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Constitutional Review and Its Limits: The Case of the CCI

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Dedicated to my father, Dr. Taye Bekele

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Abstract

Limits to the constitutional courts power to entertain cases between private parties are necessary so that constitutional review of judicial decisions in individual complaints procedures do not distract constitutional courts from its unique task of ensuring that laws respect the Constitution; also, disturbing the judicial structure in each country and, specially, the position of the supreme court. Particularly, the challenge of constitutional courts potentially disturbing the judicial structure of a state is higher in countries that have centralized constitutional review mechanisms. In Germany and South Africa where there is a central constitutional court there has at least initially been a tendency of considering them as a seat of super jurisdiction of appeals. The same holds true for the Ethiopian system, the CCI's recently established reputation as the super-jurisdiction of appeals, for cases that pass through the judicial system, has severely eroded the principle of finality. Countries such as Ethiopia which have adopted a non-court model of constitutional review face an even greater challenge, as the political body's (HoF's) interference in the adjudication process will effectively result in the violation of judicial independence.

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(1991 E.C-2009 E.C)**

**Figure 1: Cases That Have Been Lodged Before the CCI and Forwarded to the HoF
(1991 E.C-2009 E.C)**

List of Acronyms

BVerfG.....	Federal Constitutional Court of Germany
CCI.....	Council of Constitutional Court
EIPO.....	Ethiopian Intellectual Property Office
HPR.....	House of People’s Representative
HoF.....	House of Federation
FDRE.....	Federal Democratic Republic of Ethiopia
PDRE.....	People’s Democratic Republic of Ethiopia

Chapter One

1. Introduction

1.1. Definition and Origins of Constitutional Review

Constitutional review is the means by which a court determines the acceptability of a given law or other official action on grounds of compatibility with constitutional norms¹. The constitution, being the supreme norm of a given state, is often used as a standard or a benchmark for subsequent state actions to build on. If a national legal system fails to pluck out the odd laws, administrative acts or judicial decisions that are inconsistent with the constitution, the supremacy of the constitution would be compromised. Accordingly, most states have a mechanism through which state actions could eventually be weighed and validated in accordance with the existing grand norm. A state action that contravenes this Higher Law cannot be acceptable, and hence judicial review is a way to ensure that such acts cease to exist².

The power of constitutional review is given to one institution to check the legality of the act of the government. The state action which is being assessed by the review could range from the actions of the legislative to the actions of the executive and the judiciary. Thus, constitutional review can in the narrowest (original) sense be defined as the formal power of a local court or court-like body to set aside or strike legislation for incompatibility with the national constitution³. Historically, the function of making sure that statutes passed by parliament are not in breach of the Constitution is the most distinctive role of constitutional courts. However, the contemporary (broader) definition to constitutional review includes, in addition to the appraisal of legislations, the review of executive and judicial decisions⁴. To the surprise of many recent

¹ Danielle E. Finck, "Judicial Review: The United States Supreme Court Versus the German Constitutional Court", Boston College International & Comparative Law Review, vol. 20 no.1 (1997), p.123

² Mauro Cappelletti, "Judicial Review in Comparative Perspective", California Law Review, vol.58 no.5 (1970), p.1018

³ Tom Ginsburg et. Mila Versteeg, "Why Do Countries Adopt Constitutional Review?", University of Virginia School of Law Public Law and Legal Theory Research Paper, Series 2013-29 (2013), p.6

⁴ Ignacio BorrajoIniest, The Limits of Constitutional Review of The Ordinary Court's Decisions in Constitutional Complaint Proceedings, (2005, Unpublished, Council of Europe), p.4

trend show that the review of judicial decisions has surpassed the review of legislation as the primary event entertained by constitutional courts across the globe⁵.

Despite the fact that the United States was the first to effectively implement constitutional review as a working method of subordinating state action to higher principles, such an idea did not spring new from the American jurisprudence⁶. On the contrary centuries of European legal thought and discourse have deliberated on the need to have a system which establishes the primacy of norms and the subsequent enforcement of such primacy.

The doctrine that gave birth to constitutional review has its source from natural law thinking that advocated for the invalidity of unjust laws. The constitution, being an instrument that is primarily tasked with limiting governmental authority, is elevated to a status of a superior and just law, and accordingly any act that contravenes it is automatically unjust. However, such natural law tendencies were heavily weakened with the advent of legal positivism. A single strand of the positivist thought believed that no judiciary shall have the ability to assess and subsequently discard the command of the sovereign. The rise of the British positivists thought resulted in the age of resistance to constitutional review. The popular legislature was seen as the sole and ultimate source of law, and its statutes were to control all cases brought before the courts⁷.

After the Second World War states, having witnessed the largely legislative-backed Nazi atrocities, European states reconsidered the possibility of checking the legislature. As a result, war torn Europe rushed towards adopting a written, rigid and permanent constitutions which were supplemented by an ordinary judiciary or even at times a special court that had the mandate to check the constitutionality of state actions.

1.2. Models of Constitutional Review

The realities of the twentieth century forced states to popularly adopt constitutional review but failed to bind them on how to engineer such system. Such contrasting thoughts and biases between states had forced them to adopt different models for controlling state action and maintaining the supremacy of the constitution. Deep-rooted suspicions of the judicial office,

⁵ Ibid.

⁶ Cappelletti, cited above at note 2, vol.58 no.5, p.1020

⁷ Id, p.1018

commitments to legal positivism, the concept of separation of power and other practical considerations have meant that constitutional review in various countries was conducted by organs other than the judiciary⁸.

There are basically two broad models of constitutional review this are the court model and the non-court model. The court model is further divided into the centralized and decentralized constitutional review model. In the decentralized court model (also known as the American or defused model), all ordinary courts have the power to interpret the constitution and carry out constitutional review⁹. The centralized court model on the other hand tasks a specialized court with the duty of undertaking constitutional review

1.2.1. Decentralized Model

The decentralized system of review, which had its origin in the United States, gives all the judicial organs within it the power to determine the constitutionality of legislation and other state actions¹⁰. The American constitution does not explicitly institute constitutional review however, many scholars argue that it was envisaged by the drafters. Alexander Hamilton (1788) famously devoted much of Federalist 78 to justifying the practice¹¹. But the practice gained legal force and precedent after the landmark decision by the US Supreme Court in the Marbury V. Madison case of 1803. In that particular case the presiding judge Marshall CJ asserted, “it is emphatically the province and the duty of the judicial department to say what the law is”. Apart from the USA, Britain's former colonies, including Canada, Australia, and India follow the decentralized or defused model of constitutional¹².

