and its constitution is shaped by the socialist ideology.

In China ordinary courts are not allowed to decide on the constitutionality of laws. A constitutional court does not exist either. The Constitution has rather authorized the Standing Committee of the legislature (i.e. the National People's Congress) to interpret the Constitution. This is in contradistinction with the western concept of separation of powers (a device used as means to prevent concentration of power thereby its potential abuse) which is considered as the cardinal principle of political organization.

In theory the national assembly is the supreme political organ. However, it is the communist party that is at the center of decision making and leadership. Chen has observed, "In practice there (is) a concentration of power in the leaders of the communist party which (provides) leadership to the national assembly as well as other state organs (including court) both in theory and practice."[24] There is virtually no constitutional

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[22] Id
[23] Id
[24] Cia Dingjian, *Constitutional Supervision and Interpretation in the People's Republic of China,(J Chinese L 2195,* 1995) at 65

limitation on the powers of the party and the legislature. Even today there is debate in China whether the constitution is supreme over the communist party.[25] Chen commented that 'constitutions' in socialist systems operate "more like political-philosophical declarations than as legally binding norms..."[26] That is why constitutional lawyers doubt the existence of constitutionalism in such countries.[27]

Normally socialist constitutions confer the power of constitutional interpretation to the legislature. China is no exception to the rule. The 1982 Constitution of the People's Republic of China has empowered the Standing Committee of the legislature to interpret the constitution, legislations and regulations.

As per Art 67of the Constitution
The Standing Committee of the National People's Congress exercises the following functions.

1. To interpret the Constitution and supervise its enforcement
2. To interpret statutes
3. To annul those administrative rules and regulations, decisions, or orders of the state which contravene the Constitution or the statutes.
4. To annul those local regulations or decisions of the organs of the state power of provinces, autonomous regions and municipalities directly under the central government that contravene the Constitution, statutes or the administrative rules and regulations.

In socialist countries the rule of law and constitutionalism have little place to restrain governmental power which means, among others,

[25] Id
[26] Albert Chen, *The Interpretation of the Basic Law* supra note 3
[27] Id Ludwikowski as quoted by Albert Chen

constitutional rights have little or no impact in safeguarding the individual from the excesses of state power. With respect to the practice of constitutional interpretation in China, Chen wrote:

> *In the legal history of the People's Republic of China, there were only three occasions on which the (National People's Congress Standing Committee) NPCSC expressly exercised its power of interpreting laws, whereas its power of constitutional interpretation has never been expressly exercised.*[28]

In practice constitutional interpretation has not been effectively used due to many reasons including popular sentiment, lack of information, constitutional theory, organizational structure and China's political system.[29] In other words, the system of constitutional enforcement is dependent on the nature of a political system and the level of public awareness.

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2.2 Arguments for and against Judicial Review

For the purpose of this section judicial review refers to the power of ordinary and constitutional courts to interpret a constitution and overrule laws and decisions considered failing to meet the test of constitutionality. Some countries have established specialized courts for this purpose and some of the arguments on judicial review may not be directly relevant to constitutional courts.

Judicial review exists in the Americas, Europe, Asia, Australia and Africa. Today it is the rule rather than the exception. Despite its popularity, judicial review is controversial. It has proponents as well as opponents. Now we will consider the arguments of both sides.

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[28] Albert Chen, *The Interpretation of the Basic Law*, supra note 3
[29] Id

For the sack of convenience we shall divide the points raised against judicial review into three areas: counter-majoritarian argument, judicial accountability and institutional independence. Basically the critics of judicial review raise two points i.e. the undemocratic nature of judicial review and the lack of judicial accountability to the public.

2.2.1 The Counter-Majoritarian Problem

The problem of counter-majoritarianism is related to the concept of democracy. The critics of judicial review question the wisdom of empowering unelected judges to override laws and decisions made by elected representatives. In relation to the practice of the American Supreme Court, opponents ask:

> *Why a majority of nine justices appointed for life should be permitted to outlaw as unconstitutional the acts of elected officials or of officials controlled by elected officials?*[30]

In a democracy the people are the source of authority and the legislature, as the representative of the will of the people, is the proper forum to reflect the wish of the electorate. In addition, parliamentarians are subject to public scrutiny through periodic elections. This argument actually assumes a democratic system and does not tell us what kind of institutional arrangement is best in undemocratic societies.

The counter-majoritarian argument is not convincing. This is because constitutional law by definition is a limitation on the exercise of public power. An Israeli Supreme Court justice observed: "*If the counter-majoritarian argument is correct, then states ought to refrain from making*

[30] See Eugene Rostow, *The Democratic Character of Judicial Review* (66 Harv.L.Rev. 193, 1952-1953) at 206 The quoted question was raised by critics of judicial review and discussed by Eugene Rostow; otherwise, the author is pro-judicial review.

a constitution. After all a constitution is not a democratic document, since it negates, in certain circumstances, the power of the current majority."[31]

The thinking that considers judicial review as undemocratic depends very much on how we understand democracy itself. Democracy should not be considered as mere majority rule. Aharon remarks that democracy has two essential elements-formal and substantive[32]. By formal democracy he refers to rule by the majority "which is often effectuated through representatives in a legislative body."[33] Real or substantive democracy, on the other hand, is about the internal morality of democracy which is "based on dignity and equality of all human beings."[34] Real democracy accommodates the power of the majority and the limitations on that power.

If ultimate societal values are to be respected by the majority and the political organs, judicial review is the best device to defend those values. Put in a different way, judicial review is a good tool to ensure the protection of the fundamental values of a society by restraining the behavior of officials, even if those officials are democratically elected. Wheare warned against the problems of unchecked majority rule.

> *Universal suffrage can create and support a tyranny of the majority, of a minority or of one man...have not modern tyrannies been returned to power by majorities of over 90%?* [35]

Actually the counter-majoritarian argument is not concerned about the issue of institutional competence or level of expertise.[36] It rather

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[31] Barak Ahron, *Forward: A Judge on Judging: The Role of a Supreme Court In a Democracy.* (Justice Professionals Training Center, 116 Har.L.Rev, 2002) at 14
[32] Ibid at 20
[33] Id
[34] Ibid 15
[35] Wheare quoted in Minasse Haile, The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development in *Suffolk Transnational Law Review* (Vol. 20, No.1, 1996) at 51

emphasizes the importance of popular sovereignty and majority rule. The problem with this understanding of democracy is it prevents us from looking beyond majority rule to determine the appropriate institution in terms of ensuring constitutional governance in general and protecting and promoting fundamental rights and freedoms in particular.

But democracy should not be seen an end but a means to realize underlying values such as human dignity and social justice. "Government and politics are after all the arms, not the end, of social life."[37] The purpose of "(a) constitution is to assure the people a free and democratic society."[38] These are values what Aharon describes as the internal morality of democracy, as opposed to, the exercise of naked rule of a majority. To say that a given society is not democratic because sovereign power does not reside in its legislature is an oversimplification.[39]

The arguments in favor or against the courts' power to review governmental actions emanate basically from the nature of the political theory we adopt. Chen has remarked that the legitimacy of judicial review:

> *depends on the development of a coherent political theory that deals with the nature and status of the constitution, the fundamental concepts of democracy and constitutionalism and the relationship between them and the functions served by judicial review.*[40]

Despite objections, judicial review is becoming more and more popular over the years. Its usefulness in alleviating the evils of excessive

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[36] Yonatan Tesfaye, *Who Interprets the Constitution: A Descriptive and Normative Discourse on the Ethiopian Approach to Constitutional Review* (LLM thesis, 2004) http://www.up.ac.za/dspace/bitstream/2263/1079/1/fisseha_yt_1.pdf (as accessed on September 10, 2007)

[37] Eugene Rostow, *The Democratic Character of Judicial Review*, supra note 30 at 195

[38] id

[39] Id

[40] Albert Chen, *The Interpretation of the Basic Law*, supra note at 3

governmental power is beyond doubt. In short, in the modern world judicial review does not have a substitute in rendering an effective human rights protection system.

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2.2.2 The Non- Accountability Argument

The opponents of judicial review contend that while politicians are accountable to the people, judges are not. Once a person is appointed as a judge, he/she remains in principle in office until retirement. Politicians are informed about the needs of the current society but judges tend to be insensitive to such developments. The essence of this contention is judges are not accountable to the public like officials working in the other two branches. The critics question the appropriateness of empowering judges to decide on the validity of legislative and executive actions.

However, like the counter-majoritarian argument the non-accountability argument has some flaws. First, judges, too, are accountable. The difference between the accountability of the political organs and that of the judges relates to who supervises and holds them accountable. While politicians are accountable to the electorate, judges are also accountable but differently. First and foremost, they are required to give reasons for their judgments. Those judgments are also subject to investigation by a higher court by way of appeal. In principle, judicial proceedings are public. What is more the judge is answerable for misconduct.[41]

The question is not whether every organ of the state is accountable as the legislature is. The question is, in the words of Eugene, "Whether the system as a whole fits our concept of democracy...Democracies need not elect all the officers who exercise crucial authority in the name of the

[41] Barak Aharon , *Forward: A Judge on Judging*, supra note 31 at 21

voter."[42] The nature of the job parliamentarians do necessitates their public accountability. A similar accountability is not required from judges, or it will even be counterproductive.

2.2.3 Institutional Independence

The job of judge is to resolve disputes according to the law. Critics point out that the judge is likely to substitute his subjective views for that of the legislature under the pretext that the law is unconstitutional.[43] However, compared to the legislature, judges are more objective. The judiciary is better positioned to resist pressure from outsiders. On the other hand, politicians are apt to be emotional and passionate particularly in times of social crises. They may be very sensitive to the current demand of the majority as they have an obvious and direct interest regarding whether a particular law is constitutional or not.[44]
Beatty explains:

> *[T]he political branches of government cannot bring the same measure of impartiality and disinterested judgment as the courts... To allow any branch of government except the court to decide on the constitutionality of laws is to make it the judge of its own cause.*[45]

As pointed out earlier judicial review is now the rule. It is practiced not only in the West but also in the newly emerging democracies. In the first half of the twentieth century mankind witnessed the degeneration of democratic governments into dictatorships[46] and the lessons learned

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[42] Eugene Rostow, *The Democratic Character of Judicial Review*, supra note 30 at 197
[43] Id
[44] David Beatty, Human Rights And The Rules Of Law In David Beatty(ed.), *Human Rights And Judicial Review: A Comparative Perspective*(Dordrecht, Boston, London: International Studies In Human Rights, Martinus Nijhoff Publishers,1994) at 2
[45] Ibid at 3
[46] Minasse Hail, supra note 51

from that experience have given rise to the need for checking the power of the majority. "Constitutional review by the judiciary," observed one scholar "has been an advantage thoroughly recognized in both theory and practice."[47]

This does not mean that it is the only institution to protect constitutional rights. Contrary to that, other institutions such as legislatures, human rights NGOs, and the media play a crucial role in safeguarding rights and freedoms of citizens. But compared to the other two organs of government, the court (ordinary or special) is by far the best in giving practical application to basic rights.

If naked democracy may end up turning into totalitarianism, we have no reason to die for it. Tocqueville described the advantage of empowering courts to rule on the merit of a law as "one of the strongest obstacles ever put in the way of the tyranny of political groups."[48] The points raised in favor of judicial review are not mere abstractions. Judicial review has proved to be a reliable tool for ensuring observance of constitutionalism and respect for the rule of law and human rights.

[47] David Beatty, Human Rights And The Rules Of Law supra note 44 at 52
[48] Id

Chapter Three

3. Constitutional Interpretation and Enforcement of Human Rights in Ethiopia: A Historical Account

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3.1 The Constitutional Tradition

"The development of the tradition of human rights in any country is a function of the evolution of democratic institutions and democratic consciousness of those who govern and the governed. It is not a miracle child midwifed by a new regime, no matter how conscious and sensitive it is."

Pogany, Istvan, *A New Constitutional (Dis)order for Eastern Europe?, 2007)*

This section has two-fold objectives: to outline the nature of past institutions responsible for the enforcement of human rights under the past constitutions and see their impact on the present institutional organization and the practice of constitutional rights enforcement.

Our tradition is bound to influence the way the present institutions function in particular regarding the application of the Constitution. In connection to this point, a constitutional lawyer advised not to dismiss "tradition as something which belongs to the past and is, therefore, of no relevance to our quest for the understanding of present day institutions."[1] He further noted, "Tradition can never be abolished simply by enacting new laws, notably new constitutions."[2] koopmans has also stressed the need to study legal and constitutional development within

[1] James Paul and Christopher Clapham, *Ethiopian Constitutional Development: A Source Book* (Addis Ababa: Faculty of Law, Haile Sillassie I University Vol.1, 1967) at 282
[2] Id

its unique institutional context by saying, "It is hard to examine constitutional developments without taking a look at historical, social and political backgrounds"[3]

Having in mind the impact of the past on the present, we will now explore the role of the past institutions in the protection of human rights particularly the place of the judiciary in protecting those rights.

Ethiopia is one of the ancient civilizations in the world. Until the 1974 revolution abolished the monarchical system once and for all, the country had been ruled by three dynasties namely, the Axumite, Zagwe and Solomonic dynasties. During this long period the kings exercised unlimited power over the people. All forms of power–legislative, executive, judicial, military-were in the hands of the king. The king was also the defender of the Church. In theory, nobody checked the power of the ruler but practical considerations.[4] As we shall consider shortly, the era of written constitutions made the emperor even more powerful than before.

3.2 The Constitutions and Human Rights Enforcement

3.2.1 The 1931 Constitution

In the history of the Ethiopian constitutional law, the year 1931 marked a new beginning as the country adopted the first formal written constitution. The first constitution introduced, among others, parliament and provided for human rights. The significance of the 1931 Constitution in controlling governmental power was, however, very much limited. One constitutional lawyer has correctly described its utility as "an instrument

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[3] Paul Chen (reviewer), *Courts and Political Institutions: A Comparative View by Tim Koopmans http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/Koopmans104.htm* (as accessed on December 5, 2007)

[4] Aberra Jembere, *The Functions and Development of Parliament in Ethiopia* (unpublished, 1995) at 36

designed to consolidate the power of those who already held it."[5] The first constitution was an instrument to bring about centralization and modernization and it had little significance in establishing a government of limited powers.

Scholars attribute the inability of the constitution to put limits to the power of the government to the history of the constitution itself.[6] Constitutions normally result from popular pressure for restricting the excesses of governmental power. However, this was not the case with respect to the 1931 constitution which was simply a royal grant to the people. The Emperor proclaimed it because he wished to do so. And it is in the nature of power not to limit itself unless there is a compelling circumstance to do so. Thus, the Constitution's ineffectiveness in securing basic rights thereby imposing limits on the exercise of public power is understandable. Contrary to what might be expected, in the struggle for supremacy Emperor Haile Sillassie emerged victorious over his rivalries-the church and the nobility.[7]

The 1931 Constitution contained a few human rights provisions which were all modified with claw back clauses such as "pursuance to the law" and "according to the law". Besides, it was silent whether courts could interpret it and enforce its human rights provisions. At this stage it is hard to expect the courts to serve as guardians of the rights of the citizenry. After all, the monarchical system was based on the idea of imperial sovereignty. Courts were rather subordinate to the emperor's authority and he had the prerogative to review judicial decisions thereby preventing them from rendering final judgment.

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[5] Christopher Clapham, Constitutions and Governance in Ethiopian Political History in *Constitutionalism: Reflections and Recommendations Symposium on the Making of the New Ethiopian Constitution* (Addis Ababa, Inter-Africa Group, 1993) at 32

[6] Aberra Jembere, *The Functions and Development of Parliament*, supra note 4 at 16

[7] Fasil Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect* (Law Princeville NJ, Asmara Eritrea: The Red Sea Press, Inc., 1997) at 14

3.2.2 The 1955 Constitution

The Revised Constitution of 1955 made a number of significant improvements. Among others, the lower house of parliament was made elective.[8] The 1955 Constitution recognized a number of civil and political rights.

The Revised Constitution did not expressly recognize judicial review. However, such power can be inferred from its provisions. It stipulated that "[j]udicial power is vested in the courts",[9] "The Constitution ...shall be the supreme law of the Empire and "legislation, decrees, orders, judgments and decisions and acts"[10] contravening it would have no effect. The reading of these constitutional provisions may be indicative of the tacit recognition of judicial review by the Constitution. As far as the applicability of the Revised Constitution is concerned it was made "part of the working law of"[11] the country.

A proclamation issued in 1953 clearly conferred on the federal courts the power to rule on the constitutionality of legislative and executive acts. Similarly the under the Eritrean Constitution the Supreme Court of Eritrea was authorized to decide on constitutionality issues.

Art 90 of the above-mentioned proclamation reads:

> *If the constitutionality of a law or order is challenged before a court proceedings shall be suspended and the issue shall be presented to the Supreme Court [of Eritrea] which shall decide whether such act is constitutional.*[12]

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[8] The Revised Constitution of 1955, Art 95
[9] Ibid art 108
[10] Ibid art 122
[11] Paul and Clapham, *Ethiopian Constitutional Development*, supra note at 165
[12] Federal Courts Proclamation No. 130 of 1953 reprinted in Paul and Clapham supra note 1, at 382-383

The 1953 legislations were the first and the last to introduce judicial review in the history of the country. That development was probably the result of the then ongoing negotiation for the formation of the Ethio-Eritrean federation.