Many American scholars adamantly argue that it is the obligation of the judiciary to interpret laws and as the constitution is a law itself, albeit a supreme law, it shall be interpreted by the judiciary. A scholar by the name Mauro Cappelletti justifies the need for the judiciary to undertake constitutional review in the following manner;

⁸ Id, p.1033

⁹ Getachew Assefa, Ethiopian Constitutional Law with Comparative Notes and Materials, (2012), p. 505

¹⁰ Danielle E. Finck, cited above at note 2, vol. 20 no.1 (1997), p.126

¹¹ Tom Ginsburg et. Mila Versteeg, cited above at note 3, Series 2013-29 (2013), p.4

¹² Cappelletti, cited above at note 2, vol.58 no.5, p.1034

*The rationale behind giving the entire judiciary the duty of constitutional control is, on its face, both logical and simple, as is apparent from Chief Justice Marshall's opinion in Marbury v. Madison and earlier from the writings of Alexander Hamilton. It is the function of the judiciary, the argument goes, to interpret the laws in order to apply them in concrete cases. When two such laws are in conflict, it is the judge who must determine which law prevails and then apply it. When the conflict is between enactments of different normative force, the obvious criterion to be applied is that the higher law prevails: lex superior derogat legi inferiori. A constitutional norm, if the constitution is rigid, prevails over an ordinary legislative norm in conflict with it, just as ordinary legislation prevails over subordinate legislation, as the Germans would say, Gesetze prevail over Verordnungen. Hence, one must conclude that any judge, having to decide a case where an applicable legislative norm conflicts with the constitution, must disregard the former and apply the latter.*¹³

1.2.2. Centralized Model

Under the centralized form of constitutional review, the review is undertaken by a separate specialized constitutional court rather than by an ordinary judiciary¹⁴. Most European countries have established special constitutional courts in order to protect their national Constitutions against unconstitutional legislations, executive acts and judicial decisions¹⁵. Europe is closely associated with a “centralized model” of constitutional review, where only one court has authority to interpret the constitution and assess the constitutionality or unconstitutionality of any state act. In sharp contrast to the decentralized model, specialized constitutional courts may not even be a purely judicial body¹⁶.

The centralized model of constitutional review and constitutional courts are the invention of Austrian jurist Hans Kelsen¹⁷. He was the drafter of the Austrian constitution and he embodied this idea of constitutional review in the constitution. Kelsen believed that courts are on a lower

¹³Cappelletti, cited above at note 2, vol.58 no.5, p.1037

¹⁴Danielle E. Finck, cited above at note 2, vol. 20 no.1 (1997), p.129

¹⁵ Ibid

¹⁶ Ibid

¹⁷Devashri Sinha, “Constitutional Review: Study of American Model and European Model”, ILI Law Review, Summer Issue, (2016), p.160

pedestal compared to parliaments, thus constitution shall be interpreted by an authority different from the traditional courts¹⁸.

The huge backing for centralized model in Europe is underpinned to the idea of judicial certainty and separation of power. If all courts were given the power to interpret the constitution, then there will eventually be contradiction in the interpretations. This would make the judiciary and the entire constitutional system more uncertain for both citizens and governmental authorities. In sharp contrast, if only a Constitutional Court has the power to interpret the constitution and review the constitutionality of state action, there is no risk of disagreement among courts¹⁹.

Many continental scholars also assert that granting permission for ordinary courts to perform legislative review would not fall short of crowning them as legislatures and as a result contrary to the basic principle of separation of power. The civil law countries had a more dogmatic understanding to the doctrines of the separation of powers and the supremacy of statutory law. For civil law thinkers, any constitutional interpretation or invalidation of statutes was a political act, and therefore an encroachment on the exclusive power of the legislative branch to make law²⁰.

1.2.3. Non-Court Model

Under Non-Court model review system constitutional interpretation is carried out by organs outside the judiciary, often by a body with political representation or accountability. Historically, the Soviet constitution of 1920 and the PDRE constitution of 1987 both had non-court political organs as constitutional interpreters²¹. The Finish constitution also allows its legislature the Eduskunta to conduct constitutional interpretation. Presently, the FDRE constitution has the upper chamber of parliament, the House of Federation (HoF) as the highest authority on constitutional interpretation.

¹⁸ Ibid

¹⁹ Victor Ferreres, "The Consequences of Centralizing Constitutional Review in A Special Court. Some Thoughts on Judicial Activism", *Yale Law School SELA Papers*, p.1

²⁰ Cappelletti, cited above at note 2, vol.58 no.5, p.1040

²¹ Getachew Assefa, cited at note 8, (2012), p.505

1.3. The Constitution, Constitutional rights and Private Relations

There are differing understandings on the application of constitutional rights to private relations. Traditionally, constitutions are deemed to solely govern a vertical relationship between the state and its citizens. In countries, which follow such understanding (the state action doctrine), individuals will be protected only against violations of their constitutional rights that are attributable to 'state action'; that is, the activities of government actors or other bodies closely connected to the state²². Accordingly, such legal systems ponder on the issue of whether a certain action is a state action or not, as determining that is vital in using constitutional rights to resolve the issue in question.

On the contrary, some other legal systems (those that follow the horizontal effect doctrine) allow individuals to bring an action against private actors for infringement of their constitutional rights²³. The followers of the horizontal effect doctrine assert that the constitution creates norms which are aimed to have a radiating effect on the legal system as a whole apart from their distinctive role of restraining the government²⁴.

In a nutshell, it is the notion of private/public dichotomy which gave birth to the doctrinal divide between state action and horizontal effect. A closer analysis shows that these two approaches are not at all polar opposites; despite originating from different starting points the two doctrines seem to converge in their practical application²⁵. There is a gradual move by the state action doctrine which has resulted in the broader understanding of state actions; while similarly in the horizontal effect doctrine there is a trend for the restrictive application of constitutional rights in the private relations.

1.3.1. State Action Doctrine

The state action doctrine (also called historical or traditional approach) understands constitutional rights to be primarily concerned with protecting the individual against the coercive power of the state and as lacking any form of horizontal application in the private sphere. Their understanding

²²Colm O'Connell and Manfred Stelzer, "Horizontal effect/state action", Routledge Handbook of Constitutional Law (2013), p. 191

²³Ibid

²⁴Ibid

²⁵Ibid.

is based on a premise that constitutions are designed to restrict the power of government rather than interfere with private law adjudication.

Proponents of this doctrine explain that constitutional rights are imprecise, unclear and too vague to be given application in a dispute between two private persons. The wording and structure of the constitutional rights are phrased in such a way that it can regulate the exercise governmental authority over individual citizens. They claim that the name “Constitution” which derives from its base verb “to constitute” is also indicative of its purpose to structure, establish and restrict the state and not an individual citizen.

The Constitution of the United States is emblematic of traditional constitutions in the sense that it is intended to bind the state only²⁶. In a case in 1883 (Civil Rights Cases) the US supreme court held that the equal protection clause in the fourteenth amendment of the constitution prohibited discrimination by state and federal authorities and not private citizens. Therefore, as per this landmark judgement the US constitutional rights lack horizontal effect: some element of government encroachment upon individual freedom is necessary before rights can take effect. However, the prohibition on slavery as incorporated in the Thirteenth Amendment to the US constitution is the only exception as it applies to both private and public bodies²⁷.

The adoption of such position by the US legal system gave birth to a complicated question of defining and delimiting the boundary of “State action”. As state action needs to be there for constitutional rights to be given legal effect, the discourse over “what state action is” became essential to the enforcement of constitutional rights. Although there are numerous supreme Court decisions which have attempted to shed light on this subject matter they are often criticized for their inconsistency and incoherence²⁸.

In *Shelley v. Kraemer*²⁹, the US Supreme court held that the judicial enforcement of an unconstitutional private action by a court constituted a state action. In this particular case, an African American family purchased a residential property which restricted under its real estate covenant ownership by non-whites. Following the purchase, the neighbors sued the new owners

²⁶Danwood Mzikenge Chirwa, “The Horizontal Application of Constitutional Rights In A Comparative Perspective”, *Law, Democracy and Development*, (2009), p.22

²⁷ *Id.*, p. 193

²⁸ Chirwa, cited at note 19 (2009), p.23

²⁹ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

and asked for the enforcement of the restrictive covenant. Subsequently, the state court which initially entertained the case passed a judgement preventing the new owners from occupying the house. The US Supreme court reversed the decision claiming that the judicial enforcement of a racially discriminating covenant is to be considered a state action and hence a violation of the fourteenth amendment obligation of equal protection before the law.

At first glance *Shelley v. Kramer* seems to impose nondiscrimination obligations on private parties, giving standard horizontal effect to the equal protection clause³⁰. However, the Supreme court is holding the state court responsible as a state actor enforcing and thus giving effect to an unconstitutional private action. This landmark decision established that the action of a judge acting as such—that is, in a judge's capacity as law maker (for common law jurisdictions) or law interpreter—is action by a state actor.

Then one might question, if the effects are the same for both the state action doctrine and the horizontal effect doctrine, why bother over the discourse? a mere academic exercise? As a result, some scholars agree that the difference is procedural: the rejection of 'horizontal' effect simply implies that the new African American owners must obtain a judicial decision striking down the judgement deemed unconstitutional in order to indirectly win the dispute against the complaining neighbors. Had it been in a legal system that had accepted horizontal effect doctrine the purchasers could have directly sued the neighbors and had their covenant invalidated. One way or another, the outcome is exactly the same. The advocates of this idea assert that the doctrine of vertical effect/state action appears to entail an indirect horizontal effect. And that is why some of the leading voices in the field of constitutional theory stress that the choice between the doctrines of vertical and horizontal efficacy is outcome-neutral³¹.

In sharp opposition to the above proposition other scholars suggest that the outcome is not always the same. They assert that in state action doctrine certain private actions can't be linked to state action to the extent that they can trigger the application of constitutional rights. Sticking to the *Shelley* case, if the previous owners/sellers of the property had refused to sell their house just because the prospective buyers were African American no one could have brought an action against them as their refusal doesn't amount to a state action. Thus, it is not tenable to conclude

³⁰ Mark Tushnet, "The Issue of State Action/Horizontal Effect in Comparative Constitutional Law", *Effect in Comparative Constitutional Law, 1 Int'l J. Const. L.* 79, 98 (2003), p.81

³¹ Gonçalo de Almeida Ribeiro, "Direct and Indirect Effects of Fundamental Rights", ,

that vertical effect and horizontal effect doctrine always have similar outcomes- it's true that often they might yield similar results but a conclusion that their effect is necessarily identical is truly unrepresentative of the reality.

Legal systems that have adopted the state action doctrine are often criticized for their inconsistency and adoption of a double standard- an unconstitutional act by the state is repressible while a similar private act violating another individual's constitutional rights is out-of-bounds from constitutional scrutiny. But supporters of the state action doctrine hold that the state can achieve consistency and eliminate double standards by enabling the legislature and courts to develop respectively legislations and common laws which are consistent with the constitutional norm.

1.3.2. Horizontal Effect Doctrine

Horizontal effect of constitutional rights is there when these rights are applied by courts in shaping the private law norms that govern 'horizontal' relationships among private individuals, corporate bodies, and other non-state legal entities³². In sharp contrast to the vertical effect/state action doctrine, the horizontal effect doctrine allows individuals to sue before courts for a violation of their constitutional rights without showing a state action involved in the violation. Thus, in such systems individuals can invoke constitutional rights in a purely private litigation.

The Enlightenment concept that every human being enjoys certain inherent rights which was reflected in the French revolution and its spin-off- the 1789 Declaration of the Right of Man have been serving as a core for the horizontal effect thesis³³. Specifically, the declaration implies that individuals enjoy the bill of rights solely by virtue of their status as free and equal beings, which should be respected both by governments and by other private individuals³⁴. Such understanding of constitutional rights insists that the bill of rights govern the vertical relationship between an individual and a state as well as the horizontal relationship between private actors.

Despite the idea having been conceptualized as far back as the French revolution it was properly formulated and concretized in post Second World War Germany. The origins of the horizontal-effect doctrine lie in how the Basic Law was designed in reaction against a barbaric Nazi regime

³²Colm O'Conneide and Manfred Stelzer, Cited at note 17 (2013), p. 191

³³ Ibid.

³⁴ Ibid.

that defied all moral standards of civilized nations³⁵. Unlike previous constitutions the post-Nazi Germany constitution wasn't just a mere tool which was tasked to safeguard individuals against the coercive state, it was rather formulated in line with the ideas of Immanuel Kant and enlightenment principles as a guide to the entire German legal system.

Under Article 1 Paragraph 3 of the German Basic Law it states that the basic rights shall be binding as directly valid laws and not only on the legislative and the executive branch of government but also on the judiciary. This means that the judiciary should apply the constitutional norms on the civil cases it entertains which gives permit for the indirect application of constitutional rights in private suits.

It should be stressed that the mere acceptance of the principle of horizontal effect without deploying the appropriate structural set-up is a futile exercise. A case in point is the Austrian legal system which has in principle accepted horizontal application of constitutional rights but hasn't given its constitutional court the mandate to scrutinize civil cases³⁶. The mandate of the Austrian constitutional court is self-defeating considering that it had initially accepted horizontal effect. As a result, despite the official acceptance of the horizontal effect doctrine, cases between private actors can't be heard before the constitutional court as they are obviously civil cases.

The brutal Nazi administration and the backlashes of the Second World War have shaped and reshaped the German legal system for good. Post war Germany has opted for both a centralized constitutional court and the horizontal application of constitutional rights as a reaction to the atrocities associated with the Nazi government. Accordingly, it is not at all surprising that the landmark case establishing horizontal effect in the German Legal system was closely associated with the Nazi regime.

The *Luth*³⁷ case is often cited as the groundbreaking case in the horizontal application of constitutional rights. In 1958 the Federal Constitutional Court of Germany entertained a case presented to it by Erich Luth, a public official for the Hamburg state press office and Veit Harlan, a leading director under the Nazi Administration notorious for his films which featured strong anti-Semitic and pro-Nazi propaganda. Luth organized a public boycott of the directors

³⁵ Id. p.192

³⁶ Id. p. 193

³⁷ Luth, BverfGE 198 (1958).

newly released movie which threatened Harlan film from being screened in cinemas. The actions of Luth pushed Veit Harlanto sue and receive an injunction order against the boycott. The defendant subsequently objected before the Constitutional Court claiming that the injunction violated his constitutional right to free speech. The Constitutional court overturned the ordinary court's decision and scrapped the injunction order cementing the horizontal application of constitutional rights.

The Constitutional Court did not dismiss that the primary purpose of basic rights is to safeguard the liberties of the individual against interferences by the state. But, it continued further that the Basic Law established "an objective order of values" which must be looked upon as a fundamental constitutional decision affecting all spheres of law³⁸.