Clapham wrote:

> *The concept of the Constitution as law enforceable in the courts was introduced into Ethiopia during the period of federation and apparently confirmed by the Revised Constitution.*[13]

The above statement that the 1953 legislation had introduced judicial review in the Ethiopian legal system should, however, be qualified due to the emperor's exercise of judicial power as the overseer of justice. This imperial prerogative rendered judicial review meaningless.[14]The emperor's role to review court decisions is nothing but self-defeating to the significance of judicial review. This writer could not ascertain whether the then courts actually exercised their judicial review power. Actually, unlike its predecessor, the Revised Constitution did not mention the *Zufan Chilot.*

3.2.3 Constitutional Interpretation during the Socialist Regime

We now briefly discuss socialist theories and principles in order to shed light on the interpretation of the PDRE Constitution as this constitution was inspired by the socialist ideology.

The socialist states were (are) organized based on the political theory of unity of powers. In theory the exercise of legislative power is supposed to

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[13] Ibid at 401

[14] George Krzecunowicz quoted in Yonatan Tesfaye, *Who Interprets the Constitution: A Descriptive and Normative Discourse on the Ethiopian Approach to Constitutional Review* (LLM thesis, 2004) http://www.up.ac.za/dspace/bitstream/2263/1079/1/fisseha_yt_1.pdf (as accessed on September 10, 2007)

express the will of the masses. The principles of separation of powers and checks and balances are alien to a socialist system. Laws are never subject to judicial control. On the contrary, all organs of the state, including the judiciary are answerable to the legislature.[15] There is virtually no limit on the authority of the legislature or the vanguard party. Chen points out that there were "no enforceable constitutional limitations on the power of either the party's central committee or the national assembly."[16] In the socialist legal system, interpretation of laws, including the constitution, is considered as the business of the national assemblies.

Coming back to Ethiopia, the Dergue proclaimed a constitution thirteen years after it came to power. This should not give the impression that the country did not have constitution until the adoption of the 1987 Constitution. Though there was no formal constitution during this period, the proclamations issued following the Revolution and the state ideology defined the politico–legal order of the day and had constitutional significance.

The institute for the study of nationalities drafted the 1987 Constitution. This Constitution was primarily inspired by the Marxist-Leninist ideology and modeled on the constitution of the former Soviet Union.[17] The drafters also tried to address local circumstances. For example, they dropped out the commitment to monogamous marriage taking into account the views of the Muslim community.[18]

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[15] Albert Chen, *The Interpretation of the Basic Law: Common Law and Mainland Chinese Perspective* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925212 (as accessed on October 12,2007)

[16] Id

[17] Christopher Clapham, *Constitutions and Governance in Ethiopia* supra note 5 at 29

[18] Id

The National Shengo, the legislative body, was the supreme state organ mandated to "enact, amend and supervise the observance of the Constitution and proclamations."[19] The Council of State, the standing body of the National Shengo, was responsible "to interpret the Constitution and other laws."[20] The Council of State had an all-embracing authority which extended so far as to annul regulations and directives issued by the different state organs for failing to meet requirements of validity.[21]

The constitutions of 1931 and 1955 and 1987 had one thing in common. All were largely instruments of consolidating the political power of the incumbent governments.[22] As stipulated in Art 4 of the Constitution, the state organs were organized on the basis of the principle of democratic centralism. Not surprisingly in a socialist state, the President of the Republic was the president of the organ responsible for constitutional interpretation and implementation.[23] Given the President's multiple powers, it is hard to expect the Council of State to exercise an independent role in the enforcement of the Constitution.

In theory National Shengo was the supreme state organ but its practicality is really doubtful. In reality the Worker's Party of Ethiopian (WPE) as a vanguard party seemed to be positioned to play a leadership role. Regarding the power relationship between the party and government institutions, Fasil remarked that "...simultaneously, the central committee and the politburo of the party had ultimate decision making power parallel to the government institutions."[24] The President of Republic used to act in multiple capacities i.e. as party leader, head of

[19] People's Democratic Republic of Ethiopia Constitution, Art 63(1) (a)
[20] Ibid art 82(1)(b)
[21] Ibid art 82(1)(c)
[22] Christopher Clapham, *Constitutions and Governance in Ethiopia* supra note 5 at 32
[23] People's Democratic Republic of Ethiopia Constitution Art
[24] Fasil Nahum, *Constitution for a Nation of Nations* supra note 7 at 30

government and commander-in- chief of the army. Though the council of state was empowered to interpret the Constitution and follow up its implementation in practical terms the basic rights were meaningless. The organ meant to supervise the enforcement of those rights did not save citizens from being victims of rampant human rights violations.


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Chapter Four

4. The Constitutional Principles, Human Rights and Institutions

4.1 Principles and Human Rights

4.1.1 The Rule of Law and Constitutional Supremacy

In the preamble the Constitution of Ethiopia sets out some of the values the society should uphold. As incorporated in the preamble of the Constitution, the rule of law is one of the values on which the present political system is founded.

In Ethiopia we hear politicians as well as ordinary citizens talking about the rule of law. The concept of the rule of law is, however, far from clear. And its significance depends on the meaning we ascribe to it. In one sense, it refers to the requirement that obliges government officials to act in accordance with predetermined laws. In this sense the content of the law is not a primary issue. This is what is commonly referred to as "a government of laws and not of men".[1] Understood in this way, the rule of law simply refers to a requirement that imposes a duty on public officials to act as prescribed by laws announced beforehand. The purpose is decisions should be predictable so that citizens will know in advance what is expected of them.[2] This is a positivistic and minimalist approach.

In another sense, the rule of law is primarily concerned with the content of the law. This is related to the American concept of substantive due process. In the first sense so long as the law is duly enacted by the legislature, its application automatically follows. In the second sense the fact that a law is made following the normal course of the lawmaking process does not guarantee its validity. The legislature is not absolutely

[1] Kenneth Davis, Discretionary Justice: A Preliminary Inquiry (Urbana Chicago, London: University of Illinois Press, 1971) at 3

[2] Ibid at 29, Administrative Law Reform Proposal, the British Committee on Administrative Tribunals and Enquiries

free to make any law for its laws are to be tested against higher norms. Failure to meet certain standards will result in invalidation. The positivistic concept of the rule of law is not compatible with such concepts as due process, natural law, higher law, fairness and absence of arbitrariness.[3]

Under Art 9 of the Constitution the rule of law is supplemented by constitutional supremacy. Hence, all state organs need to keep in mind the principles, values and fundamental rights when making laws and policies and taking decisions. In addition, as per Art 13(2) the fundamental rights provisions are to be interpreted in a manner consistent with the principles of human rights treaties adopted by Ethiopia. As articulated by Alemayehu G/Mariam, the gist of Art 13(2) is the provisions of Chapter Three "*must be interpreted consistent with the general body of international human rights law. This article precludes idiosyncratic or constricted interpretations of rights based on local or uniquely national considerations.*"[4] Though what Almayehu calls *the general body of international human rights law* is not clear, the idea is local circumstances are no excuses to limit human rights.

Even if the HOF exercises exclusive jurisdiction on the constitutionality of laws, judges can still have a significant role in the protection of basic rights by way of indirect application. In other words, without directly invoking a constitutional provision, judges may permeate the ideals of the Constitution into legislations while interpreting and applying them. In this way the Constitution will be infused into the laws and actions of

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[3] Kenneth Davis, *Discretionary Justice* supra note 1 at 3

[4] Alemayhu G/Mariam, *Constitutional Rights and Constitutional Wrongs: Justice System Reform through Accountability in Ethiopia http://www.makedictatorshiphistory.org/doc/prof-alema-constitutional-rights-and-constitutional-wrongs-in-ethiopia-.pdf* (as accessed on the 24th of October, 2007)

government through interpreting the later having regard to the spirit and purposes of the constitution.[5]

The rule of law presupposes limitations on the exercise of public power. As we will see later it is also closely related to judicial independence and separation of powers within a democratic system of government.[6]

4.1.2 Constitutionalism

The principle of constitutionalism requires governments to act in accordance with a constitution with a view to preventing abuse of governmental power laying down substantive and procedural limitations on the exercise of power. Basic rights and freedoms are examples for substantive limitations.[7] To ensure further the observance of constitutionalism, power is divided among different branches and "only certain institutions may exercise certain forms of power if specific procedures are followed."[8] As Ray points out, constitutionalism is "predicated upon the presence of effective restraints on political and governmental action."[9]

Constitutionalism comprises of the following principles[10]

1. Differentiation of state functions and their assignment to different state organs or political structures for the sack of dispersal of power.

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[5] Rakeb Messele, *Enforcement of Human Rights in Ethiopia* http://www.apapeth.org/Docs/ENFORCEMENT%20OF%20HR.pdf (as accessed on the 15th of September, 2006)

[6] Yonatan Tesfaye, *Who Interprets the Constitution: A Descriptive and Normative Discourse on the Ethiopian Approach to Constitutional Review* (LLM thesis, 2004) http://www.up.ac.za/dspace/bitstream/2263/1079/1/fisseha_yt_1.pdf (as accessed on September 10, 2007)

[7] Samirenda Ray, *Modern Comparative Politics: Approaches, Methods and Issues* (New Delhi, Prentice-Hall of India Pt. Ltd, 2003) at 209

[8] Johan Waal et al, *The Bill of Rights Handbook* (4th D. Juta and Co. Ltd, 2001) at 7

[9] Samirenda Ray *Modern Comparative Politics* supra note 7, at 210

[10] Id

2. Planned mechanism, like checks and balances as in the American political system, for achieving cooperation among several power holders.
3. Mechanisms for avoiding frictions and deadlocks between or among two or more power holders.
4. A method to adjust the constitution peacefully to changing socio-political conditions for avoiding illegality, violence and revolution.
5. Incorporation of fundamental liberties and freedoms, coupled with the means of protecting them.

The constitution's supremacy clause in Art 9 apparently guarantees constitutionalism as it makes laws and decisions inconsistent with it invalid. However, the existing institutional relationship among the three branches, especially the absence of review of legislative and executive acts by an independent body makes it impractical. The Constitution has failed, in the words of Professor Minasse, "*to provide for genuine means of controlling the legislatures and executives, particularly in the interest of protecting human rights scrupulously set forth in the Constitution.*"[11] One may contend that the principles of separation of powers and checks and balances in a parliamentary system such as Ethiopia are irrelevant. In the United Kingdom where there is such a government courts do not have the authority to question the merit of parliamentary statutes. However in the British system there are other means such as an independent media that can unveil abuse of power and inform the citizen what it is being done by their government. But in the Ethiopia, apart from the absence of judicial control on the legislature and the executive, other means of control such as the media are very weak. And this must exacerbate the lack of control on government officials.

[11] Minasse Haile, The Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development In *Suffolk Transnational Law Review* (Vol. 20, No. 1, 1996) at 46

Another requirement for effective protection of human rights is entrenchment. Entrenchment is a safeguard against a unilateral constitutional amendment in general and basic rights in particular by federal or state legislatures. In this way the constitution puts a brake to government power. In this regard the Constitution in Art 105 provides for a very stringent procedure of amendment particularly with reference to Chapter Three. Accordingly, there are there cumulative requirements for constitutional amendment: proposal for amendment of the Chapter needs the approval of all state councils, a two-thirds majority vote in both the HOF and the HOPRs.

4.1.3 Justiciability

In Art 9 laws, customs and decisions that contravene the Constitution are categorically declared to be of no effect. The supremacy clause is well articulated in the Constitution. This Clause is not, however, self-executing. Hence the need for a referee that decides on the validity of laws and actions. This reminds us the concept of justiciability which is an indispensable condition for ensuring constitutionalism. The more justiciability is expanded the more opportunity it creates to ensure the implementation of limitations to the power of government. The idea of justiciability makes a distinction between issues that are (and are not) subject to judicial decision. Art 37 of the Constitution reads:

> *Everyone has the right to bring a justiciable matter to and to obtain a decision or judgment by a court of law or any other competent body with judicial power.*

However, justiciability as stipulated in Art 37 needs to be seen in the broader context. The constitutionality of legislative enactments is not subject to judicial review. Therefore, issues concerning the constitutionality of legislative acts are not justiciable. This has an

obvious ramification on the enforceability of the Constitution. John De Waal *et al* have rightly observed that "constitutional supremacy will mean little if the provisions of the constitution [are not] justiciable."[12] The point is different limitations on the power of government will not be sufficient without justiciability. John De Waal *et al* went on to the extent of recommending the judiciary as the appropriate organ to enforce a constitution.[13] The more justiciability is expanded, the more opportunity judges have for bridging the gap between law and society and protecting human rights. In the Ethiopian case, the converse is true whereby non-justiciability has been expanded thereby further incapacitating the judiciary that had already lost the power to examine the constitutionality of the legislations.

4.1.4 Separation of Powers and Checks and Balances

"If one were faced with the stark choice between structural checks and balances, one the one hand, and a Bill of Rights, on the other hand, he would be foolish to choose the latter."[14]

Now let us consider the rationale behind separation of powers and examine our institutional organization against the principle under discussion and see to what extent the designing of our institutional system has been guided by this principle in particular the power relation the HOF and the judiciary.

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[12] Juan de Waal et al, *The Bill of Rights Handbook* supra note 7 at 8
[13] Id

[14] Scalia, Antonin, Federal Constitutional Guarantees of Individual Rights in the United States of America In David Beatty(ed) *Human Rights and Judicial Review: A Comparative Perspective,* (Dordrecht Boston London: International Studies in Human Rights, Martinus Nijhoff Publishers, 1994) at 42

The French political thinker Montesquieu designed separation of powers as a means to avoid concentration of powers in one person or institution. The underlying belief being concentrated power is likely to be abused and misused. Hence the need for separating functions and assigning those functions to separated organs of government. In general terms it means the legislative, executive and judicial functions should be handled by three separate government branches. Here one thing is worth noting. Separation of powers is not applied by all systems in the same way. In the United States, for example, it is supplemented and modified by checks and balances. As a matter of fact, Congress has lawmaking power; the executive is responsible for law enforcement and the judiciary applies the law to real controversies. Without going to the details while Congress seems to have exclusive legislative mandate, it is not free to legislate any law it likes to do so. The courts step in to invalidate legislations regarded as inconsistent with the US Constitution.

In France, where separation of powers originated, the concept has been applied literally and strictly. Because the parliament has exclusive power to legislate, courts are not allowed to examine the validity of legislations. This, in effect, means the system of checks and balances is lacking in the French institutional system.

The separation of powers and checks and balances were designed to govern the relationship among the three branches of government. While the former was designed to allow the three organs function independently within their own spheres of power, the latter is meant to make them more dependent on each other by controlling each other.[15] The reason being even separated powers may be used arbitrarily unless there is control by the other branches. Judicial independence is related to these

[15] John Elster, Majority Rule and Individual Rights in Stephen Shute and Susan Hurley (Eds.), *On Human Rights: The Oxford Amnesty Lectures*, (Basic Books Harper Collins Publishers, 1993) at 75

two concepts and presupposes a certain area of power for the judiciary; and when that area is diminished its independence is also diminished. By extension its role in the implementation of rights and freedoms is also reduced.

In the United States judicial review of legislative and executive acts was established since *Marbury v. Madison* in 1803. In *Marbury v. Madison* the Supreme Court came up with the idea that courts should refuse to apply laws considered to be violative of the American Constitution. In this way the judiciary, in particular the Supreme Court put a check on the power of congress and the executive.

As the power to decide on constitutionality of legislations is vested in the HOF, judges do not have the authority to exercise judicial review over legislative acts. (They have, arguably, such power over executive actions). Consequently, the judiciary is not in a position to control and check the HOPRs. The judiciary holds a subordinate position relative to the legislative and executive organs.[16] In this regard the Ethiopian and the American systems are different. In the latter, the three branches of government are, at least in theory, considered to be co-ordinate and co-equal.

In Ethiopia the three bodies are not equals theoretically as well as practically. The Constitution explicitly provides that the HOPR is the highest authority of the Federal Government. (So are state legislatures in their respective states.) Further, as stated elsewhere, the courts' role in protecting the supreme law from legislative encroachment is minimal. What is more, under Proclamation 250/2001 the rulings of the HOF on

[16] The Ethiopian Constitution in Art 50(3) provides that the House of Peoples' Representatives is the highest authority of the federal government. As regards the executive branch, Aalen observed that the functions entrusted to the Prime Minister make him more powerful than his counterparts in other parliamentarian forms of governments.

constitutionality issues have general effect. Hence, courts have the duty to follow such decisions as precedents. This, in effect, means, (contrary to the principle of separation of powers), the judiciary is "required to be bound by the decision of a non-judicial institution."[17]

We can make the following points regarding separation of powers and judicial independence in Ethiopia. For a number of reasons the Ethiopian courts are weakened.