Some have resorted to favor the horizontal effect doctrine having criticized and dismissed the state action doctrine for being inconsistent and for imposing double standards to the state on one hand and private actors on the other hand in the obligation to respect constitutional rights. They claim that a right which is not allowed for the state to infringe shall not, for stronger reason, be permitted for an individual to trespass. Erwin Chemerinsky has argued for the abolition of the state action doctrine because of its limited applicability to the conduct of non-state actors³⁹. Abolishing the doctrine means that 'the Constitution would be viewed as a code of social morals, not just of governmental conduct, bestowing individual rights that no entity, public or private, could infringe without a compelling justification⁴⁰. If applied in such manner the constitution would have a radiating effect across the entire legal system and social order fulfilling the aim the drafters of the Post-Nazi German constitution had.

Horizontal application of constitutional rights could either be direct or indirect. "Giving constitutional rights direct horizontal effect would make it possible for a private party to sue another private party in an ordinary court or in the Constitutional Court) merely on the ground of an alleged violation of a constitutional right."⁴¹ On the other hand in an indirect horizontal application of constitutional liberties the constitutional rights violated are not invoked crudely as they are but in conjunction with other statutory obligations imposed on the violator. At times

³⁸ Mark Tushnet, Cited at note 22, (2003), p.88

³⁹Chemerinsky E, "Rethinking state action", Northwestern University Law Review (1985), vol. 80, p.503.

⁴⁰ Ibid

⁴¹ColmO'Conneide and Manfred Stelzer, Cited at note 17 (2013), p. 194

terms in the ordinary laws such as “public moral”, “public good” and “common standards” can be used as a bridge connecting the application of constitutional rights to private relations. In other words, the constitutional rights envisaged under the constitution are indirectly applied by the courts as reflecting “Public morals”.

The German legal system doesn’t envisage a direct horizontal effect but rather an indirect horizontal application as the constitution states that basic rights shall bind the executive legislative as well as the judiciary but not the individual citizens. The phrasing “basic rights as a valid law” under Article 1 Paragraph 3 of the German Basic law coupled with the constitutional court’s ruling over the Luth case has validated an indirect horizontal application.

On the contrary, the South African constitution has provided for the application of both direct and indirect horizontal effect⁴². Section 6 of the 1996 Constitution stipulates that “a provision of the Bill of Rights is not only binding on the legislature, the executive, the judiciary, and all other organs of the state, but also on a ‘natural or juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’”. Most South African scholars argue that although the constitution’s phrasing inclines towards a direct application of constitutional rights, they claim that the practice is still that of an indirect horizontal effect as ruled in *Du Plessis v. De Klerk*. This case was decided under the interim constitution of 1993 which didn’t incorporate the phrase “binding...natural or juristic person”, as a result many claim that it only envisaged indirect application. This position is briefly summarized in article by Prof. Francois Venter;

“A difficult (and not yet fully resolved) question emerges from the wording of sections 8(2) and 8(4)[of the South African Constitution]: do the fundamental rights apply directly to legal relationships between private persons? The discussion of this matter is conducted in terms of the expression ‘horizontal application’. The Constitutional Court addressed the issue, still under the 1993 Constitution, in Du Plessis v De Klerk, and, leaning strongly on the German example, construed an ‘indirect horizontal application’ of the fundamental rights provisions. Although the current wording has been interpreted academically to have introduced a more direct horizontal application of fundamental

⁴² Johan Van der Walt, “Horizontal application of fundamental rights and the threshold of the law in view of the Carmichele saga”, South African Journal on Human Rights, (2003) vol.19, p. 531

*rights, no judicial shift in such direction has occurred. Until such time as the interpretation in Du Plessis v De Klerk is rejected or taken further by the Constitutional Court, it should be considered to represent the accepted doctrine.”*⁴³

There are risks associated with giving constitutional rights horizontal effect; which could range from-eroding the existing civil law and common law principles that have technically and gradually developed through years of practice by a simple balancing of constitutional rights to compromising the finality of ordinary court judgements. Colm O’Cinneide and Manfred Stelzer have explained the major criticism against the horizontal effect doctrine in the following manner;

“German lawyers have at times criticized the horizontal-effect doctrine on the basis that it enables the Constitutional Court to displace highly sophisticated arguments based on hundreds of years of civil law doctrine on the basis of rather blunt balancing decisions that do not necessarily improve the overall rationality of the legal system”

Thus, the legal systems which have opted for horizontal effect doctrine have further instituted prudential regulations through which their courts can apply them.

1.4. The Limits to the Power of Constitutional Courts in Entertaining Private Litigation

Limits to the constitutional courts power to entertain cases between private parties are necessary so that constitutional review of judicial decisions in individual complaints procedures do not distract constitutional courts from its unique task of ensuring that laws respect the Constitution; also, so that decisions rendered to dispose of individual complaints by constitutional courts would not disturb the judicial structure in each country and, specially, the position of the supreme court⁴⁴. Especially attention must be given so that constitutional courts don’t turn into a super-jurisdiction of appeals.

Particularly, the challenge of constitutional courts potentially disturbing the judicial structure of a state is higher in countries that have centralized constitutional review mechanisms. In countries where there is a diffused constitutional review there isn’t such problem as both the constitutional

⁴³ Francois Venter, “South African Constitution: Country Report”, South African Journal on Human Rights, (2010) vol. 26, p.53

⁴⁴ Ignacio Borrajo Iniest, cited at note 6, p.4

and ordinary jurisdictions are vested in the ordinary courts. As a result, the likelihood of the ordinary judiciary being deprived of its mandate under the guise of constitutional review is zero.

In Germany and South Africa where there is a central constitutional court there has at least initially been a tendency of considering them as a seat of super jurisdiction of appeals. Such tendencies would inevitably compromise the finality of the Supreme Court's decision and consequently its reliability. Countries Such as Ethiopia which have adopted a non-court model of constitutional review face an even greater challenge, as the political body's (HoF's) interference in the adjudication process will effectively result in the violation of judicial independence as enshrined under the FDRE constitution.

In Germany, it is fairly established that the federal constitutional court is not a super jurisdiction of appeal. The constitutional court of Germany doesn't have the mandate, the facilities nor the manpower to entertain all cases that allegedly exhibit even the slightest of constitutional character. Since the constitution is a framework document that lays down general standards, any given case can always be traced back to the constitution. Thus, the court has through practice established both procedural and acceptance requirements that should be fulfilled before a certain case is entertained.

1.4.1. Procedural Requirement

The Nature of the Violation: The claim of right violation before the constitutional court should be by the alleged encroachment of the state. However, after 1958 private encroachment can also be redressed as the verdict in the Luth case has established horizontal application of constitutional rights. But still as the German system has only embraced indirect horizontal effect there is no possibility for an individual to allege such a violation directly before the BVerfG (Federal Constitutional Court of Germany). The claim must be directed instead against the ordinary judgment⁴⁵.

Exhaustion of all available remedies: The plaintiff shall exhaust all possible legal remedies before going to the constitutional court. The plaintiff is required to exhaust every ordinary

⁴⁵ Alfredo Narvaez Medecigo, Rule of Law and Fundamental Rights: Critical Comparative Analysis of Constitutional Review in the United States, Germany and Mexico (2016) p. 197

possibility not only in the sense of having filed all the available redress mechanisms, but also of having argued appropriately against the basic right violation already at those stages⁴⁶.

1.4.2. Acceptance (Substantive) Requirement

Once the case has fulfilled the prescribed procedural requirement it doesn't necessarily mean that the constitutional court will entertain it. The case must then pass through a second layer of filtering which will assess the substantive character of the case in question. The substantive requirement involves both an objective as well as a subjective

Fundamental constitutional significance. This is a purely objective criterion which eliminates all cases having a constitutional issue but lacking the required significance. In order for a case to have fundamental constitutional significance it has to either raise a constitutional question that is unclear and can't be simply understood from the wording of the constitution or has not been yet clarified by the constitutional jurisprudence or, due to modified circumstances, is once more in need for clarification⁴⁷. However, if the case has already been decided in previous judgements by the constitutional court and if that decision favors the complainant the case is not necessarily dismissed but rather the decision of the ordinary court would be reversed with no further ado. Hence, under such circumstances the court is capable of resolving the case without fully evaluating the merits. Employing filtering and remedy mechanisms like this have proved to reduce the courts case load while still maintaining litigant's satisfaction.

Appropriateness of Enforcing the Rights: It will be appropriate to enforce the alleged rights in cases when the denial of a decision on the merits by an ordinary court results in an especially grave harm to the complainant⁴⁸. This requirement is often described as the subjective substantive criteria.

⁴⁶ Id. p.198

⁴⁷ Id. p.199

⁴⁸ Id. p.200

Chapter Two

2. The System of Constitutional Review in Ethiopia

2.1. Background to Constitutional Review in Ethiopia

Despite having four constitutions, Ethiopia regrettably doesn't boast a great history of constitutional interpretation. The 1931 constitution of Ethiopia which was the first modern and written constitution did not even include a specific provision on constitutional adjudication⁴⁹. Similarly, the revised constitution of 1955 was no different as it failed to stipulate any organ empowered to undertake constitutional review. Such an omission by the drafters was even more surprising considering the very fact that the revised constitution had within it a supremacy clause under Article 122. The existence of such supremacy clause has persuaded many scholars to assert that maybe the framers had envisaged a decentralized model of constitutional interpretation⁵⁰. This position is also substantiated by the fact that the revised constitution had a huge input from the American constitutional system which demonstrated that the ordinary court may exercise constitutional review without the explicit authorization of the constitution⁵¹.

The 1987 PDRE Constitution was the first constitution to have incorporated an express clause on the interpretation of the Constitution and the body responsible for such task. By virtue of Article 82(1)(b) the State Council (*Shengo*), a political body, was entrusted with the power of entertaining constitutional adjudication⁵². However, in practice the National *Shengo* didn't have any role in constitutional adjudication as no case was presented before it.

In 1995, Ethiopia adopted a unique breed of a non-court model to constitutional review by granting the HoF, the second chamber of parliament, with the power of interpreting the constitution while simultaneously placing the CCI, a body constituting mostly of legal professionals, in an advisory role. What makes the Ethiopian model of a non-court constitutional

⁴⁹ Yonatan Tesfaye Fisseha, "Who Interprets the Constitution: A Descriptive and Normative Discourse on the Ethiopian Approach to Constitutional Review", LLM Thesis (2004) University of Western Cape, p.7

⁵⁰ I.d, p. 8

⁵¹ Ibid

⁵² Ibid

review different from others is that the HoF, a body entrusted to interpret the supreme law of the land, is an upper house of parliament with no power of legislating and obviously no direct popular mandate⁵³. In an attempt to alleviate the lack of legal expertise in the HoF, the constitutional assembly envisaged a formation of a Council of Constitutional Inquiry capable of advising on and recommending cases to the former.

Such a position by the FDRE constitution has received mixed reaction from both scholars and legal practitioners. A significant number of academics assert that the Ethiopian constitutional adjudication system in general and the constitutional adjudicator in particular lack the impartiality and independence necessary to adequately safeguard the principles and the rights guaranteed by the constitution⁵⁴.

According to the minutes of the constitutional assembly there were two major explanations for the framers of the constitution to opt for the HoF as a constitutional arbiter as opposed to the ordinary judiciary or an independent constitutional court⁵⁵. The first reason is closely related to the very nature of the constitution as well as the potential role of the Nation, Nationalities and Peoples of the state⁵⁶. Article 8 as well as the third preambular provision of the constitution clearly state that the Nations, Nationalities and Peoples of Ethiopia are the authors and owners of the constitution. In asserting that the constitution is a compact between the NN&P, the framers have also hinted the political nature of the constitution⁵⁷. As sovereigns, it is the NN&P's free will and consent that is expressed in the document and hence it is they who should be the sole interpreters of the constitution. Accordingly, the House of Federation is the forum that best reflects the interest of the NN&P-as it is the chamber of parliament where the nationalities are truly represented with each Nation, Nationality and Peoples having one representative in default and an additional one for each one million population it holds⁵⁸.

⁵³ AssefaFiseha, "Federalism and Accommodation of Diversity in Ethiopia: A Comparative Study", Nijmegen: Wolf Legal Publishers (2006), Pp. 137-155.

⁵⁴ TemesgenBeyene, "The Question of Independent and Impartial Constitutional Adjudicator in Ethiopia: A Comparative Study with Germany and South Africa", LLM short thesis (2014) Central European University, p. 52

⁵⁵ See *Ye Ethiopia HigeMengistGubae Kale Gubae v. 4 Hidar 14-20, 1987 E.C.* (Minutes of the Constitutional Assembly, November 1994) discussions on Articles 59, 61 and 62.

⁵⁶ AssefaFiseha, "Constitutional Adjudication in Ethiopia: Exploring the Experience of The House of Federation (Hof)", Mizane Law Review, Vol. 1 No.1 (2007), p. 10

⁵⁷ Idib

⁵⁸ Article 61 (2)

The second rationale for granting the HoF with the power of interpreting the constitution is closely related to the attempt by the framers to avoid judicial activism/adventurism. The drafters argue that if the judiciary is allowed to interpret the constitution they might be inclined to construe generally termed clauses of the constitution in line with their individual beliefs and preferences. Most of the members to the constitutional assembly claimed that an adoption of a decentralized model will be self-defeating as the constitutionally established and coveted interest of the NN&P would be effectively hijacked by the individual interests reflected within the judicial system⁵⁹.

The House of Federation, in carrying out its mandate of constitutional adjudication, is assisted by the Council of Constitutional Inquiry, an advisory body, whose primary role is to receive and examine constitutional issues forwarded to its attention by courts or any interested person. After reviewing the proposed constitutional issue, the Council might reject the case claiming that it doesn't raise a constitutional dispute or alternatively accept the case and submit its findings to the House admitting that it requires constitutional interpretation.

The Council is an organ comprising of mostly legal experts of high standing, chaired and co-chaired by the President and Vice-President of the Federal Supreme Court respectively. Its list of eleven members also includes six legal experts appointed by the President of the Republic on recommendation by the House of Peoples' Representatives and three other persons assigned by the House of Federation from among its members. Therefore, during the drafting process of the constitution it was guaranteed that at least eight of the eleven members would have some sort of legal knowledge and training capable steering the political body of the HoF in the right direction.

2.2. The Legal Framework of Constitutional Review

There are three core legal documents that govern constitutional adjudication under the Ethiopian legal system. These are the FDRE Constitution, the CCI establishment proclamation and the HoF establishment proclamation.