1. lack of power to decide on the constitutionality of legislations
2. Even worse, by virtue of the two laws i.e. proclamations 250/2001 and 251/2001, they are further weakened for the laws in question have extended the HOF's mandate at the expense of the courts.

4.1.5 The Enforceability of Chapter Three of the Constitution

Among the four constitutions Ethiopia proclaimed at different times, the FDRE Constitution has no match in terms of the list of rights (enumerated from Art 14 to Art 44) it recognizes. The 1995 Constitution is concerned with two fundamental values-democracy and human rights. Accordingly, the new political system is based on a democratic order; even the nomenclature bears this-*Federal, Democratic Republic of Ethiopia.*[18] The people exercise sovereign power directly and indirectly through representatives. To realize a democratic system of governance, elections are held periodically and the party or a coalition of parties with the greatest number of seats in parliament organizes the executive.[19] That means the party that has the support of the majority rules the country. It follows, at least theoretically, laws and policies formulated by

[17] Aberra Jembere, *The Functions and Development of Parliament in Ethiopia* at 82
[18] The Constitution Art 1
[19] The Ethiopian Constitution, Art 56

the government in power reflect the wish of the current majority. If unrestrained, democracy may lead to the tyranny of the majority.

Thus, democracy has to have limitations. Constitutional rights are one such limitation which are "counter-majoritarian in nature and are thus a check to even a democratic government."[20] The Ethiopian Constitution is sensitive to human rights as much as it is for popular sovereignty. In this regard, the Constitution declares human rights as "inviolable and inalienable" and "emanating from the nature of mankind."[21] This assertion has far reaching consequences. In the words of Kommers, "contrary to...legal positivism...fundamental rights are not the creation of law, nor are they distinctive to the people" of a particular country[22] Human rights predate the state and its laws and are to (or should) be put beyond the reach of government. In short human rights are limitations on even a democratically constituted government. However, human rights themselves are not absolute. They are also subject to certain limitations.

Enforceability, the binding nature of a constitution in general and fundamental rights in particular and the precedence of the constitution over government organs are at the core of the concept of fundamental rights. Concerning the enforceability of rights and freedoms, the Ethiopian Constitution seems to make a distinction between rights enumerated under Chapter Three and those under Chapter Ten. Art 13(1) stipulates that state organs have the "duty to respect and enforce the provisions" of Chapter Three. It follows that all, or at least most, of the basic rights in Chapter Three are to be enforced by the concerned authorities and in the event of their encroachment the concerned institutions need to redress the grievances of citizens.

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[20] John Elster *Majority Rule and Individual Rights* supra note 16 at 67
[21] Ethiopian Constitution Art 10(1)
[22] Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 2nd (Durham, London: Duke University Press, 1997) at 33

As to the principles and objectives laid down in Chapter Ten which is titled-National Policy Principles and Objectives-the realization of such objectives is time taking and dependent on the availability of resources. The list includes access to public health, education, clean water, housing, food and social security. This is not, however, to say the government does not have a duty to make an effort towards the fulfillment of these objectives. On the contrary, to the extent possible it has to endeavor to make available the provision of these services.

Coming back to Chapter Three, the statement that this Chapter Three is enforceable needs to be qualified. This is because not all rights under this chapter are enforceable overnight. For example, the right to clean environment and the right of women to equality are bound to take time. As far as distinction between the different groups of rights regarding implementation is concerned, the jurisprudence seems to be settled.

Mr. Rene Cassin, for example, distinguished between obligations of government leading to final results and obligations to take action. He said, "[C]ivil and political rights and some economic rights might connote obligation that would produce actual results, most economic and social rights, however, could only give rise to obligation to take action."[23]

With respect to the majority of the fundamental rights it is possible to conclude that they are exercisable and; they are also remediable in the event of infringement.

One of the challenges in the Ethiopian political system is how to apply constitutional democracy-a concept which signifies constitutionalism and democracy which are sometimes hard to reconcile in the event of conflict.

[23] Rene Cassin Quoted In *Journal Of Human Rights Law And Practice* (Civil Liberties Organization Lagos, Nigeria, Vol.3, No.1, 2, 3 December, 1993) at 25

Politically, the HOF may be the right avenue for constitutional adjudication. Nonetheless it cannot guarantee constitutionalism for this requires independent and impartial constitutional governance. These qualities are lacking from the HOF as we shall see in the next chapter in detail.

Chapter Five

5. Human Rights Enforcement Institutions: Jurisdiction and Limitations

5.1 Institutional Organization

"Security for rights consists not so much in bill of rights, as in the skillful organization of the government and its aptitude, by means of its structure and genius and the sprit of the people which pervades it, to produce wise laws and just, firm and intelligent administration of justice."

Chancellor James Kent as quoted by David Beatty Human Rights and Judicial Review: A Comparative Perspective, 1994)

There are a number of institutions such as the Human Rights Commission and the Ombudsman Office, albeit the doubt as to their effectiveness, which can make contribution to the promotion and enforcement of rights and freedoms. Now let us consider the principal institutions of constitutional enforcement in Ethiopia.

5.1.1 The HOF: Organization, Composition and Functions

In federal systems bicameralism is the norm. The Ethiopian Constitution of 1995 has apparently established two federal houses-the HOPR and the HOF. This arrangement should not, however, give the impression that Ethiopia has two legislative chambers. Though the legislature is bicameral in form, in content, it is not. The reason is that this body has little role in law and policy making. The Ethiopian parliament is essentially unicameral.[1]

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[1] See Art 62 of the Constitution

5.1.1.1 Organization and Composition

Mekonnen has identified "common denominators" shared by constitution interpreting bodies cutting across both the American and the European models. One such denominator is the role of politics in the appointment of judges. In the appointment of judges for ordinary courts as in the American system or constitutional courts as in the European context, politics plays a major role.[2] This is the case, for example, in the United States, Germany and South Africa.[3] But once a person is appointed to the post, he or she is no more accountable to the electorate and they are protected from the pressure of political branches. Independence and neutrality of judicial bodies are the mark of democratic systems. In the words of a constitutional lawyer, the trend in most democracies is:

waning public trust in political leadership; increasing influence of human rights protections in judicial decision-making and judicial review; and "judicialization" of politics and policy-making i.e. the extension of court jurisdiction to matters previously deemed not susceptible to judicial remedy, and the decreasing deference that courts grant to political institutions.[4]

Art 61 of the Constitution deals with the composition and organization of the HOF. Accordingly the HOF comprises representatives of nations, nationalities and peoples of Ethiopia. Each of these groups has at least one representative in the HOF. For every one million additional people a nationality has, it has one more representative. In other words, the larger a nationality, the more seats it has in the HOF. Following the rule that the House represents the nations, nationalities and peoples, the people living in the major cities such as Addis Ababa and Dire Dawa are not represented in the HOF. What is more the Federal Government does not

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[2] Mekonnen Frew, *Judicial Review in Ethiopia: A Comparative Appraisal* (LLM thesis, the American University in Cairo, School of Humanities and Social Sciences, the softcopy of this thesis was made available to me by the writer, 2007) at 54

[3] Id

[4] Paul Chen (Reviewer), *Courts and Political Institutions: a Comparative View by Tim Koopmans*, http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/Koopmans104.htm(as accessed on December 5, 2007)

have representation in this institution. And in the event of conflict between the central government and the states the interest of the former is likely to be affected. As to the mode of composition, the Constitution has provided for two options: election by the state councils or the state councils may arrange elections to get members of the House elected by the people directly.[5] So far the second option has been the practice.

The House of Federation currently has 112 members representing sixty nine nations, nationalities and peoples.[6]

[5] *Constitution of the Federal Democratic Republic of Ethiopia (* Hereafter referred to as "the Constitution"*)* *Proclamation* 1/1995 Federal Negarit Gazeta 1st Year No.1, Art 61(3)
[6] http://www.hofethiopia.org/HOF/HOF_Members_Amh.html (as accessed on February 26, 2008)

Having other official responsibilities, all members are part time staff at the CCI. This raises a question whether the institution can perform its duty effectively, efficiently and up to the standard expected of it.

The following table shows the members of the Council and their principal responsibilities.

S.N	Name	Other Responsibility They Have*
1	Kemal Bedri	President, Federal Supreme Court
2	Menberetsehai Tadesse	Vice-President, Federal Supreme Court
3	Fasil Nahum (Dr.)	Special Advisor to the Prime Minister
4	Abay Woldu	Secretary, Tigray Regional State
5	Kumma Demekissa	Minister, Ministry of Defense
6	Hashim Tofik (Dr)	Director, Federal Police College
7	Beyene Biltu	Practicing Lawyer
8	Hassen Ebrahim	Member of the HOF
9	Getahun Kassa	Director, Ethiopian Human Rights Commission
10	Degife Bulla	Speaker, HOF
11	Mulugeta Ayalew	Amhara Region Justice Bureau

	State	Nur of S	No. Nat ties Rep nte
	Tigray	6	3
	Afar	2	1
	Amhara	17	5
	Oromia	19	1
	Harari	1	1
	Somalia	4	1
	Benshangul-G	5	5
	SNNPR	54	48
	Gambella	4	4

5.1.1.2 Functions

We may categorize the multiple responsibilities of the HOF as quasi-legislative, quasi-executive and quasi-judicial functions.

As a quasi-legislative organ, it identifies civil matters that should be regulated by federal laws.[7] It also decides on the distribution of concurrent revenue between federal and state governments and decides on the allocation of federal subsidies to the sates.[8] Furthermore, the HOF participates in Constitutional amendment process. As a quasi-executive body, the House orders the intervention of the Federal government in the states if a state action threatens the constitutional order.[9] Finally in its judicial capacity the HOF interprets the Constitution and resolves constitutional disputes. Out of the varied functions of the HOF, we are interested in its Constitutional interpretation function. The mandate of the house to interpret the Constitution is perhaps the most important of all.

The fact that the House is the ultimate decision maker with respect to Constitutional interpretation is not questionable. What is questionable is the scope of its power i.e. whether the HOF has an exclusive jurisdiction over constitutional interpretation or whether there is some area left for other institutions especially the judiciary. Art 62 (2) stipulates that the HOF "has the power to interpret the Constitution." Furthermore, Art 83(1) empowers the same organ to decide on "[a]ll constitutional disputes." Later we shall try to determine the scope of the House's constitutional mandate.

5.1.2 The CCI: Organization, Composition and Function

"In a state in which the rule of law prevails there should be effective machinery for the protection of the fundamental rights and freedoms."

[7] The Constitution Art 55 (6)
[8] Ibid Art 62 (7)
[9] Ibid Art 62 (9)

The International Commission of Jurists, 1965

5.1.2.1 Organization and Composition

Three laws govern the CCI's formation and operation: the Constitution, Proclamation 250/2001 and a Regulation prepared by the CCI and approved by the HOF in 1997. The CCI is one of the constitutionally established organs of government. As outlined in the preamble of Proclamation 250/2001, the Council is established to give an efficient and effective professional service to the HOF.

The CCI has a total of eleven members. As per Art 82 the President and Vice President of the Federal Supreme Court are *ex officio* President and Vice President, respectively, of the CCI. It has also six legal experts chosen based on their "proven professional competence and high moral standing."[10] According to the Constitution, the legal experts are to be appointed by the President of the Republic on recommendation by the HOPRs for a fixed term of six years.[11] The remaining three members are selected from the HOF. When we look at its composition, there is apparently the participation of the judiciary, the HOPRs, the HOF (and by extension the states), the President of the Republic. As Jon Abbnik pointed out, the CCI has got some "*of its members appointed by the Prime Minister and six members (most likely selected through party channels) delegated from the regional state governments and is thus not fully independent.*"[12] From this assertion, it follows that there is inconsistency between the Constitution and the practice of selection to the office of the CCI.

Having other official responsibilities, all members are part time staff at the CCI. This raises a question as to whether the institution can perform its duty effectively, efficiently and up to the standard expected of it.

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[10] Ibid Art 82(2)(c)

[11] The Proclamation on the Consolidation Of The House Of Federation And Definition of Its Powers And Responsibilities Proclamation No. 251/2001 Federal Negarit Gazeta, 7th year No. 401, Art 7(2)

[12] John Abbink, *Ethnicity and Constitutionalism in Contemporary Ethiopia* http://www.ascleiden.nl/GetPage.aspx?datastore=1&url=/publications/gjabbink (as accessed on 26 May, 2006).

The members of the Council of Constitutional Inquiry

Name	Other Respons They Have*
Kemal Bedri	President, Fe Supreme Court
Menberetsehai Tadesse	Vice-President, Federal Sup Court Special Advisor t
Fasil Nahum (D:	Prime Minister
Abay Woldu	Secretary, T Regional State
Kumma Demeki	Minister, Minist Defense
Hashim Tofik (D	Director, Fe Police College (Minister D Ministry of Justic
Beyene Biltu	Practicing Lawye
Hassen Ebrahin	Member of the H(
Getahun Kassa	Director, Ethi Human R Commission
Degife Bulla	Speaker, HOF
Mulugeta Ayale	Amhara R Justice Bureau

*The responsibilities indicated in the right column are just the principal ones. Some members of the Council have multiple official duties.

5.1.2.2 Function

The Council of Constitutional Inquiry is an organ whose sole responsibility is to receive constitutional disputes and give opinion how such disputes should be resolved. In this regard it takes one of the following two courses of action. When it thinks there is a need for a constitutional interpretation, it submits its recommendation to the HOF for final decision. However, if it believes the issue does not amount to a constitutional dispute, it remands the case to the court before which it arose.[13]

Words on words

The Constitution and the CCI use the phrases: "there is a need for constitutional interpretation" and "there is no need for constitutional interpretation". These phrases, as used in the Constitution and the Council, are misleading. When the Council uses these statements, it uses them to mean the disputed law or action is and is not contrary to the Constitution, respectively. However, to arrive at this conclusion there is a process that obviously involves, more often than not, constitutional interpretation. In the case of persons accused of corruption, the CUD, etc, the Council held that there was no need for constitutional interpretation. No doubt the CCI interpreted Constitution to determine whether or not the HOPRs had the power to make some offences non-bailable or the directive issued by the Prime Minister was valid. Saying a law is consistent with the Constitution is quite different from saying there is no need for constitutional interpretation. Thus, we need to make a distinction between what the phrases signify and how they are used in practice.


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[13] *The Ethiopian Constitution* supra note 4, Art 84(3)

Case Comments

The CCI (ultimately the HOF) has jurisdiction over the so-called abstract review and concrete review. The Council plays a key role in determining what the Constitution is and its opinions can affect the views of the ultimate interpreter – the HOF. In other words, the impact of the Council is far from being just a fact finding body as some call it.[14] Also as the practice shows, in the majority of cases the HOF upheld the recommendations submitted by the CCI.

The CCI's decision against a petition is reviewable by the HOF. Parties dissatisfied with the ruling of the Council may appeal to the HOF. The House is at liberty to disregard CCI's opinion. For example, in the case of *Dr. Tesfaye Akalu,* the Constitutional and Regional Affairs Standing Committee of the HOF rejected the opinion of the Council that the petition was barred by the period of limitation under art 22 of proclamation 250/2001.[15] The petitioner challenged a decision rendered by the Federal Cassation Court as violative of his right to property. The CCI, however, refused to entertain the case on the ground that it was filed out of time. The complainant contended that the 90 days' time limit does not apply for cases falling under Art 23 of proclamation 250/2001 i.e. cases arising outside court. (Incidentally, the latter provision does not contain time limit beyond which complaints may not be accepted.)

This reminds us the power the Constitutional and Regional Affairs Standing Committee exerts in the constitutional adjudication process. It is this body that deliberates on constitutional disputes as the majority of the members are not available most of the time. In fact its proposed decisions are subject to approval by the full House. In the case of *Dr Tesfaye Akalu*, the Committee held that the 90 days time limit did not apply in matters arising out of court and got this

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[14] Minase Haile, The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development in *Suffolk Transnational Law Review* (Vol. 20, No.1,1996) at 55

[15] The Proclamation on the *Council of Constitutional Inquiry Proclamation No. 250/2001* Federal Negarit Gazeta 7th year No. 40 under Art 22 of proclamation 250/200, if parties to a court case believe that there is a need for constitutional interpretation, they are required to notify the court. Should the court reject the notification, they may take the matter to the Council within the ninety days' time limit.

position approved by the full House. As a result, the decision of the CCI was reversed by the Standing Committee and eventually by the full House.

Considering the practice of the CCI, its limitations are clear. It has not even designed principles and techniques of interpretation despite a stipulation to that effect in its founding proclamation.[16]In fact the two proclamations contain a few principles: presumption of constitutionality[17], severability,[18] exhaustion of remedies[19] and effect of constitutional decisions.[20] The HOF can be approached by individuals[21], by at least one-thirds of members of the federal or state councils, or the federal and state executive bodies.[22]

However these principles are far from adequate and the use of detailed basic principles is decisive in minimizing the potential for arbitrariness and unreasonableness. Principles of constitutional interpretation are also indispensable in guiding how to balance the interests of society and the individual; otherwise our rights and freedoms are likely to be watered down. Almost all the human rights provisions have claw back phrases such as "to be determined by law" and "in accordance with law". During interpretation such phrases may create a loophole for unnecessary restrictions on the exercise of basic rights unless clear and detailed rules and principles are laid down that will serve as standards and guidelines.

It is hard to see the wisdom of letting the President and Vice-President of the Supreme Court act in two capacities. If one wants to challenge the validity of the Supreme Court's decision or its cassation division, (where one or both of them participated in; which actually happened repeatedly), it is hard to expect them to

[16] Proclamation 250/2000, supra Note 9, Art 20(1)
[17] Proclamation 251/2001, supra Note 6, Art 9(1)
[18] Ibid Art 12
[19] Proclamation 250/2001, supra Note 9, Art 23(2)
[20] Proclamation 251/2001, supra Note 6, Art 11
[21] Proclamation 250/2001, supra Note 9, Art 23 (1)
[22] Ibid Art 23(4)

be neutral when sitting in the CCI to review a decision they themselves made. The reason is obvious-they come to the Council with preconceived judgment. In addition, the membership of officials working in executive organs is not in harmony with the nature of their role as arbitrators of disputes. Why, for example, the defense minister?[1] This is ridiculous. Reason and conscience calls for the disqualification of all but the practicing lawyer. The membership of the special advisor to the office of Prime Minister is also contrary to common sense; it is doubtful if he can maintain an impartial position when an action of his office is challenged before the CCI.

In Ethiopia the realization of fundamental rights necessitates a constitutional amendment so that the Council will be re-organized taking into consideration the following measures. Its members should be prohibited from other public and private occupations that may affect their official responsibility. This is because acting in other capacities will most likely compromise their ability to discharge their duty. First, it reduces the amount of time and energy they could have devoted for their responsibility under discussion. Second, it creates a possibility for conflict of interest and this may affect the integrity and impartiality of the institution. Being independent and capable is not enough. More importantly, the CCI should have a final authority on constitutional cases.

1.1.3 The Judiciary

"In my opinion...it is important that the Judiciary system should not only be independent in its operation but as perfect as possible in its formation."
George Washington, the First US President, quoted by Antonin Scalia, Federal Constitutional Guarantees of Individual Rights in the United States of America,1994)

[1] Incidentally the Defense Minister has been recently appointed as the mayor of Addis Ababa City

The judiciary has tremendous responsibility in serving as the custodian of human rights and the rule of law in a free society. This responsibility is particularly pressing in societies with authoritarian tradition such as ours where judges should play active role in narrowing down the gap between constitutional values and the reality on the ground.

The judiciary as the third branch of government is constitutionally established and vested with judicial power. Further the Constitution recognizes the judiciary as independent and prohibits any outside interference in its business. Judges are required to decide in accordance with the law.[2] These are important steps in ensuring the existence of a vigilant court system. This does not mean that they are sufficient conditions.

The Constitution has established a three level court system both at federal and state levels. The Federal Supreme Court is constitutionally established while the organization of federal high and first instance courts is left for the discretion of the HOPRs.[3] In the States, the state supreme, high and wereda courts are all established by the Constitution. The courts, together with other organs, have the power and duty to enforce Chapter Three of the Constitution.

With respect to the practice of constitutional application by the courts, such cases are extremely rare. And when one comes across such cases, the level of reasoning is extremely poor. Judges simply mention a constitutional provision and usually do not attempt to balance the values that come into conflict with each other. As most cases involve the need for weighing conflicting interests and striking a balance between those interests, courts must first assess whether the challenged act or law is reconcilable with the rights of others.

This writer tried to find out court cases involving interpretation of a constitutional provision. This should be a source of concern. One wonders

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[2] The Constitution, supra note 4, Art 79(2) (3)
[3] Ibid Art 78(2)

whether it makes sense to decide whether a person violated the press law without first seeing his action in light of the fundamental right to freedom of expression as enshrined in the supreme law of the country.

Generally we can make some points as to the practice of courts. Court cases are devoid of constitutional values and sound reasoning. Judges tend to see detailed issues in isolation rather than looking at them from the wider perspective of the system as a whole. This is a source of concern, however. The writer's effort to find out criminal cases involving interpretation of Art 29 of Constitution in relation to the press law violation has not been fruitful. This calls for a question. How can courts convict a person under the press law without first looking at the content of a newspaper in light of the fundamental right to freedom of expression as enshrined in the supreme law of the country? Such a judgment is bound to be far from complete and devoid of principles.

Let me explain in a context. In *Rental Houses Agency v. Princess Tenagnework Haile Sillassie et al,*[4] the dispute involved houses nationalized by the former government pursuant to Proclamation 47/1974. In the same year the Ministry of Public Works and Urban Development made a decision to the effect that persons whose resident and extra houses were nationalized would be entitled to a monthly payment from the government, provided that they did not have other means of income. The Rental Houses Agency, however, failed to make the payment to the beneficiaries of the scheme. In 1987 E.C., after the change of government, the applicants brought action to the court and the court decided for the plaintiffs. On appeal by the Agency, the Federal Supreme Court upheld the decision of the High Court. The Agency, once again, took the matter to Federal Cassation Court saying that the decision of the Ministry was repealed by the Office of the Prime Minister (after the change of government) and there was a fundamental error of law in the judgment given by the lower courts

[4] *Rental Houses Agency V. Tenagnework Haile Sillassie* et al , Federal Supreme Court Cassation Division, Cassation File No. 16/95

(Incidentally, the decision of the Ministry of Public Works and Urban Development was made in accordance with Proclamation 47/1974).

In reversing the decision of the federal first instance, high and supreme courts, the cassation court articulated that under the FDER Constitution the Prime Minister was responsible to lead the Council of Ministers and coordinate its activities. Nevertheless, the action of the Prime Minister' Office did not result in repealing the decision of the Ministry per se. It went beyond. In effect, it rendered Proclamation 47/74 inapplicable. As the power to make or unmake a proclamation belongs to the legislative branch, this action transgressed the authority of the legislative organ.

It is worth noting that while the court, rightly or wrongly, made a reference to the constitutional power of the Prime Minister, it failed to approach the issue from a wider perspective. It should have also considered the Constitution's provision on property right and weighed the matter against constitutional standards.

5.2 Jurisdictional Delimitation between the HOF and the Judiciary

Our objective in this section is to determine the role of the courts, if any, in the enforcement of fundamental rights. As the Constitution declares itself to be the supreme law of the country, it definitely is a legal as well as a political document.

Back to the question we raised earlier: is constitutional interpretation the exclusive power of the HOF. This question has been the subject of debate among the scholarly community. Some say the HOF has exclusive mandate to decide on the meaning of the Constitution. Yonatan, for example, contends that

the fact that the Constitution deals with constitutional interpretation and constitutional adjudication separately indicates that the framers of the Constitution intended the House to have power over both. He says, "[T]hat is why [the Constitution] deals with the issue of constitutional review under a specific provision i.e. Art 84 (2) [and] does not lump it together with Art 84(1)."[5]

Others argue that, though the HOF has the last word in constitutional interpretation, courts, too, have the authority to settle on what it does and does not say. This position starts with the premise that courts have the power and duty to enforce the fundamental right and freedoms provisions as stipulated in Art 13(1). Enforcement requires interpretation. Therefore courts have legitimate authority to make constitutional interpretation. Regarding this position there seems to be a consensus among the majority of scholars. Yonathan's position seems to be too mechanical and too analytical. Judges cannot avoid determining constitutionally relevant issues. For example, while conducting a criminal trial they decide whether confession was voluntarily secured, whether an accused person is entitled to the service of defense counsel at state expense, whether the right to speedy trial as been violated, etc.

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[5] Yonatan Tesfaye, *Who Interprets the Constitution: a Descriptive and Normative Discourse on the Ethiopian Approach to Constitutional Review* (LLM thesis, 2004) http://www.up.ac.za/dspace/bitstream/2263/1079/1/fisseha_yt_1.pdf (as accessed on September 10, 2007). Yonatan's argument is based on the distinction he made between constitutional interpretation and constitutional dispute resolution. I agree with his view that constitutional interpretation may take place in two scenarios. One when the constitutionality of a law or an action is contested. Issues involving the in/validity of a law or an action call for, more often than not, constitutional interpretation to determine whether the challenged act falls outside the permissible limit. Two, the need for constitutional interpretation also arises when there is a need for determining the scope of a constitutional text. This is about expounding the meaning of the constitution which can happen even in the absence of the former. However, his conclusion that the judiciary does not have the authority to decide on the meaning of the Constitution is not convincing.

Donovan acknowledges the existence of an apparent contradiction in the Constitution.[6]On the one hand, courts have a duty to enforce Chapter Three. The power to interpret the Constitution belongs to the HOF, on the other. However, in most cases enforcement without interpretation is impossible. In other words, determining the content of a text is a precondition for application.

Tsegaye explains:

Enforcement presumes clear understanding. Understanding requires a degree of value clarification. Interpreting as a mode of value clarification precedes enforcement.[7]

To say that courts are under-duty to enforce the Constitution but do not have a say on its interpretation is self-contradictory.

Art 84(2) which provides for the procedure to challenge the un/constitutionality of laws refers to "federal or state law." In determining the HOF's scope of power, this provision is helpful. This is possible by defining the meaning of *law* as used in the same provision. Does *law* refer to all types of laws (at all levels in the hierarchy of laws) or just legislative enactments? Art 84(2) is not very clear but its Amharic version makes it so clear by referring to "federal or state legislative law". The adjective "legislative" seems to indicate that what the framers of the Constitution had in mind was proclamations of central and state government legislatures.

In light of this assumption Donovan ascribes a narrower meaning to *constitutional interpretation.* According to her the framers of the Constitution

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[6] Dolores Donovan, Leveling the Playing Field: The Judicial Duty to Protect and Enforce the Constitutional Rights of Accused Persons Unrepresented By Council in *Ethiopian Law Review* (Vol. 1, No.1, 2002) at 31

[7] Tsegaye Regassa, Courts And The Human Rights Norm In Ethiopia: An Overview In *Proceedings Of The Symposium On The Role Of Courts In The Enforcement Of The Constitution.*(Addis Ababa: Birhanena Selam, 2001) at 112.

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intended to refer to the act of declaring invalid federal and state legislation when considered to be in conflict with the Constitution.

She added that the framers:
did not have in mind the multitude of daily official acts of interpretation performed by government officials at all levels of all three branches of government in the course of their countless mundane actions guided by and enforcing the Constitution.[8]

Having a similar position with Donovan Ibrahim argues that issues (other than those pertaining to legislative enactments) including those having constitutional significance such as an act or decision of state organ of ... or a custom contravening the Constitution are not matters to be entertained by...the [HOF]. Such disputes are to be contested before the courts." [9] *Acontrario,* laws other than proclamations are not *law* in the sense the word *law* is used in Art 84 (2). Hence, issues pertaining to the constitutionality of regulations, directives and administrative contracts and decisions do not fall under the jurisdiction of the HOF. Incidentally, Art 84 (2) is reproduced in the Rules of Procedure of the CCI issued in 1997.[10]

As far as interested party in matters arising outside court are concerned, art 23(4) of the same proclamation contains, albeit far from clear, the groups entitled to bring cases before the Council. These are "at least, one-third of members of the Federal or State Councils, or the Federal or the State executive bodies."[11] A pragmatical consideration also justifies judicial participation in the interpretation and application of the basic rights. The job of the judge is to interpret and apply the law (including a constitution) to cases. This is

[8] Dolores Donovan, *Leveling the Playing Field*, supra note 23 at 32
[9] Ibrahim Idris, Constitutional Adjudication under the 1994 FDRE Constitution in *Ethiopian Law Review* (Vol. 1, no. 1, 2002) at 78
[10] Working procedure of the Council of Constitutional Inquiry Art 3
[11] Proclamation 250/2001 supra note 9, Art 23(4)

consistent with the spirit of the Constitution which vests judicial power in the courts. Moreover, the Constitution is the supreme *law* of the land; so it is a law. We need to also note that the Constitution does not prohibit judges from interpreting it.

Proclamations 250 and 251 and Their Impact on the Enforcement of Constitutional Rights

We have delineated above the respective jurisdictions of the HOF and of the courts from the perspective of the Constitution. However, in the two legislations that deal with the powers of the CCI and the HOF the term *law* has been given a much broader meaning than in the Constitution. Accordingly, *law* includes not only primary legislations but also "regulations and directives issued by federal and state government institutions". In art 17 proclamation 251/2001 decisions of any government organ or official are also included in the list of matters falling under the jurisdiction of the Council (and the HOF).[12] For this reason the HOF's scope of power is extended far beyond its constitutional mandate. This extension has in turn far reaching impact on the enforceability of our constitutionally guaranteed rights. Unfortunately, human rights are violated more frequently by the action of local officers and officials of the executive branch than by legislative actions.

So in terms of ensuring respect for human rights and the rule of law, the current rights enforcement mechanism in general and the extension of the

[12] See also our discussion on the Chinese constitutional interpretation system and of the socialist regime in Ethiopia under the PDRE Constitution. One can easily discover the similarity between the current Ethiopian constitutional enforcement system and the former two systems.

House's power in particular is a serous impediment. It means, on the part of the judiciary as the third branch of government, the courts are further marginalized in the power relationship.

This writer does not see any justification whatsoever that can override the authorization of the judiciary to examine and decide on the validity of executive acts. This seems to be the hangover from the socialist tradition. What is interesting is the HOF has a power almost identical to that of the Council of State of the People's Democratic Republic Ethiopia and the Standing Committee of the National People's Congress of China.

Actually there are other institutional constraints associated with the HOF that impede the enjoyment of basic freedoms. Inaccessibility is but one of the many. The result is a person who alleges, say, an infringement on his right to property by a municipal directive must come to Addis Ababa, even from the remotest parts of the country. The broadening of jurisdiction entails an increase on the case load of the House which convenes only occasionally. Other constraints will be discussed under institutional limitations.

Assefa describes the experience of other countries with similar institutional system like ours. In Germany, for example, the Constitutional Court decides on the validity of laws issued by central and state legislatures whereas ordinary courts decide on the constitutionality of executive actions.[13] Ibrahim has also said courts can determine the legality of executive acts "including those having constitutional significance such as an act or a decision of a state organ or public official or a custom contravening the Constitution."[14]

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[13] Assefa Fiseha, Constitutional Interpretation: The Respective Role Of Courts And The House Of Federation In *Proceedings Of The Symposium On The Role Of Courts In The Enforcement Of The Constitution* (Addis Ababa: Birhanena Selam, 2001) at 10

[14] Ibrahim idris, *Constitutional Adjudication Under the 1994 FDER Constitution* supra note 26 , Art 71

This view is in line with the practice of the German Constitutional Court as well. In Germany, ordinary courts may, for instance, annul an order issued by local police prohibiting a certain public meeting when the order violates the constitutional right of peaceful assembly. If, however, the court finds that the enabling statute is at issue and not merely the administrative act based on which the action was taken, then the court refers the issue to the Constitutional Court.[15]

From the reading of the Constitution and the nature of the judicial business, we can make the following points on the role and jurisdiction of the courts.

1. It is in the nature of judicial power to examine the provisions of the legislative and executive acts in light of constitutional values.
2. When the constitutionality of legislative enactments is questioned before the courts, they need to refer the issue to the CCI; possibly such issues may reach the HOF. The point is such matters fall outside the scope of judicial constitutional power.
3. From the second statement it follows that, constitutionally speaking, the judiciary can rule on the validity of subordinate laws, administrative decisions and contracts.
4. The last situation, which may not be disputable, is judges can invalidate executive regulations, directives and decisions on the ground that they go beyond the power delegated via an enabling legislation. Here constitutionality is not at issue but conformity with a primary law of the legislature. The courts' power on such issues seems to have been implicitly recognized by proclamations 250 and 251 as well.

The above statements are made on the basis of the Constitution; however, as we discussed above the two proclamations have extended the power of the HOF beyond its constitutional authority. Once again the extension of the HOF's

[15] Hans Rupp, *Judicial Review in the Federal Republic of Germany* (accessed from the Internet on November 24, 2006)

jurisdiction by the two proclamations seems to go beyond its constitutionally given power. If this is so, it follows that the two proclamations are unconstitutional. As we shall consider below, the practice of the institutions has not always been the same.

In *Ethiopian National Association for the Blind v. Oromia National State Education Bureau and Jimma College of Teachers' Education,*[16] the controversy arose from a directive passed by the Regional Education Bureau setting out admission criteria applicable to teachers' colleges established by the State government. The directive stipulated, *inter alia,* that students who had sight or hearing problems were not eligible for admission. In accordance with the directive, the Jimma College of Teachers' Education refused to accept two visually impaired students. The Ethiopian Association for the Blind took the matter to the Federal First Instance Court. The complaint was, however, referred to the Council on the ground that it involved a constitutional issue.