2.2.1. The FDRE Constitution of 1995

⁵⁹AssefaFiseha, "Constitutional Adjudication in Ethiopia: Exploring the Experience of The House of Federation (Hof)", *Mizane Law Review*, Vol. 1 No.1 (2007), p. 11

Under the FDRE constitution, the provisions that deal with the interpretation of the constitution are Articles 62(1), 83 and 84. Despite the fact that these provisions lay down the framework for constitutional adjudication, the contents of these articles are so terse and far apart that they fail to comprehensively answer the most critical of questions under this topic.

Article 62 (1) of the constitution confers upon the HoF the power to interpret the constitution. Furthermore, Article 83 states that all constitutional disputes shall be handled by the HoF. However, the constitution leaves wide open various questions such as;

- (1) What constitutes constitutional dispute?
- (2) Does constitutional interpretation only refer to the power to determine the constitutionality of legislation or does it also include the expounding of constitutional provisions?
- (3) Are ordinary courts deprived of the power to interpret the constitution?

With the exception of the third question, which is a bit controversial and will be addressed under section 2.3, I claim that the subsequent provisions have directly or indirectly covered such aspects. What the constitution refers to under article 84 (2) “unconstitutionality of a federal or state law” is the first aspect of a constitutional dispute⁶⁰. However, this should not be construed in such a way that all constitutional dispute necessarily involves the issue of unconstitutionality of legislation⁶¹. A closer examination of the relevant constitutional provisions indicate that the drafters have also envisaged the interpretation of constitutional provisions as Such a line of argument is supported by the arrangement of the provision, as article 84 (1) of the constitution which talks about constitutional interpretation is supplemented by sub-article two which talks about constitutional review specifically. The fact that an additional provision was required to specifically address the review of legislations is indicative of the fact that the framers envisioned two distinct aspects of constitutional disputes. These two aspects are; (1) the general task of interpreting the Constitution with a view to ascertaining the meaning, content and scope of a constitutional provision (article 84(1)) and the more detailed role of determining the constitutionality of “federal or state law” (article 84(2))⁶².

⁶⁰ Yonatan F., cited at note 1, p. 12

⁶¹ Ibid.

⁶² Ibid.

2.2.2. The CCI re-establishment Proclamation

For a majority of its existence the CCI was an office under the structural set-up and auspices of the HoF. However, in 2013 the council of constitutional inquiry establishment proclamation no. 250/2001, an instrument which officially established and governed the Council, was repealed and replaced by proclamation no. 798/2013-a proclamation to re-enact for the strengthening of the powers and duties of the CCI. The reason behind such restructuring, as clearly indicated in its preambular provisions, was the Council's need to have its own supporting office which would enable it to discharge its duties efficiently while still maintaining its constitutional independence.

There are three possible routes through which the council could receive and examine an alleged constitutional dispute. The first route is by an application of a party that is considered an interested party in the particular constitutional issue⁶³. Within the first route itself there are two possible scenarios. One scenario under this route is when the constitutional dispute presented by the interested party pertains to a case that is being entertained by a court of law. Under these situations the interested party is obliged to initially request for the court's referral of the case to the council. According to article 4(4) of the proclamation it is when the court rejects such request that an interested party to a litigation can unilaterally lodge an application before the council. The second scenario is when an interested party alleges that his fundamental right and freedom provided under the Constitution have been violated due to the final decision rendered by government organ⁶⁴. One important thing that has to be noted is that the contested decision of the government organ has to be final and rendered by the competent body having the due hierarchy to consider the case⁶⁵. Thus, its difference with the first scenario is that the interested party doesn't require the approval of the court or government body as the case has already received judgment. The term government organ includes the legislative, executive as well as judicial organs of both the federal and state administrations⁶⁶. Thus, applications based upon decisions of courts fall under this category of requests submitted by virtue of article 5(1).

⁶³Council of Constitutional Inquiry Proclamation, 2013, Proc. No 798, Neg. Gaz. Year 19, no. 65, Art. 4(1)(5) and 5(1)

⁶⁴Id, Art. 5(1)

⁶⁵Id, Art. 3(2), (b)

⁶⁶Id, Art. 2(6)

The second possible route for application before the council is through the submission of a case by the court entertaining a pending lawsuit⁶⁷. As has been stated earlier a court may bring a case to the attention of the council if, the court on its own motion or upon the request of a litigating party, believes that an interpretation of the constitution is necessary for the disposal of the case⁶⁸.

The third route is either when the federal or state legislature by a one-third or more vote or alternatively the federal or state executive request for a constitutional interpretation of an unjusticiable matter⁶⁹.

These three possible routes can again be broadly classified as either concrete constitutional interpretation or abstract constitutional interpretation based on the justiciability of the underlying matter. In the case of concrete review, the judiciary or an administrative organ may come across a case the disposition of which requires the interpretation of the constitution; in such cases the court or the interested party, as the case may be, must refer the constitutional interpretation aspect of the dispute to the CCI or HoF, because constitutional interpretation is the jurisdiction of the HoF⁷⁰.

The CCI and the HoF are also empowered to entertain constitutional disputes in the abstract when there is no underlying dispute between parties. The CCI reestablishment proclamation recognizes the possibility of abstract review as Article 3(2)(c) envisages constitutional interpretation of unjustifiable matters. This particular aspect of the Ethiopian Constitutional adjudication system resembles the process of constitutional adjudication in Germany. In Germany, the federal constitutional court can entertain an application with no controversy or adverse party by way of its mandate to undertake abstract review⁷¹. The exercise of abstract review is contrary to the practice of constitutional review in decentralized models. What characterizes the decentralized system of judicial review in the US is the requirement or the presence of a real controversy and adverse parties⁷². Judges in the US have established through

⁶⁷Id, Art. 4(3)

⁶⁸ Ibid.

⁶⁹Id, Art. 3(2), (c)

⁷⁰AssefaFiseha, "Constitutional Adjudication in Ethiopia: Exploring the Experience of The House of Federation (Hof)", Mizane Law Review, Vol. 1 No.1 (2007), p. 29

⁷¹I.d, p.7

⁷² Ibid.

practice that they will not render an opinion or decide a constitutional case unless there is an actual dispute between litigants⁷³.

The Council, after examining the application for constitutional interpretation, shall either reject the application and notify the applicant forthwith or alternatively submit the case to the House of the Federation together with its recommendations if it believes there is indeed an issue of constitutional dispute⁷⁴.

Article 16 (1) of the proclamation asserts that the council has the power to;

investigate constitutional issues in accordance with Article 84(1) of the Constitution and should it, upon consideration of the matter, find it necessary to interpret the Constitution, it shall submit its recommendation of constitutional interpretation to the House" of the Federation: and when it finds that the matter does not need constitutional interpretation, it shall make a decision to that effect⁷⁵.

As regards to the composition of the panel, Article 15 of the proclamation lists the President and Vice President of the Federal Supreme Court as chairperson and deputy chairperson respectively. The council also includes six legal experts appointed by the President of the Republic on recommendation by the House of Peoples' Representatives and three other persons assigned by the House of Federation from among its members⁷⁶. Thus, lack of legal expertise is not an issue in the CCI as at least eight of the eleven members are legal professionals.

2.3. The CCI and HoF in Practice

The CCI, in its eighteen years of existence, has entertained a total of 2409 cases of which it has referred 37 to the HoF. Despite seeing a total of 791 cases in the thirteen years spanning from 1991 E.C to 2004 E.C the CCI has only accepted 3 cases. These cases were the KedijaBeshir, Beshangul-Gumuz and Silte Cases. Surprisingly, in the short period of five years ranging from 2005 E.C to 2009 E.C the CCI has accepted 34 cases from a total of 1618 cases lodged before its office.

⁷³ John Ferejohn and Larry Kramer, "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Self-Restraint," *N. Y. U. Law Review* Vol. 77 No. 4 (2002): Pp. 1003-1008.

⁷⁴ Council of Constitutional Inquiry Proclamation, 2013, Proc. No 798, Neg. Gaz. Year 19, no. 65, Art. 16

⁷⁵ Ibid

⁷⁶ Ibid

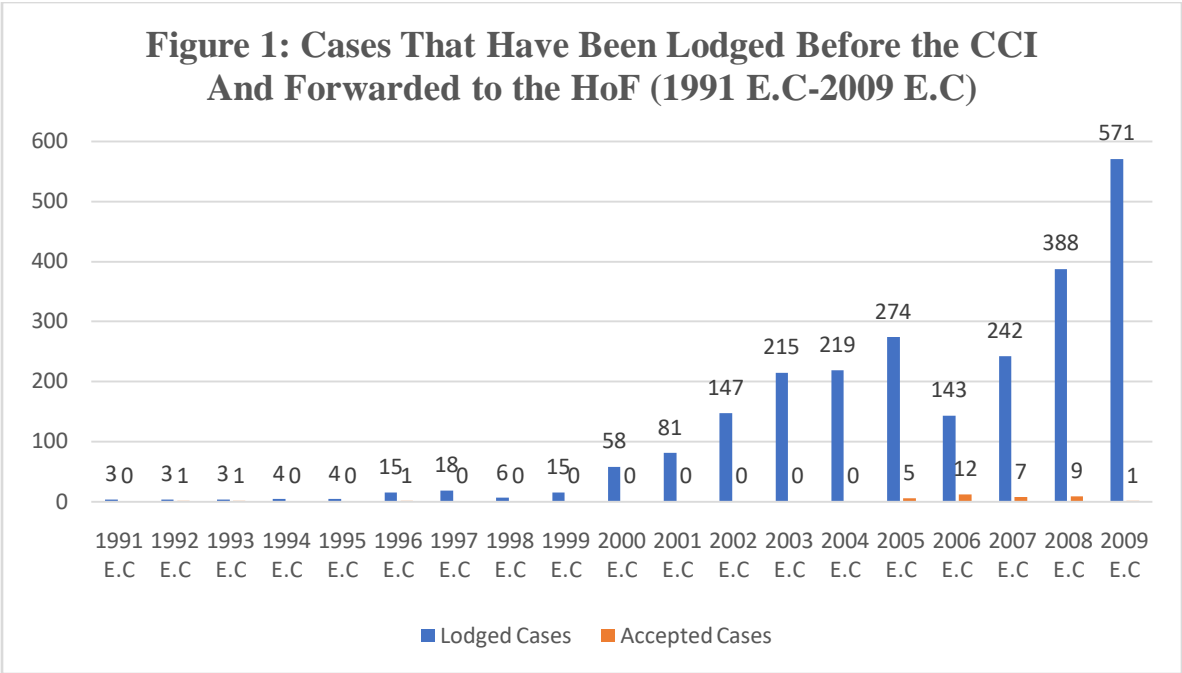
What is the explanation behind such a drastic change in case intakes and referrals? Why was the year 2005 E.C a watershed moment in the process of constitutional adjudication in Ethiopia? Was the shift triggered by a shift in policy of the CCI or the HoF? Did the HoPR have any role in the dramatic shift of stance by the CCI/HoF? All these are questions that come to mind when going through the case registry data of the CCI.

The dramatic shift of position in the constitutional adjudication process was triggered by the active effort of the federal legislative. The HoPR in promulgating the CCI re-establishment proclamation no. 789/2013 envisaged an independent office with an enhanced case intake capacity. The re-establishment proclamation came into force on the 30th of August 2013 G.C which is roughly around the beginning of 2005 E.C. The fact that the proclamation that restructured the CCI came into force during the same time the CCI opened its door isn't a mere coincidence but rather a prearranged outcome.

**Table 1: Cases That Have Been Lodged Before the CCI and Forwarded to the HoF
(1991 E.C-2009 E.C)**

Year (E.C)	Cases Brought Before the CCI	Cases Accepted by the CCI
1991	3	0
1992	3	1
1993	3	1
1994	4	0
1995	4	0
1996	15	1
1997	18	0
1998	6	0
1999	15	0
2000	58	0
2001	81	0
2002	147	0
2003	215	0

2004	219	0
2005	274	5
2006	143	12
2007	242	7
2008	388	9
2009⁷⁷	571	1



2.4. The Role of Courts

Is the HoF the sole and ultimate interpreter of the constitution on every matter?

Various scholars have debated over the actual role of the judiciary under the existing constitutional setup. The positions of these scholars as can be gathered from their writings is often quite contrasting and at times irreconcilable. Such apparently divergent views held in the academic circle could be attributed to two sources; their differing understanding of (1) the intention of the framers in granting the HoF the power of constitutional interpretation under Article 62(1) of the constitution, (2) what constitutional disputes are as defined under Article 84.

⁷⁷ The cases lodged before the CCI are usually accepted or rejected after an average of one year since the initial submission. Thus, the cases accepted category of the year 2009 isn't totally reflective as the actual number of cases that might be accepted from those lodged in the same year might rise.

One of the influential, prominent and earlier writings is that of AssefaFiseha. He asserts that it was not the intention of the constitutional framers to fully oust the judiciary from all constitutional matters⁷⁸. He bases his arguments based upon Article 84(2) and 13(1) of the constitution. Assefa asserts that according to article 84 of the constitution, the HoF is only entitled to check the constitutionality of laws enacted by either the federal or state legislative body⁷⁹. According to his argument, the constitutionality of directives, regulations and orders instituted by the executive can and should only be evaluated by the ordinary judiciary.

Assefa's second layer of argument is based on Article 13(1) of the constitution which states that "all Federal and State legislative, executive and judicial organs at all levels have the responsibility and duty to respect and enforce the provisions of this chapter". According to Assefa, courts should and will inevitably interpret the text of the constitution while carrying out their constitutional mandate of enforcing the fundamental rights stipulated under chapter three⁸⁰. His argument, simply put, is that the constitutional interpretation powers granted to the HoF by virtue of Article 62(1), 83 and 84 shouldn't be understood in disregard or isolation to the obligation vested on all branches of the judiciary to respect and enforce the constitutionally granted fundamental rights and freedoms under Article 13.

Similarly, the former vice president of the Federal Supreme Court and vice chairperson of the CCI Dr. MenbereTsehay also holds the view that courts still have a role under the Ethiopian system of constitutional adjudication. He holds that courts may interpret the constitution as they are clearly empowered over cases arising under the constitution by the virtue of article 3 of the federal courts establishment proclamation no. 25/1996⁸¹.