In rejecting the complaint, the CCI stated:

Though it is clear that every law and action should conform to the Constitution, as it is clearly put in Art 84(2), only issues concerning the constitutionality of legislative enactments can be submitted to the Council; courts should send to [the Council] *questions of constitutionality only when they have doubt as to the validity of laws issued by legislative bodies. Concerning directives or decisions, they should decide what they think.*[17] (Translation, mine)

This writer wonders why the CCI skipped Proclamation 250/2001 which has extended the jurisdiction of the CCI to rule on the constitutionality of not only primary legislations but also regulations, directives and decisions. The Council

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[16] *Ethiopian National Association for the Blind V. Oromia National State Education Bureau et al* File no. 16/96

[17] Id

never mentioned the Proclamation and made its decision based on the Constitution alone.

However, the Council has not always been consistent in determining the respective jurisdiction of the courts and the Council (and the HOF) as we shall see shortly. In the *Coalition for Unity and Democracy v. Prime Minister Meles Zenawi,* [18] the dispute arose out of a directive passed by Prime Minister following the May 2005 general elections. Consequently rights to public assembly and demonstration were suspended in Addis Ababa and its environs "to ensure the peacefulness of the vote counting process and disclosure of its outcome to the public."[19] (Translation mine)

The CUD (the Coalition for Unity and Democracy)[20] alleged that the election result was rigged by the ruling party and intended to protest against the alleged act. In an attempt to get the ban on public assembly and demonstration lifted, the CUD took the matter to the court which was later referred to the Council on constitutional basis. In the complaint three basic questions were raised:

1. The directive violated the constitutional rights of the party members and their supporters as well as the Proclamation governing peaceful assembly and demonstration.
2. There was no compelling circumstance to issue the directive.
3. The Prime minister did not have the power to suspend the fundamental rights under question. (Translation mine)

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[18] *Coalition for Unity and Democracy v. Prime Minister Meles Zenawi*, the decision was given on *Sene* 7/1997

[19] *Addis Zemen Ginbot* 10, 1997 E.C. supra note 36 at 6

[20] The CUD, an alliance of four political parties which was formed a few months before the may 2005 elections won the second largest number of seats in parliament.

Citing Art 17(2) of Proclamation 250/2001, the court referred the case to the CCI.[21] Let us look at what Art 30(1) of the Constitution says.

Everyone has the right to assemble and to demonstrate together with others peaceably and unarmed, to petition. Appropriate regulations may be made in the interest of public convenience relating to the location of open-air meetings and the route of movement of demonstrators or, for the protection of democratic rights, public morality and peace during such a meeting or demonstration.

As regards the first issue, the Council made the following observation.
It is clear that Art 30 of the Constitution guarantees the right to assembly and demonstration. The same article also deals with the manner how to exercise the right. Procedures may be put in place how the right may be exercised in order to prevent inconvenience to the movement of the public and ensure the respect for peace, democratic rights, and public morality. (Emphasis added; Translation mine)

The underlined phrase i.e. *the manner how to exercise the right* seems to deal with procedural limitations on the exercise of the right in question. But the impact of the suspension seems to go beyond regulating the manner of exercising freedom of assembly and demonstration. In other words, it is more of a substantive restriction.

With respect to the second question i.e. whether the Primer had the power to suspend fundamental rights, the Council responded in the affirmative.
As can be gathered from Art 72 and 74 of the Constitution, the highest executive power is vested in the Prime Minister and the Council of Ministers. The Prime Minister has the duty to observe and ensure observance of the Constitution and

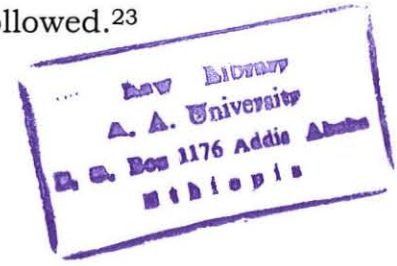
[21] Art 17(2) of Proclamation 250/2001 stipulates: "Where any *law or decision given by any government organ or official* which is alleged to be contradictory to the constitution is submitted to it the council, the council shall investigate the matter..." (Emphasis added).

follow up and ensure the implementation of laws, policies, directives and decisions adopted by the HOPRs. Therefore, taking into consideration the conditions prevailing in the City [of Addis Ababa], it is not possible to say that the suspension of the rights under discussion for a period of one month, contravenes the Constitution. (Translation mine)

As to whether prevailing conditions a certain measure, the Council stated that such question is to be determined by the concerned power holders. Determining whether prevailing circumstances necessitated the suspension of the Constitution might be the discretion of the concerned government officials. However, once an action is taken, it should be subject to the scrutiny of the organs responsible for Constitutional enforcement; these organs should examine whether the suspension was necessary, reasonable and proportional to meet the threat the government intended to avert.

As to whether circumstances dictated the making of the decree, (specifically whether there existed a need to avoid possible break down of law and order), the statement of the Prime Minister seems to prove the opposite. He said against the skepticism that violence would occur in and around Addis Ababa, the fear declined from time to time. And the election was conducted peacefully.[22] Apart from that, the government did not mention a present or imminent danger to the constitutional order.

Putting aside the question whether the decision was justifiable in the circumstances existing at the time of its issuance, in the opinion of this writer, the Prime Minister did (and does) not have the power to suspend the Constitution. Under the Constitution, fundamental rights may be suspended only if certain conditions exist and procedures are followed.[23]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[22] Addis Zemen *Ginbot* 10, 1997 E.C. supra note 36 at 6
[23] For details, see Art 93 of the Constitution

1. external invasion, a break down of law and order which endangers the constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel, a natural disaster and an epidemic.
2. It is the Council of Ministers (not the Prime Minister alone) that has the authority to proclaim a state of emergency.
3. A state of emergency a decree should be submitted for the scrutiny of the HOPRs within forty-eight hours if parliament is in session, if not, in fifteen days. Even if we assume that there could be a break down of law and order (had it not been for the measure), the last two conditions were not fulfilled.

Contrary to the position the Council held in the *Ethiopian National Association for the Blind v. Oromia National State Education Bureau et al,* in *the CUD case,* it went through the merit of the case and decided that it was constitutional. This deviates from its position in the *Ethiopian National Association for the Blind* that courts could rule on the validity of directives and decisions. Such lack of consistency and predictability might be minimized, had the institution clear and detailed decision making rules and principles to follow such as the principle of precedent. No question the latter case was politically speaking by far significant as the interest of the government was at stake. After asserting the constitutionality of the directive, the CCI stated that the dispute did not call for constitutional interpretation and remanded it to the court.

5.4 Appraisal of Fundamental Rights Enforcement Practice and Case Comments

As Cristian Starck rightly observed, "[c]onstitutional interpretation is controlled above all by one's conception of a constitution."[24] With the assumption that conception and attitude towards constitutional law in general and judicial role in the application of fundamental rights provisions in particular has impact on

[24] Cristian Starck Constitutional Interpretation in Cristian Starck (ed.) *Studies In German Constitutionalism: The German Contribution To The Fourth World Congress Of The International Association Of Constitutional Law* (Nomos Verlagsgeselschaft, Baden-Baden,1995) at 58

the enforcement of basic rights, a questionnaire has been administered to get information regarding the views of our judges on the matter.

Outcome of the Questionnaire

In an attempt to find out the attitude of Ethiopian judges with respect to their role of constitutional application and to evaluate the impact of such attitude a questionnaire was administered. The opinion of judges concerning their role in the application of the Constitution is the first step in the direction they take on the subject. The survey aimed at reaching judges working at the federal, high and first instance courts in Addis Ababa. As regards Federal Supreme Court judges, it was possible to secure the views of one respondent only; nine other judges did not respond. In order to include the views of state judges, the survey covered Oromia State Supreme Court judges. Out of a total of fifty judges, only thirty responded. So the analysis will be based on a sample of thirty questionnaires. Most of the questions were objective to be answered by saying 'yes', 'no' and 'I am not sure'.

The first question was whether the judges thought that they had the power to interpret the Constitution. The result was 45% replied in the affirmative, another 45% in the negative. The remaining 10% were not sure. As the response shows, there is high level of confusion among the judges as to their role in the interpretation of the constitution and 10% of the respondents could not take position. The second question is whether judges think that they have the power to apply the provisions of the Constitution to court cases. The respondents were divided into two. An overwhelming majority of the respondents (94.7%) answered affirmatively. The remaining (5.3 %) were not sure. The next question was if they in practice interpret the Constitution. Most judges covered in the survey (63.15%) said "yes"; 15.78 "no" and 21.02 said "I am not sure."

The third question was framed with the view to see if judges are positivistic or not. The question is: will you disregard a proclamation if it violates constitutional rights and values. Only 55.55% said they would disregard it; 27.77% replied in the negative and the balance 16.66% goes to the "not sure group". A related question sought to find out if judges think they have the power to invalidate regulations, directives and decisions of the executive for failing to meet the test of constitutionality. Just a little more than half (52.63%) believed they could invalidate such laws and decisions; 36.84% responded by saying no; and 10.52 could not take position.

In order to assess the attitude of judges concerning the rights of individual in relation to group rights, judges were asked if they believed the Constitution gave priority to group rights and rather than individual rights. More than half (55.55%) said group rights were given precedence over individual rights. Judges were also asked to find out if they apply the Constitution indirectly (i.e. without necessarily citing its provisions) whether they take into account the spirit and purposes of the Constitution while conducting trial and making judgments. The result was 83.33% make an affirmative response; 5.55% in the negative and the remaining 11.11% were not certain of taking into consideration the Constitution. Incidentally, the indirect application of the fundamental rights refers to a situation whereby laws and decisions are made in light of constitutional values and standards without necessarily citing its provisions. This is about measuring conducts, policies, laws, and decisions using the Constitution as a yardstick. Another question was if they had a copy of the federal constitution. All but one said they had.

From the responses we can discern the lack of a uniform understanding among judges as regards judicial role in the application of Constitution. The fact that almost half of the respondents believed that they had no power to interpret a constitutional text indicates that a lot needs to be done to have a clear position on the question. Even if 45% of the respondents replied that they interpret the

Constitution, this writer is quite skeptical about the reality. As mentioned elsewhere, an effort to find out decisions involving constitutional provisions did not bear fruit. This is not to say courts do not interpret to the Constitution at all. The point is judicial application of constitutional rights is extremely rare. A random search through civil and criminal cases is unlikely to come up with constitutionally significant decisions.

They also make a distinction between interpretation and application of the Constitution. According to them, courts have the power to apply, but not to interpret, the Constitution. To explain their position, they cite art 19(4) of the Constitution which contains the forty-eight hours time limit to bring an arrested person before court. This does not require interpretation; only application. But this distinction does not take us anywhere. The Constitution is not always black and white. The degree may vary but most of the constitutional provisions are general and vague which require interpretation. Hence, the need for competent staff to understand and interpret the Constitution.

Case Comment

Where possible the ruling of the Council is to be made unanimously.[25] Dissenting is also possible. This happened in this case. The dispute involved residents of Benshangul-Gumuz State and the Berta political party. In this case the validity of the electoral law's requirement was disputed. The proclamation made knowledge of the working language of a state a requisite to stand for election. As per a petition filed by the Berta political party, the Electoral Board de-registered candidates with Amhara, Oromo, Tigre and Agew ethnic origin saying they did not fulfill the requirement of the law. Residents of the state from these ethnic groups brought action to the Council of Constitutional Inquiry arguing that the action violated their constitutional right to elect and to be elected.

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[25] Proclamation No. 250/2001 supra note 9 Art 30

The Benshangul-Gumuz case is one of the most interesting and controversial cases from different perspectives. The case involved a clash between two conflicting rights i.e. the right of citizens to participate in governance and the right of an ethnic group to self-administration. It clearly involved a clash between the rights of individuals and of groups. Not surprisingly, the HOF had to also consider the views of professionals. All the three professionals but one opined that the electoral law contravened the Constitution.

As regards this issue, the Council was divided into two. The majority found out that the law was inconsistent with the Constitution.
The minority held an opposite view. Here is what they said.

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Basically when it is necessary to interpret a constitutional text, meaning should be ascribed to such text taking into account the general purpose and spirit as well as the goals the Constitution aims to achieve and the dangers it intends to avert. Interpretation should not be made by just considering a certain provision in isolation. A constitution becomes a living document when it protects the rights and interests of groups and individuals and ensures lasting peace and development. It is only when it takes into consideration the reality on the ground and rather than being theoretical. When there is conflict between rights, we should seek solutions from this perspective. (Translation mine)

The minority went on to say that when individuals want to participate in matters concerning the administration of a nationality they should know that the language of that nationality and made a distinction between the right to elect and the right to be elected. According to them, while the later requires knowledge of a local language, the former does not. They concluded, "Though Art 38(b) [of the proclamation]apparently conflicts with the Constitution, when seen in light of the general federal system and the wide rights conferred upon nations and nationalities, the conflict is not real."(Translation mine)

On The Validity of the Anti-Corruption Law

Arrested and accused of corruption offence, *Abate Kisho et al* disputed the constitutionality of Art 51(2) of Proclamation 239/2001, which made the offence non-bailable. Art 51(2) reads: "A person who is arrested on suspicion of having committed a corruption offence shall not be released on bail."

In challenging the validity of the Proclamation, the accused argued the law violated their right to liberty by allowing arbitrary arrest. [26] The Council discussed the meaning of "arbitrariness" by referring to the definition given to it by the Human Rights Commission of the United Nations. The Commission defined *arbitrariness* as follows.

Arbitrariness is not to be equated with 'against the law' but must be interpreted more broadly to include the elements of inappropriateness, injustice and lack of predictability such that remand in custody must not only be lawful but also reasonable in all circumstances.

Apart from the contention that the power to decide on bail belongs to courts, not the legislature, the detainees also said the Proclamation was over general as the definition given to "corruption offence" is wide-ranging. As the definition is extremely broad, it could be open to abuse.

'Corruption offence' means any offence committed in relation to a government or public service or public interest in violation of the duties proper to a government or a public service by seeking, exacting promise, or receiving any gratification or advantage for himself or for other person or group of persons, or inflicting harm to another person; and includes corrupt practices, acceptance of undue advantage, traffic in official influence, abuse of power, maladministration; appropriation and

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[26] In relation to the issue, the Council made a reference to the right to liberty as stipulated in art 17 of the constitution which in sub-art (2) reads, "*No person may be subject to arbitrary arrest* and no person may be detained without a charge or conviction against him.(emphasis added)

misappropriation in discharge of duties, extortion and disclosure of secret, and shall include such other similar cases.[27]

Case Comment

In connection with the objection that the law went beyond the justifiable limitations applicable only "in exceptional circumstances", the Council understood the potential danger associated with it's being over general. And yet it took a soft stand. Instead of saying what it had to say, it went around the bush; making unwarranted advice to the legislature to take care while framing laws.

Here is what Council said:

Since prohibiting bail is a limitation on a fundamental right, both the legislature and courts should take caution. As the law of the legislature cannot abrogate a right altogether (other than limiting it), legal provisions should be framed in such a way that they should be clear. The phrase, 'in exceptional circumstances', aims to limit the scope of the limitation [to the right to bail].[28] (Translation mine)

The case of employees of the commercial bank of Ethiopia and merchants accused of corruption under the same file shows how lenient the Council is.[29] The Council stressed that the Proclamation was over general and vague and could lead to arbitrariness. In the words of the CCI: "The law does not define what corruption is, what it means to be a suspect, how and by whom bail may be denied."[30]

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[27] *Anti-Corruption Special Procedure and Rules of Evidence Proclamation* Federal Negarit Gazeta 7th year NO 24 proclamation No. 236/2001, Art 2(1)

[28] *Abate Kisho et al V. Federal Ethics and Anti-Corruption Commission* File NO.11

[29] *Commercial Bank Employees et al V. Federal Ethics and Anti-Corruption Commission* File No. *13*

[30] Id

The Council went on to say, "This law deviates from the usual way of framing a criminal law. Instead of providing for the elements constituting the crime of corruption and the corresponding punishment, the Proclamation sums up many crimes together and put them under the umbrella of 'corruption offence'."[31] (Translation, mine)

In the case of employees of the Commercial Bank of Ethiopia, the CCI read the Constitution into the Proclamation and made the following comments how the later should be understood and applied:

1. Under the proclamation the term "to be a suspect" refers to suspicion supported by sufficient evidence.
2. The meaning given to corruption does not put the offences constituting corruption in the order of seriousness and dangerousness they pose to the society, or according to the degree of punishment they entail. The reason why bail should be denied only in certain circumstances is to avoid arbitrary arrest and ensure the delivery of justice. The seriousness of a crime, the threat release of the criminals may pose to societal interests; public peace and order are some the grounds that justify pre-trial detention. Thus, not all corruption offences justify denial of bail.
3. Putting several offences under the crime of corruption irrespective of the degree of danger they may create to the public interest, peace, security and the administration of criminal justice may render pre-trial detention unconstitutional and lead to arbitrary detention. Therefore, from this point of view the proclamation needs amendment."

4. We have also realized that Proclamation 239/2001 E.C. and the other laws on corruption do not provide for a time limit how long investigation should take.

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[31] Id

Content of a petition

Art 3 of the Regulation requires complainants to give the details of their allegations in writing. This provision does not, however, specifically state the elements a complaint should contain. In *Tadesse Bekele et al*[32], the petitioner complained against a decision rendered by the Federal Cassation Court. However, the Council's Registrar declined to submit the complaint to the CCI on the ground that it failed to mention what constitutional provision was at issue. The same position was held in *Workwuha Teshome.*[33]

Advisory Opinion

The House of Federation is not duty bound to give advisory opinion. It may, however, render such service, should it wish to do so. Some years ago the Office of the Prime Minister forwarded certain questions to the CCI to find out the impact of enacting a federal family law.

The Office sought explanation on two basic questions.

1. Whether the Federal Government might issue a family law that would lay down basic concepts to be followed by the regional states?
2. Whether the enactment of such a law would affect the states' lawmaking power? (Translation mine)

In its report to the HOF, the CCI expressed its concern over its capacity to handle an increasing workload.

Generally as complaints coming to the council are increasing from time to time, as members of the council have multiple responsibilities and some of them come from the regions these factors affected negatively their ability to discharge their duty effectively. It is therefore necessary to re-organize the Council so that it will

[32] *Tadesse Bekele et al V. Benshangul-Gumuz State Executive* File No. 2/96
[33] *Workwuha Teshome,* File No. 14/97

have the competent human resource and material resources necessary to perform its activities.[34]

In *Abdilmamud Ibrahim et al v. Benshangul-Gumuz State,* the petitioners were members of the State legislature. Following a decision of the state for their arrest by the state executive body, the petitioners were arrested and put in custody.[35] The arrestees denied any wrongdoing. They also argued that the action taken by the state executive violated the Federal Constitution's provision on immunity of parliamentarians. The Council, after asserting that the Federal Constitution grants immunity to members of the (Federal) House of Peoples' Representatives only, it recommended that the parties should first resort to local avenues at the state level particularly the State Constitutional Inquiry Council.

Concluding Remarks

From the wording of the Constitution it is safe to say that the HOF is the sole arbiter to invalidate legislative acts. The ordinary courts have the jurisdiction to rule on the constitutionality of regulations, directives and administrative actions. This is based on the wording of Art 84(2) of the Constitution, in particular its Amharic version.

The HOF is charged with interpreting the text of the Constitution as well as deciding on the validity of legislative enactments *vis-a-vis* the Federal Constitution. The judiciary can, however, legitimately decide on the meaning of a constitutional text particularly Chapter Three. But this does not mean that courts have the last word. As the ultimate interpreter, the HOF has the authority to overrule judicial decisions.

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[34] The 1996 E.C. Performance Report to the HOF
[35] File no 24/98

As foreign literature shows, courts-ordinary as well as special-have to weigh interests that have come into conflict before deciding a case. In discharging this responsibility, legal institutions employ techniques and principles of interpretation such as proportionality, reasonableness and necessity. From the decisions of the CCI and the HOF we can identify some principles no matter how insufficient they are. Literal interpretation (textualism) is most commonly used. Sometimes the Council applies the principle of balancing of interests. For example, in the case of persons accused of corruption, the CCI looked at the interests of the suspects to be released on bail and of the government to ensure that criminals face justice for the wrong they have done to the society. International human rights, albeit less frequently, are also referred to in determining the meaning of constitutional provisions. A case in point is the reference made to determine the validity of the anti-corruption law.

> The use of rules of interpretation is one of the most underdeveloped areas in Ethiopia. Time and again this write wants to stress the need to adopt detailed and clear rules of interpretation so that we will minimize the risk of arbitrariness, subjectivity and unpredictability.

1.2 Why Politicians Interpret the Constitution?

[Only when] "...the courts have the competence to assess acts of the state (including the statutes) according to the constitution, then the statements in the constitution will be understood to be legal statements."[36]

Constitution interpreting institutions existing around the world may be classified into three major groups-ordinary courts, constitutional courts and

[36] Cristian Starck, Constitutional Interpretation in Cristian Starck (ed.), Studies in German Constitutionalism: The German Contribution to the Fourth World Congress of the International Association of Constitutional Law, 1995) at 58

legislative bodies. The first two are the ones that are most common. Legislative interpretation is, as pointed out above, the exception. To the knowledge of this writer at present it exists only in Ethiopia and China.

> Now we will investigate why our country has adopted such a system and examine its impact on the protection and enforcement of constitutional rights and freedoms. Before turning to the impact of the current institutional set up we first try to find out the *raison d'être* of the authorization of a political organ to adjudicate constitutional cases.

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The Debate in the Constituent Assembly

During the adoption of the Constitution there was a debate as regards the nature of the institution that would be responsible for constitutional adjudication. The Constituent Assembly was divided on this issue into two groups.[37] One group advocated for judicial review. The second group was opposed to the first position and argued that the Constitution was the result of a political contract among the nations, nationalities and peoples of Ethiopia and hence their representatives must be the ones to determine its meaning. This group felt that "it would be inappropriate to subject it to the interpretation of unelected judges."[38] In short this group understood the constitutional document "as a political matter rather than a legal one."[39] As we can gather from Ibrahim's observation, there was also a utilitarian consideration.

> *It [the Constituent Assembly] was... convinced that such a task was so essential to the basic interests of the nations, nationalities, and*

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[37] Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* (Nijmegen: Wolf Legal Publishers, 2005) at 58
[38] Id
[39] Id

peoples of Ethiopia that it could not be entrusted to an organ other than the House of Federation.[40](Emphasis added)

Later we will see whether a majoritarian organ can really achieve the principle of utilitarianism (maximum pleasure to the greatest number of people) and promote the interests of the majority of the people.

Donovan has given a justification why a political organ has been authorized to interpret the Constitution.[41] Her explanation revolves around the fact that the country is in transition from socialism to democracy. According to her in liberal democracies courts and constitutional courts review the constitutionality of laws. In socialist systems the legislature is responsible to make such decisions. Countries that are in transition from authoritarian socialist rule to democracy assign constitutional adjudication to a legislative body. Ethiopia is a country in transition. That is why the second chamber of the legislature is given such authority. Ethiopia is the only example she has given for the third group. Donovan's argument that countries in transition confer constitutional interpretation power to their legislatures is not well substantiated. To the best of the writer's knowledge, legislative constitutional interpretation exists only in Ethiopia. Only Ethiopia meets the two conditions i.e. being in transition and having a legislative constitution interpretation system. China is still essentially a socialist state.

Contrary to her position all former socialist countries including Russia and Eastern European countries have abandoned legislative interpretation and, instead, resorted to the constitutional court system. Donovan's assertion that countries in a transitional period confer the power under discussion to the

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[40] Ibrahim Idris, *Constitutional Adjudication under the 1994 FDRE Constitution* supra note 26 at 72

[41] Dolores Donovan, *Leveling the Playing Field*, supra note 23 at 31

legislature and her speculation that in the future they "will transfer this power to the judiciary"[42] is not well founded.

B. Party Ideology

The underlying rationale, in the opinion of this writer, is related to the ideology of the ruling party. The party was, if not now, an advocate of socialism. This assertion has recently been confirmed by a former senior party leader.[43]

The third possible reason (related to the second) is that during the deliberation and adoption of the Constitution, constitutional rights were understood as synonymous to group rights rather than including individual rights as well. Commenting on the post-1991 Ethiopian political system, Abnnik has said, "[E]thnicity has been declared the ideological basis of politician organization and administration."[44] The government of Ethiopia wants to deal with its citizens in groups.[45] And this thinking seems to have motivated the makers of the Constitution to authorize the HOF (as the representative of nations, nationalities and peoples) as a constitutional adjudicator.

C. The Constitution's Approach Towards Group V. Individual Rights

Departing from the most popular opening phrase "We the People..." in other constitutions, the Ethiopian Constitution starts with "We, Nations, Nationalities, and Peoples of Ethiopia..." Furthermore, the Constitution vests sovereignty in the nations, nationalities and peoples of Ethiopia.[46] The framers of the Constitution considered the different multicultural groups as building

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[42] Ibid

[43] Siye Abraha, a former high ranking official of the ruling party stated that the ruling party in particular the TPLF (Tigray People's Liberation Front) had socialist background. He made this statement during an interview he had with the VOA, Amharic Service in October, 2007

[44] John Abbink, *Ethnicity and Constitutionalism*, supra note 7

[45] Id

[46] The Constitution supra note 4 Art 8(1)

bricks.[47] The fact that the Constitution is group-focused is not disputable. And the empowerment of the HOF to interpret the Constitution is apparently logical, in spite of inherent institutional constraints associated with it.

D. The Ethiopia's Tradition

The fourth opinion, for adopting the current institutional system, relates to the tradition of the country. This should be seen from two perspectives. On the one hand, the country belongs to the civil law system whereby the judge's role is basically to apply the law as declared by the legislature. Unlike his common law counterpart, the judge in the civil law system is duty bound to apply the law even if he/she may have concerns as to the merit of the law. The judge in this system is restrained. This departs from the common law tradition, particularly the United States where the judiciary is considered co-equal to the other branches and has always been assertive. In contradistinction to the civil law judge, the American judge invalidates a statute when he thinks it is inconsistent with the American Constitution.

Ethiopia has adopted the civil law system whereby students are trained to apply the intention of the lawmaker as declared in the law book and the courts are not accustomed to judicial review. During their studentship, judges were not trained in a manner to enable them exercise judicial review. And it is pointed out that if judges are given judicial review power they may not use it ably and appropriately. The point is due to lack of experience our judges are not ready to assume this responsibility.

The second argument for not having judicial review in Ethiopia, (which is an aspect of our tradition) relates to the country's authoritarian tradition when the courts were used as instruments in the interests of the power holders and maintaining the status quo.

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[47] Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia* supra note 58 at 229

These justifications together with the rest might have persuaded the framers of the Constitution not to give judicial review power to the courts or to establish a full fledged constitutional court. However, both of these reasons, like the first two, do not convince this writer. Countries having authoritarian as well as civil law tradition like Ethiopia have established constitutional court system.

The Ethiopian system of constitutional enforcement mechanism is at variance with the practice prevalent in the vast majority of countries. In Europe, for example, once societies abolished repressive governments, they entrusted constitutional adjudication to constitutional courts. Beatty remarks on the development of constitutional dispute settlement institutions in the second half of the twentieth century:
Earlier ideas and ideologies about absolute sovereigns, the general will of the people, the dictatorship of the proletariat, etc, as the fairest and most effective way of reconciling the interest of each individual with the interests of the larger community within which he/she lives.[48]

"Pre-World War II Europe trusted its legislature and led to the horrors and that in turn led to a shift in paradigm, for instance, in Germany to the evolution of constitutional court."[49] This move towards constitutional court system is the most significant innovation in terms of constitutionalism i.e. the imposition of constitutional constraints on executive or legislative discretion.[50]

5.4 The HOF's Institutional Limitations

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[48] Istvan Pogany, *A New Constitutional (Dis)order for Eastern Europe (as accessed from the Internet on September 14, 2007)*
[49] Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia* supra note 58 at 396
[50] Istvan Pogany, *A New Constitutional* (dis)order, supra note 70

"If the other branches of government substantially control the judicial powers, or other branches of government effectively exercise the judicial power, then there is generally no institutional power in government to stand in the way of human rights violations."
The Arab Judicial Forum

In this section we shall consider whether the HOF is the right forum to enforce our constitutional rights effectively, efficiently, independently and impartially. The appropriateness of this origin will be evaluated against widely accepted principles as well as (its own) practice. The purpose is to find out whether politicians can also be good judges, whether the HOF possesses the qualities expected of an adjudicating body, to be more specific, whether legislative constitutional interpretation serves the purpose of enforcing constitutional rights and freedoms of citizens.

An examination of its appropriateness in light of principles and theories follows. In Chapter Six we will evaluate its practice.

One of the points raised in defense of the current institutional arrangement is that the Constitution is a political document resulting from a contract among the nations, nationalities and peoples. As outlined elsewhere, the Constitution's approach towards the multi-linguistic groups shows its emphasis on group interests. However, understanding the Constitution in this sense should be considered with caution lest it should ignore the interests of private individuals.

The liberal ideology which gives the center stage to the individual human being seems to have influenced the Ethiopian Constitution. This is because most of the fundamental rights provisions are taken almost verbatim from the UDHR and ICCPR. The ICCPR (unlike the ICSCE) was proposed by western democracies which are the sworn supporters of liberalism and individual

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liberty. Most of our constitutional rights are, by extension, inspired by the liberal theory. It follows that the Ethiopian Constitution is sensitive to individual rights as much as group rights.

What is more, the Constitution does not recognize a hierarchy of human rights. In fact the equal treatment of all rights is in line with the position held at the United Nations World Conference on Human Rights in 1993. The Vienna Conference emphasized the equality and indivisibility of human rights by proclaiming, "All human rights are universal, indivisible, interdependent and interrelated."[51] The massage is all rights (individual or group or under any other way of classification, for that matter) are equal and should apply at all times without distinction.

The emphasis of a political system on-group or individual interests-has implications on the "nature of the society's political and legal institutions and values."[52] Ethiopia is no exception to this. In the West where the liberal philosophy is prevalent the focus is on the interests of the individual. Of course, whether liberalism is good to society is open to debate; and this writer is now arguing for or against it. Third world countries tend to favor collective rights which seem to be the case in Ethiopia as well. Today the rhetoric is on the rights of nations, nationalities and peoples.

The social contract theorists have pointed out that there is a conflict between the two approaches-citizen-oriented and group-oriented. The former group considers the individual "as free, autonomous and equal citizen."[53] The later group "ground democracy in utilitarian community-based notion of the

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[51] The United Nations Conference on Human Rights, Vienna 1993
[52] Horrigan Bryan, *Adventures in Law and Justice: Exploring Everyday Big Legal Questions in Everyday Life* (Delhi: Universal Law Publishing Co. Pvt. Ltd, 2003) at 47.
[53] Id

institutions and conditions which maximize collective well-being and preferences, on the other."[54]

However, as experience shows the capacity of majoritarian institutions to meet utilitarianism is really doubtful. Such institutions tend to be passionate, irrational and emotion-driven, particularly in times of social crisis.[55] The principle of utilitarianism is viewed as "the greatest good for the greatest number and the rule of the many over the few"[56] disregarding the interests of the individual. Elster has rightly stated the problem of this view.

The connection between the two doctrines [i.e. utility maximization and majority rule] is undermined ... if one reason why majority rule has to be constrained by rights is that the majority in the heat of passion may fail to perceive what is in its best interest. In that case, rights are needed to promote aggregate welfare and majority rule becomes the enemy of utilitarianism rather than its natural allay.[57]

In short, majority rule which is at times characterized by emotion is not capable of being in harmony with the rule of law. As experience at home and abroad shows the appropriateness of the institution of HOF in enforcing constitutional rights is very, very disputable. Concerning the argument that Ethiopian courts were part of the past oppressive governments does not seem to be a satisfactory justification to deny them judicial review power or, at least, the establishment of a constitutional court. In Europe, too, courts were part and parcel of the oppressive regimes.
Carol Guarnieril wrote the following.

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[54] Id
[55] John Elster, *Majority Rule and Individual Rights* in Stephen Shute and Susan Hurley (eds.) *On Human Rights the Oxford Amnesty Lectures, 1993 (*Basic Books Harper Collins Publishers, 1993) at 179
[56] Id
[57] Ibid 182

Until the middle of the twenty century judiciaries on the continent [of Europe] were generally considered pillars of the established order... judges were expected to act in a subordinate capacity with respect to the political branches and to the norms the latter enacted.[58]

Commenting on the current Ethiopia institutional arrangement, one scholar has expressed his being surprise "*in view of the clear global trend towards the adoption of judicial review and the suffering of Ethiopians under dictatorships*"[59]

5.4.1 Independence and Impartiality

No one disputes that a judicial organ should be independent and impartial, not only theory but also in fact, to parties coming before it. That is not enough. It should also be perceived to be so by the public. Even if an institution is independent, unfavorable public perception towards it can be damaging to its image thereby negatively affecting human rights enforcement. The *Black's Law Dictionary* defines the term *independent* as "Not subject to the control or influence of another" (2) "Not associated with another" (3) "not dependent or contingent on something else." [60] The word *impartial* is also defined as "unbiased; disinterested."[61]

No doubt that ensuring the independence of law enforcement organs is one of the key conditions to make these institutions viable custodian of basic rights. Such independence should exist not only at institutional level but also at the level of the individual member. Setting aside their political affiliation, let us examine the protection particularly the issue of immunity given to members. In this regard Art 63(1) of the Constitution which deals with immunity states: "No member of the House of the federation may be prosecuted on account of any

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[58] Carol Guarnieril, *Courts and Marginalized Groups* supra note at
[59] Minasse Haile, The New Ethiopian Constitution supra note 9 at 55
[60] *Black's Law Dictionary* 12th ed at 654
[61] Ibid at 638

vote he casts or opinion he expresses in the House, nor shall any administrative action be taken against any member on such grounds."[62] Art 63(2) contains exceptions. "No member of the House of the federation may be arrested or prosecuted without the permission of the House except in case of *flagrante delicto.*"

However the constitutional protection granted to members of the House has been watered down by a legislative enactment. Art 49 of Proclamation 251/2001 provides that:

Where a member of the House fails to competently represent his Nation, Nationality or People, he may be subjected to disciplinary measure in accordance with the regulation of the House.

What is stipulated in Article 49 of the Proclamation 251/2001 is inconsistent with the nature of the job the House performs as a judicial organ. As per the law, for all intents and purposes, members of the House are forced to maintain partisan position.[63] Art 50 of the same proclamation provides grounds that may lead to disqualification of a member.

a. *Where the Council that elected him decides that he be removed.*

b. *In the case of members directly elected by the people of a state when fifteen percent of the electorate decide that he be removed in accordance with relevant regulations of the Electoral Board.*

c. *Where the House by a two-thirds majority decides that a member does not represent his constituency properly on moral consideration.*

The Proclamation makes members of the House accountable to the HOF as well as the state council that elected them or to the electorate (as the case may be). The massage this article sends to members is that they may be expelled from

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[62] Sub-art (2) contains exceptions to the principle of immunity. "No member of the House of Federation may be arrested or prosecuted without the permission of the House except in case of *flagrante delicto.*"

[63] Mekonnen Frew, *Constitutional Review in Ethiopia* supra note 1at 76

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the House on grounds far from clear. The result is the constitutional immunity of members of the HOF has been restricted.

A. Conflict of Interest

Related to im/partiality is the composition of a tribunal. In the case of the HOF, its members are from state executive and legislative branches. This in effect means a legislator who participated in the making of a law at the state level changes his role to sit as a judge to see the validity of the law he himself took part in its making. The president and vice president of the Federal Supreme Court who sit as judges in the Supreme Court and the cassation division sit to decide on the validity of decisions they made in their judicial capacity. The revision of court decisions by the HOF also contradicts with the UN Basic Principles on the Independence of the Judiciary which prohibits revision of judicial decisions by non-judicial organs.[64]

This may create a loophole for political maneuver and ultimately compromise the integrity of the institution. And this law erodes potentially the immunity extended to House members by the Constitution. This law will obviously have negative impact on the independent judgment of the House members. This is in contradistinction with the practice in (other) democratic systems. In western democracies, the practice is once a person is appointed as a judge he is no more accountable to the electorate.[65] In other words, judges are insulated from the influences coming from the electorate and other government branches. In such a situation it is naïve to expect the House members to play by the rules.

[Unlike the members of the HOF],...*members of the US Supreme Court and the German as well as the South African Constitutional Courts do not constitutionally represent any constituency··No doubt, these removal procedures [of the HOF] put*

[64] The UN Basic Principles on the Independence of the Judiciary Arts 2 & 3
[65] Mekonnen Frew, *Constitutional Review in Ethiopia supra note , at 78*

some strain on...the members of the House, especially given the fact that they can be removed, so to speak, from above and from below."[66]

Mr. Louis Joinet, the UN Rapportieur on the Independence of the Judiciary and the Protection of Practicing Lawyers, has said, "It is now universally recognized that fundamental rights and liberties can best be preserved in a society where the legal profession and the judiciary enjoy freedom from interference and pressure."[67] Justice is highly dependent on the existence of an institution that is competent, independent and impartial employing a fair and public hearing.[68]

Art 2 of the UN Basic principles on the independence of the judiciary stipulates.[69]

The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

The judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

Further the same document provides that the Basic Principles apply to professional as well as lay judges where they exist. The idea is the principles of competence, independence and impartiality are applicable to all organs responsible to discharge dispute resolution.

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[66] Ibid at 79
[67] Louis Joinet, a UN Rapportieur on The Independence of the Judiciary and Protection of Practicing Lawyers at ii
[68] Reed Brody (ed.), *The Center for the Independence of the Judges and Lawyers: A Compilation of International Standards* (No. 25-26, April-October, 1992) at 23
[69] UN Basic Principles on the Independence of the Judiciary supra note 84 Art 2

Now let us investigate whether the HOF is independent and impartial. Members of the House are politicians elected by the people or other politicians. In other words, they are members of a particular political party and advocates of its ideology. But politicians are not, by definition, impartial. Thus, it is difficult to expect members of the House to be impartial towards parties to a case, especially when the interests of the party in power and the government are at stake.

Justice requires the treatment of like cases alike. Judgeship and partisanship are contradictory. In my opinion, the role of the House as a judicial body goes counter against common sense and reason for it does not fulfill the cardinal principles of judgeship, namely, independence and impartiality. Borrowing terms from the *Black's Law Dictionary*, members of the House are "subject to the...influence of" the party they are from since they are "associated with" a political party and ideology. And their decisions are likely to be "contingent on" political considerations and the wish of the majority.

Given the mode of organization and composition, the House does not meet the requirements of independence and impartiality. What is more the HOF's composition does not reflect the political divide between the incumbent and the opposition. This could diffuse the excesses of politics and bring about compromise among different groups. As it stands now, the HOF is deficient in the basic qualities required of an adjudicatory organ.

Minasse is correct in saying that a separation of powers, federalism and entrenchment of fundamental rights "make sense only if there is an *independent body* to decide whether the government has exceeded the limits to its power set by the constitution."[70] (Emphasis added) He goes on to say, "The HOF is neither a judicial body nor a body likely to restrain the governments at

[70] Minasse Haile supra note 9 at 52

the federal and state levels."[71] Ray has also underlined the need for a strong, impartial and independent judiciary and recommended that such body be "independent both of the federal legislature, the executive and of governments of the units."[72]

As far as the HOF is concerned, there is even a contradiction within our legal system as a whole. On the one hand, we have "politician-judges" who are supposed to administer justice. On the other, there is a universal principle (which is also part of the Ethiopian legal system) that prohibits judges from becoming members of a political party. This is an obvious conflict within the same legal system. Fiss describes this basic norm by saying "The judge must stand independent of the interests of the parties or even those of the body politic."[73] In short, a collection of politicians, like the HOF, may not play in accordance with the rule of law and principles of human rights, let alone to be the custodian of citizens' rights.

It is not possible to see an overriding justification to bypass the universal principles of judicial independence and impartiality to make our dispute settlement mechanism an exception to the rule. Given our institutional set up, it is very questionable to expect such qualities from the HOF and the CCI. Aalen has gone even so far as to say the Ethiopian system "is different from other constitutional interpretation organs by not being independent of political forces."[74] More specifically, constitutional interpretation is "controlled by the

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[71] Id
[72] Samirenda Ray, *Modern Comparative Politics: Approaches, Methods and Issues* (New Delhi, Prentice-Hall of India Pt. Ltd, 2003) at 209
[73] Fis Grimm, *In Defense of Judicial Review*(London: Martinus Nijhoff Publishers, *199) at 128*
[74] Lovise Aalen, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000* (Bergen: Ch. Michelsen Institute Development Studies and Human Rights, Report 2002:2) supra note at

party in power" and "the Ethiopian system lacks the essential limits to government."[75]

Well, it is said the HOF represents the interests of nations, nationalities and peoples in whom sovereign power resides, and, therefore, their representatives have legitimate command to make a decision regarding the Constitutional text. As the second chamber of the legislative branch, it is really questionable if it has the independence to invalidate legislations of a "fellow" chamber for such a power makes it a judge in its own cause. This organ has interest in the outcome of its decisions, at least, with respect to those disputes involving the interests of the majority *vis-à-vis* the minority groups and individuals.

5.4.2 Limitations Associated with Majoritarian Institutions

Basically judicial review is used as a tool to address the tyranny of the majority. Majoritarian institutions usually tend to be incentive to minority interests and individuals, sometimes even against those interests. Elster warns against the threat such institutions pose not only to minorities but even to majorities themselves. The majority in the heat of passion may fail to perceive what is even in its best interest unless it is checked by some mechanism. Contrary to the utilitarian argument for the rule of the many over the few, Elster remarks on the potential danger associated with this philosophy. "A majority may set aside the rule of law under the sway of a standing interest or a momentary passion."[76] Madison, too, expressed his concern regarding majority decision making. "In all cases where the majority is united by a common interest or passion, the rights of the minority are in danger."[77] The enforcement of fundamental rights which are basically counter-majoritarian is left for a majoritarian political organ. This is virtually self-defeating.

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[75] Id

[76] John Elster, *Majority Rule and Individual Rights*, supra note 75 at 182

[77] Eugene Rostow, *The Democratic Character of Judicial Review* note 4 at 55

Recognizing basic rights is one thing and designing an effective enforcement mechanism is quite anther. The framers of the Ethiopian Constitution have failed to establish a practical human rights enforcement institutional system. If involvement in a political struggle compromises the independence and impartiality of an adjuratory body, the HOF is not the proper institution to enforce constitutional human rights. The institutional arrangement requires a majoritarian organ to enforce basic rights which are, more often than not, counter-majoritarian. The concern is politicians are likely to be partial. Consequently they may favor their supporters and discriminate against those who do not subscribe to their values and ideologies; let alone those who confront them and challenge their policies and decisions. In short, constitutional interpretation by the HOF is not compatible with constitutionalism-a device designed to keep the legislative and executive branches within the scope of their powers.

As regards the problem of majority rule, our institutional arrangement is particularly susceptible to another form of abuse. In other federations, second chambers are organized in such to way that the principle of democracy which favors big groups in the organization of lower chambers is compromised to prevent, or at least, minimize domination by the bigger groups over the smaller ones. In Ethiopia both chambers are organized in a more or less the same manner. Those who have large size have dominated both chambers of the legislature.

Once again in other federations, with a view to promote shared-rule, states participate in law and policy making at the central government level through the second chambers. Against this commonplace practice elsewhere, the Ethiopian second chamber has little role to play in the law making process. Though the Constitution provides for the representation of every nationality in the HOF, the numerically smaller groups are disadvantaged and are less

protected by the institution of HOF. The House claims to promote the interests of all nationalities, in reality, it may not protect all equally. Because of the overwhelming majority seat held by the two largest nationalities, there might be potential domination by majority over minorities.[78]

5.4.3 Practical Constraints

A. Absence of Clear Rules of Interpretation

"If all decisions involving justice to individual parties were lined up on a scale, with those governed by precise rules at the extreme left, those involving unfettered discretion at the extreme right, and those based on various mixtures of rules, principles, standards, and discretion in the middle, where on the scale might be the most serious and the most frequent injustice?
...the greatest and most frequent injustice occurs at the discretion end of the scale, were rules and principles provide little or no guidance, where emotions of deciding officers may affect, where political or other favorism may influence decisions, and where the imperfections of human nature are often reflected in the choices made."
Kenneth Davis, *Discretionary Justice: A Preliminary Inquiry*, 1971

Under proclamations 250 and 251, the HOF and the CCI are required to enact rules of procedure and principles that serve as basis for constitutional interpretation and decision-making. In the absence of substantive and procedural norms, it is difficult to expect objectivity and predictability from constitutional adjudication. In connection to this, Fiss says interpreters "are not assumed to have the wisdom of philosopher-kings...but rather from the procedures that limit the exercise of their power."[79]

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[78] The Oromos and the Amharas combined account for about one-third of the seats at the House of Federation.
[79] Fiss Grimm, *In Defense of Judicial Review* supra note 92 at 134

General and predetermined rules may ensure uniformity which in turn offers certainty and predictability. Where rules of law are proclaimed in advance, Salmond remarked, "... [T]he citizen can plan his activities with a measure of certainty and predict the legal consequences of his behavior." [80] The preannouncement of the rules of the game has also another advantage. It minimizes the risk of arbitrary decisions.[81] It also guarantees "stability and security which the social order derives from uniform, unchanging and certain rules of law."[82]

As to the necessity of rules of procedure and substance Edgar Bedenerheimer also underscored benefit of having standards and principles of decision making. "[T]he recognition of a body of building standards of adjudications [is] well-nigh indispensable for the proper discharge of the judicial function" for it will reduce "purely individualized and ad hoc disposition of a single, particular situation."[83]One of the fundamentals of justice administration is the treatment of like cases alike. He further said, "Even a single judge would hardly be able to administer justice, impartially and even handedly without the help of such standards."[84]

The attempt of the law to introduce ordered relations in to the dealings of private individuals and groups as well as into the operations of government cannot be accomplished without norms-which in Latin means, "rule, standard, or yardstick". The formulation of detailed laws and principles of constitutional interpretation is absolutely crucial and urgent to constitutional dispute settlement by the CCI and the HOF.

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[80] P.J.Fitzgerald (ed.), *Salmond on Jurisprudence,* 20th ed. (London: Sweet And Maxwell Ltd., 1966) at 60
[81] Id
[82] Id
[83] Edgar Bodeneheimer, *Jurisprudence: The Philosophy and Method of the Law* 2nd ed. (Delhi: Universal Book Traders, 1974) at 247
[84] Id

The rule of law "operates on principles which are known or readily discoverable, reasonably clear, apply uniformly and generally...apply prospectively...and are in force through public trials operating on rational procedural rules."[85]

At the House parties, do not have an opportunity to attend the decision-making process and present oral argument. This is contrary to the right to be heard considered as a principle of natural justice. "[P]ublicity, which is so crucial in any legal process, does not feature in the practice of (the CCI and the HOF). Decisions of the Council are communicated to parities by the Registrar after they make express request to get the decision.[86] Transparency, which is one of the fundamental principles of the constitutional system, must be applied to ensure that parties get the chance to appear before the institution and express their views. A judicial process that does not give an opportunity to speak is far from being fair for the outcome of a decision may be affected by the fairness of the process.

B. Level of knowledge and skill

It is clear that members of the HOF are chosen on the basis of their political views, not legal expertise. It is reasonable to conclude that most, if not all, of them do not have the expertise required to understand and interpret the Constitution which is very general and abstract. In other words, members of the HOF's lack theoretical and technical knowledge about constitutional principles, values and rights. One may here argue that there is the CCI which predominantly comprises of legal expertise. However, the CCI's recommendations are non-binding and the HOF is at liberty to disregard them.

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[85] Ibid 249

[86] Mekonnen Frew, *Constitutional Review in Ethiopia,* supra note 1at 80

C. The Size of the HOF

With its 112 members, it is unrealistic to engage all members in constitutional adjudication process as it is not manageable. Constitutional issues can better be handled by a small group of people rather than a big gathering.

D. Accessibility

The age-old adage goes: "Justice delayed is justice denied." As per Art 67(1) the HOF is required to conduct "at least two sessions annually." This means normally the House convenes every six months. Of course, apart from constitutional dispute litigation, the HOF has other responsibilities to discharge.[87]

In most cases a case may not be resolved in one sitting as it may require further investigation. If that is the situation, by a conservative estimation, a case may take well over a year. In practice some cases took as much as four or five years. This is not without forgetting the time required before a case reaches the HOF.

Given the work pressure as well as the other factors discussed above, the HOF does not have enough time to deliberate on constitutional cases adequately. These institutional constraints have made the HOF impotent to protect and enforce the basic rights and freedoms the Constitution declares to be inviolable and inalienable.

Last, but not the least, we may question why four institutions, *viz*, the HOF, HOPR, CCI and the ruling party (arbiters and potential parities to a constitutional case) are headquartered in the same compound. In this regard the experience of the German Constitutional Court is worth noting which has deliberately been located in the city of Karlsruhe, separating it geographically from

[87] For details, see art 62 of the Constitution, supra note 4

other federal institutions.[88] Due to the fact that the above mentioned offices are in the same place, outsiders may be suspicious of the concerning the integrity of the HOF (and the CCI).

Conclusion and Recommendations

This thesis is about the study of the organization and operation of Ethiopia's institutions and its impact on the implementation of fundamental rights and freedoms. Thus, the central question is whether Ethiopia has appropriate institutional structure that is able and willing to protect the rights of all citizens. With the objective of shedding light as to the nature of appropriate and effective institutional organization, a comparative approach has been employed.

Countries around the world have different institutional system of constitutional enforcement. Broadly speaking, the different institutions may be classified into two-the American (the decentralized) and the European (centralized) models. In the case of the former, ordinary courts at all levels in principle determine what the text of a constitution says. Most continental European countries have a different system of constitutional interpretation and adjudication. For the purpose of constitutional dispute settlement, independent and impartial special courts, commonly known as constitutional courts, have been established. These institutions are separate from the ordinary court structure. We have also legislative constitutional interpretation which exits in a few countries. China is an example to this group of countries. The Chinese have conferred the mandate to supervise and interpret the constitution to the legislature. However, legislative institutions lack the basic tenets required of a judicial body i.e. competence, independence and impartiality.

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[88] Rupp Hans, *Judicial Review in the Federal Republic of Germany* (accessed from the Internet on November10, 2006)

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In Chapter Two, we have looked at the legal institutions of different countries, namely, United States, United Kingdom, Germany, France, and China. The sample of countries has been chosen deliberately for the unique institutional arrangement existing in each country. In the United States ordinary courts determine the meaning of the Constitution when it is an issue in deciding a particular case. The United States Supreme Court has played a tremendous role in shaping the American political and legal system since the landmark case of *Marbury V. Madison.* In United Kingdom courts have not had the power to overrule parliamentary legislation. The reason being parliament has been considered supreme over other institutions including courts. The traditional prerogative of parliamentary supremacy is, however, changing in recent years, especially after the UK joined the European Union. Accordingly, the validity of domestic laws and decisions of the British government can be scrutinized by the European Court of Justice. In France, too, ordinary courts do not rule on the merit of legislative enactments. Instead, constitutional court has been constituted which examines the merit of laws before they enter into force. In other words, the French system is different from the other systems in that it operates prior to the promulgation of legislations. The 1949 Basic Law of Germany established a constitutional court system which is probably the most popular one in the European continent. Now it is receiving more than five thousand constitutional complaints annually.

We have also discussed the Chinese constitutional interpretation model. As a socialist state, China does not accept separation of powers and checks and balances. On the contrary, unity of sate power is the principle that is in turn founded on the Marxist-Leninist political ideology. Accordingly, courts do not have the authority to control actions of the other branches of government. The legislature has rather the responsibility to interpret and supervise the implementation of the

constitution. This has its own limitations in terms of ensuring constitutionalism. Generally, in socialist countries, constitutions tend to be too aspirational; giving less attention to establishing viable legal institutions and respect for human rights.

In chapter two, we also considered the arguments for and against judicial review-the power of courts to invalidate legislations and executive actions considered to have contravened a constitution. The arguments raised by the critics of judicial review essentially revolve around two core issues-democracy and accountability. It is said the empowerment of judges to override legislations and actions of officials is undemocratic. This is what is known as the counter-majoritarian problem. As the critics argue it is contrary to the popular will to allow unelected judges to invalidate the laws and policies of representative institutions. Furthermore, while politicians are accountable to the electorate through periodic elections, there is no such judicial accountability. Once a person is appointed to the judicial post, he/she remains in office for life or until retirement, as the case may be. In the opinion of this writer, the counter-majoritarian argument is not convincing. Democracy should not be taken as mere majority rule. Nor should it be considered as an end, but a means to serve societal interests. There are certain values to be honored by not only politicians but also the electorate.

By protecting certain values from the tyranny of the majority, the majority itself ultimately benefits. History has witnessed when democratically elected governments degenerated into dictatorship leading to the destruction of humanity and property. In the heat of passion and emotion, the popular governments fail to act in the interest of society, let alone in the interest of minorities and the individual. Authorizing a legislative organ to adjudicate constitutional cases is

tantamount to making it a judge in its own cause. For an obvious reason the legislature is likely to have direct interest in the outcome of its decisions.

In addition, the argument that judges are not accountable is an oversimplification failing to reflect the reality. It is true judges are not accountable to the public in a manner politicians are. Nevertheless, judges are accountable in different ways. Among others, they are required to give reason for their decisions and to decide based on the law. Further, judicial decisions are subject to scrutiny by a higher court through appeal.

Chapter Three has dealt with the institutions responsible for constitutional rights enforcement under the previous constitutions of Ethiopia with the view to trace our tradition and assess its impact on the present institutional arrangement and the practice of rights enforcement. Despite variation in degree, the constitutions of 1931, 1955 and 1987 provided for basic rights. No matter how undeveloped it might be, the 1931 constitution provided for human rights. It was, however, silent whether the judiciary could enforce its provisions. The 1955 Revised Constitution arguably recognized the power of courts to review the constitutionality of legislations. Under the PDRE Constitution of 1987, the National Shengo, the legislative organ, was mandated to interpret the constitution. All the previous three constitutions had one thing in common. They were instruments of power consolidation rather than limiting the excesses of power. In short, human rights protection and enforcement has always been very poor in the Ethiopian tradition.

Chapter Four takes up the discussion on certain underlying constitutional values and principles in general and how those principles

are treated in the FDRE Constitution in particular. The objective is to explore the implications of these principles on the enforcement of fundamental rights. Any justice administration system remains to be impotent without the fulfillment of certain conditions. In this regard, the concepts of the rule of law, constitutional supremacy, constitutionalism, justiciability and separation of powers have been considered. Concerning separation of powers, this idea does not have a clear-cut meaning. For example, in the United States and France, the concept is applied differently.

> It is worth appreciating the fact that the FDRE Constitution recognizes a wide-ranging list of human rights. Furthermore, it vests judicial power in the courts and the constitution has been declared the supreme law of the land. The rule of law is proclaimed to be as one of the ideals of the new political order. The Constitution also deals with justiciability. Under the Constitution, the judiciary has no authority to rule on the merit of legislative acts. It is the second chamber of parliament, the HOF, which has the command to decide on constitutionality issues. Thus, questions concerning the validity of legislations are not subject to court examination. Issues involving the constitutionality of proclamations are not justiciable. The following statement of the Federal Supreme Court's Vice-President sums up the present positivistic approach. "*The Ethiopian courts cannot refuse to enforce a law made by the law maker even if that law is in violation of the constitution.*"[89]

As to the nature of an adjudicatory organ (like the HOF), it is self-evident such institution must be independent, impartial and competent

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[89]As quoted by Mekonnen Frew, *Constitutional Review in Ethiopia: A Comparative Appraisal,* supra note 1, at 101Y, YE'ITIYOPIYA HIGINA FITIH GETSITAWOCHI, 16(1999 E.C (2007).

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and adequately resourced. The HOF, as pointed out time and gain in the body of this study, does not possess these universal principles governing the organization of a judicial body. To be specific, being a collection of politicians, the House of Federation lacks the qualities expected of an adjudicatory body, and given its nature, the House of Federation is bound to be a partisan organ in matters involving the interests of the government. Apart from that, by virtue of proclamation 251/2001, members of the HOF are accountable to the HOF itself and to the people, or the state council who elected them. They are subject to removal from their position on grounds that are not certain. The proclamation has eventually eroded their constitutional immunity. This law will make them less confident and more dependent in their judgment.

From the reading of Art 84(2) of the Constitution, it seems that the power to rule on the merit of subordinate laws was reserved to the judiciary. However, the jurisdictional delimitation does not stop here. The matter has been complicated by virtue of proclamations 250/2001 and 251/2001. Pursuant to the two laws, the jurisdiction of the HOF includes the power to decide on the constitutionality of regulations, directives, and decisions of any government organ. The result is the legislature has taken away additional power from the courts to give it to the second chamber. The proclamations under discussion have also given an unwarranted signal to the courts. Because of this judges are shying away from their duty of enforcing the constitutional provisions on basic rights despite the consensus reached among the majority of the scholarly community. Most scholars agree that Ethiopian courts have legitimate and inherent mandate to interpret the Constitution and annul executive actions. As things stand now, the Constitution has been raised to a level where judges cannot reach and citizens cannot use it to protect themselves from unrestrained government power.

As far as the demarcation of jurisdiction between the HOF and the courts is concerned, the practice is not yet clear as the Constitutional Inquiry Council held conflicting views. In one case, the CCI expressed clearly that it was not its business consider disputes involving the validity of executive regulations and decisions. In another occasion, it examined the merit of a directive issued by the Executive to see its constitutionality. The Council is not presently able to operate effectively. Decisions take a long time. Its inability can be inferred from, among others, the fact that it does not yet have clear rules of interpretation. This writer stresses his firm belief that the absence of clear standards of decision-making leads to unpredictability, subjectivity and arbitrariness. There is also confusion on the part of the judges concerning their role in the application of the Constitution. Generally, judges do not try to consider the ideals of the Constitution while deciding cases and judgments are devoid of constitutional values. To put it in different words, judges tend to focus on less important issues.

Recommendations

For any constitution to be meaningful, enforcement is crucial. However, the current Ethiopian institutional structure has proved to be a bottleneck to the realization of fundamental rights. We, therefore, there is a need to reform our institutional set up.

A. Short-Term Solutions

If we want to have a custodian for basic rights and freedoms, we cannot afford to relegate the courts. Judges should decide on the validity of laws enacted by the executive branch. Therefore, proclamations 250 and 251 of 2001 should be repealed. Besides, all stakeholders must make a concerted effort to bring about a viable and assertive judiciary. One way to do this is through short-term trainings to raise awareness of judges about the judicial duty to enforce the Constitution. They have to have a

clear understanding as regards the scope of the courts' jurisdiction in the interpretation and application of the Constitution

B. Long-Term Solutions

This writer recommends a constitutional court system, as opposed to a political organ which is the case today. The writer also believes constitutional decision-making by a constitutional court is preferable to ordinary courts. The former creates an opportunity for specialization that will in turn bring about greater knowledge regarding constitutional matters. In defending the interests of individuals, powerless and disadvantaged sections of the society, such an organ is more suitable. This long-term solution requires a constitutional amendment. To ensure the enforcement of constitutional rights and the rule of law, a full-fledged constitutional court with a final say is indispensable. Moreover, the constitutional court should be established in such a way that it will be competent, independent and impartial. As far as the relation between the constitutional court and ordinary courts is concerned, I recommend that all supreme and high courts be able to entertain constitutional cases and, as a final arbiter of such disputes, the constitutional court will have the power to scrutinize decisions of the courts.

The court's composition should take account of the political divide between the incumbent the opposition so that it will secure legitimacy. Its staff should be prohibited from working in other official positions. For that compromises professionalism and gives rise to conflict of interest between their role as members of the CCI and their other official duties.

Bibliography

A. Books

Aalen, Lovise, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000* (Bergen: Ch. Michelsen Institute Development Studies and Human Rights, Report 2002:2)

Aberra Jembere, The Functions and Development of Parliament in Ethiopia (unpublished, 1995)

Abdullahi an–Na'im, Legal Protection Of Human Rights In Africa: How To Do More With Less in Austin Sarat *et al* (ed), *Human Rights: Concepts and Contingencies* (The Amherst Series in Law, Jurisprudence and Social Thought, The University of Michigan Press, United States, 2004)

Abraham, Henry, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France.* (6th ed. New York, Oxford: Oxford University Press, 1993)

Assefa Fiseha, Constitutional Interpretation: The Respective Role Of Courts And The House Of Federation In *Proceedings Of The Symposium On The Role Of Courts In The Enforcement Of The Constitution.* (Addis Ababa: Birhanena Selam, 2001)

Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study (Nijmegen: Wolf Legal Publishers, 2005)*

Aharon Barak, *Forward: A Judge on Judging: The Role of a Supreme Court In a Democracy* (Justice Professionals Training Center, 116 Harv. L. Rev.16, 2002)

Beatty, David, Human Rights and the Rules of Law in David Beatty(ed) *Human Rights and Judicial Review: A Comparative Perspective* (Dordrecht Boston London: International Studies in Human Rights, Martinus Nijhoff Publishers, 1994)

Beatty, David, The Last Generation: When Rights Lose Their Meaning in David Beatty(ed) *Human Rights and Judicial Review: A Comparative Perspective* (Dordrecht, Boston, London: International Studies in Human Rights, Martinus Nijhoff Publishers, 1994)

Bedeneheimer, Edgar, *Jurisprudence*: The Philosophy and Method of the Law 2nd ed (Delhi: Universal Book Traders, 1974)

Clapham, Christopher, Constitutions and Governance in Ethiopian Political History in *Constitutionalism: Reflections and Recommendations, Symposium on the Making of the New Ethiopian Constitution* (Addis Ababa, Inter-Africa Group, 1993)

Davis, Kenneth, *Discretionary Justice: A Preliminary Inquiry* (Urbana, Chicago, London: University of Illinois Press, 1971)

Donovan, Dolores, Leveling the Playing Field: The Judicial Duty to Protect and Enforce the Constitutional Rights of Accused Persons Unrepresented By Counsel in *Ethiopian Law Review* (Vol. 1, No. 1, 2002)

Elster, John, Majority Rule and Individual Rights in Stephen Shute and Susan Hurley (eds.) *On Human Rights: The Oxford Amnesty Lectures 1993* (Basic Books Harper Collins Publishers, 1993)

Fasil Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect* (Law Princeville NJ, Asmara, Eritrea the Red Sea Press, Inc 94)

Fitzgerald, P.J (ed), *Salmond on Jurisprudence* 20th ed (London: Sweet and Maxwell Ltd., 1966)

Horrigan, Bryan, *Adventures in Law and Justice: Exploring Big Legal Questions in Everyday Life* (Delhi: Universal Law Publishing Constitution. Pvt. Ltd., 2003)

Ibrahim Idris, Judicial Adjudication under the 1994 FDRE Constitution in *Ethiopian Law Review* (Vol. 1, No. 1, 2002)

Kommers, Donald, *The Constitutional Jurisprudence of the Federal Republic of Germany.* 2nded (Durham, London: Duke University Press, 1997)

Koopmans, Tim, *Courts and Political Institutions: A Comparative View* (2003)

Mekonnen Frew, *Judicial Review in Ethiopia: A Comparative Appraisal* (LLM thesis, 2007)

Minasse Haile (Prof.), The New Ethiopian Constitution: its Impact upon Unity, Human Rights and Development in *Saffolk Transnational Law Review* (Vol. 20, No. 1, 1996)

Murphy, Walter and Tanenhaus, Joseph, *Comparative Constitutional Law: Cases and Commentaries* (New York: St. Martins Press, 1977)

Paul, James and Clapham, Christopher, *Ethiopian Constitutional Development: A Source Book* (Addis Ababa: Faculty of Law, Haile Sillassie I University, Vol. 1, 1971) at 282

Ray, Samirenda, *Modern Comparative Politics: Approaches, Methods and Issues* (New Delhi, Prentice-Hall of India Pr. Ltd, 2003)

Rostow, Eugene, *The Democratic Character of Judicial Review* 66Harv. L. Rev.193, 1952-1953

Scalia, Antonin, Federal Constitutional Guarantees of Individual Rights in the United States of America In David Beatty(ed) *Human Rights and Judicial Review: A Comparative Perspective* (Dordrecht Boston London: International Studies in Human Rights, Martinus Nijhoff Publishers, 1994)

Tegaye Regassa, Courts and the Human Rights Norm in Ethiopia: An Overview in *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution* (Addis Ababa: Birhanena Selam, 2001)

Waal, Johan et al, *The Bill of Rights Hand Book* (4th ed. Juta & Co Ltd, 2001)

B. Laws

Constitution of the Federal Democratic Republic of Ethiopia Proclamation 1/1995

People's Democratic Republic of Ethiopia Constitution of 1987

The Constitution of 1931

The Revised Constitution of 1955

The Proclamation on the *Council of Constitutional Inquiry Proclamation No. 250/2001* Federal Negarit Gazeta, 7th year No. 40

The Proclamation on the Consolidation of the House of Federation and Definition of its Powers and Responsibilities, Proclamation No. 251/2001 Federal Negarit Gazeta 7th year No. 401

The Anti-Corruption Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation No. 239/2001, *Federal Negarit Gazeta, 7th year No 27*

C. Internet Sources

Abbink, John, *Ethnicity and Constitutionalism in Contemporary Ethiopia,* (http://www.ascleiden.nl/GetPage.aspx?datastore=1&url=/publications/gjabbink as accessed on May 25, 1998)

Alemayhu G/Mariam, *Constitutional Rights and Constitutional Wrongs: Justice System Reform through Accountability in Ethiopia* http://www.makedictatorshiphistory.org/doc/prof-alema-constitutional-rights-and-constitutional-wrongs-in-ethiopia-.pdf (as accessed on the 24th of October, 2007)

Chen, Albert *The Interpretation of the Basic Law: Common Law and Mainland Chinese Perspectives,* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925212 (accessed on Oct. 12, 2007)

Dingjian, Cia, *Constitutional Supervision and Interpretation in the People's Republic of China,* (accessed from the internet on Oct. 12, 2007)

Guarnieri, Carol, *Courts and Marginalized Groups: Perspectives from Continental Europe,* (accessed from the internet on October 6, 2007)

Hans, Rupp, *Judicial Review in the Federal Republic of Germany* (as accessed from the internet on November 24, 2006)

Pogany, Istvan, A New Constitutional (Dis)order for Eastern Europe?*(as accessed* from the internet *on October 10, 2007)*

Rakeb Messele, *Enforcement of Human Rights in Ethiopia* http://www.apapeth.org/Docs/ENFORCEMENT%20OF%20HR.pdf (as accessed on the 15th of September, 2006)

Yonatan Tesfaye, *Who Interprets the Constitution: A Descriptive and Normative Discourse on the Ethiopian Approach to Constitutional Review (*LLM Dissertation Faculty of Law, University of Cape Town, 2004), http://www.up.ac.za/dspace/bitstream/2263/1079/1/fisseha_yt_1.pdf(accessed on September10, 2007).

D. Cases

Abdilmamud Ibrahim et al v. Benshangul-Gumuz State

Ethiopian National Association for the Blind v. Oromia National State Education Bureau, Petition No. 16-03-96 E.C

Rental Houses Administration v. Princess Tenangewerk Haile Selassie et al, Federal Supreme Court Cassation Division, Cassation File No. 16195(1999 E.C

Coalition for Unity and Democracy v. Prime Minister Meles Zenawi, Sene 7, 1997 E.C

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