In responding to AssefaFiseha's assertion that 'the judiciary will obviously engage in the interpretation of the constitution while enforcing the chapter three constitutional rights', Yonatan Tesfaye contends that there are instances when the courts can enforce the constitution without

⁷⁸AssefaFiseha, "Constitutional Adjudication in Ethiopia: Exploring the Experience of The House of Federation (Hof)", *Mizane Law Review*, Vol. 1 No.1 (2007), p. 16

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹MenbereTsehay, "*Ye Ethiopia FithGetsitawoch [Aspects of Ethiopian Justice]*", (Addis Abeba, December 1999 E.C), pp. 136-137

interpreting it⁸². He further contends that there are certain rights which are framed so clearly that they don't require the court's interpretation but rather its mere application⁸³.

TakeleSeboka goes to an extreme end by claiming that the ordinary judiciary can even refuse to apply a law which it deems to be clearly and obviously unconstitutional⁸⁴. Takele asserts that the use of the term "constitutional dispute" in conjunction with the word "contested" under Article 84(2) is indicative of the framers intention to limit the jurisdiction of the CCI/HoF to the invalidation of legislations when they are contested or doubted to being unconstitutional⁸⁵. The *a contrario* reading of this position is that the judiciary still maintains the power to dis-apply laws it deems to be clearly and undoubtedly unconstitutional.

Getachew Assefa, who heavily relied on the originalism method of constitutional interpretation, seems to forward a fairly accurate and convincing argument as to the respective roles of the courts and HoF/CCI in the process of constitutional adjudication. In referring to the minutes of the constitutional assembly Getachew is quite adamant that the drafters of the constitution had no intention whatsoever to allow the judiciary to undertake constitutional interpretation⁸⁶. In critique of Takele's assertion that the ordinary judiciary is capable of disregarding an overtly unconstitutional legislation, Getachew states;

"It needs to be re-emphasized that the minutes of the constituent assembly do not give any indication to that a distinction need to be made as to matters or laws or decisions involving constitutional interpretation that may or may not go to HoF/CCI. ...[I]t will be unconstitutional for courts to pass upon an issue of constitutionality or a settlement of constitutional dispute whether they are faced with simple or complex issue in the matter. So the Argument by those who say that courts can set aside a clearly unconstitutional law relied upon by parties to a dispute is untenable when seen from both the intention of the makers and the black letter law of the constitution."⁸⁷

⁸²Yonatan Tesfaye, "Whose Power Is It Anyway: The Courts and Constitutional Interpretation", Journal of Ethiopian Law, Vol.22 No.1 (2008), p.134

⁸³ Ibid.

⁸⁴TakeleSeboka, "Judicial Referral of Constitutional Disputes in Ethiopia", Ethiopian Constitutional Law Series, Vol. 3, (Addis Ababa, AAU Printing Press 2010), p.66

⁸⁵ Id. p.67

⁸⁶ Getachew Assefa, "All About Words: Discovering the Intention of the Makers of the Constitution as on the Scope and Meaning of Constitutional Interpretation", Journal of Ethiopian Law, Vol.24 No.2 (2010), p.168

⁸⁷ Id. p. 165

Getachew also contests the assertion by scholars such as Assefa Fiseha and Ibrahim Idris that the judiciary is entitled to check the constitutionality of governmental acts rendered by organs other than the Federal or State legislative. Getachew primarily contends that we should not rely on Article 84(2) of the constitution to demarcate the jurisdiction of HoF as the entire provision was dedicated to laying down the procedures to be followed by the CCI⁸⁸. He also claims that Article 84(2), which most academics rely on to further such view, should not be apprehended in isolation of Articles 83(1), 84(1) and (3)⁸⁹. A holistic appraisal of the article clearly shows that all constitutional disputes shall only be resolved by the HoF⁹⁰.

Getachew partially accepted Yonatan's position that the courts may be in the position to mechanically enforce the text of the constitution without interpreting it⁹¹. However, Getachew heavily criticized Yonatan's stand on categorically labeling certain rights as being mechanically enforceable while classifying some others as requiring interpretation⁹². He insisted that the determination cannot be a pre-determined one but rather one reached at with due consideration of the underlying factual dispute⁹³.

I also concur with the assertions made by Getachew Assefa as they consistently reflect the intention of the makers of the constitution. It seems quite bizarre to think that the constitutional assembly, which rejected the option of adopting a decentralized model of constitutional interpretation with the view of eliminating judicial activism, would have the intention of reserving certain constitutional interpretation powers to the judiciary⁹⁴.

Nevertheless, it is obvious that the judiciary has a role in enforcing the constitutional provisions under chapter three by virtue of Article 13(1) of the constitution. This is because constitutional enforcement doesn't necessarily involve interpretation. Such position is further supported by Article 3 of the Federal courts establishment proclamation which state that courts are empowered to apply the constitution. However, in applying the constitution, courts must be careful so as not

⁸⁸ Id. p.166

⁸⁹ Id. p.167

⁹⁰ Ibid

⁹¹ Id. p.166

⁹² Ibid

⁹³ Id. p. 169

⁹⁴ The courts were feared to potentially deprive the owners of the constitution, the Nation Nationalities and Peoples of their constitutional promises

to engage in the construction of the constitutional text as constitutional interpretation is the exclusive mandate of the HoF by virtue of article 62(1) and 83.

It is my opinion that many of the authors, who insisted that courts still have a say in the process of constitutional adjudication, are wary and un-receptive to the idea of a non-court model to constitutional interpretation. Hence, throughout their arguments they try their level best to counter and limit the jurisdiction of the CCI/HoF by expanding the role of the judiciary in the process of constitutional adjudication. I believe that we should insulate and compartmentalize our arguments on the propriety of the system of constitutional interpretation adopted by Ethiopia and the actual roles given to courts and the HoF/CCI in the process of constitutional adjudication as stipulated in the FDRE constitution. The letters of the constitution are quite clear as they give the exclusive power of settling constitutional disputes to the HoF. Similarly, the minutes of the constitutional assembly were indicative of the fact that its members were unequivocal in airing their distrust of the judiciary and hence justified for fully ousting it from the process of constitutional interpretation.

Chapter Three

3. The Practice of Constitutional Adjudication in Ethiopia

3.1. Background

The process of constitutional adjudication under the FDRE constitution, despite its slow start, has made a sharp turn as of late by aggressively accepting and reversing court decisions. This sharp turn has been the result of an active effort by the legislative to create an active and responsive system of constitutional interpretation. In 2013 the HoPR enacted a legislation re-establishing the CCI as an independent entity with its own office and staff. Subsequently the process of constitutional adjudication saw a meteoric rise in both case intake and recommendations made by the CCI.

However, a closer comparison between the repealed proclamation no.251/2001 and the new proclamation no. 789/2013 shows no additional powers being given to the Council for it to go through such a drastic shift in role. Thus, it is not necessarily the law that is disrupting the constitutional interpretation process but rather the application of the law by the CCI once it was reestablished. We can logically deduce that there was a policy and direction shift attached to the new law enacted by the legislative that allowed the CCI to assume a broader role. Such practice would force many to question the legitimacy of the CCI practice which can be considered as a grab of judicial power.

What is more problematic is the growing misconception about the process of constitutional adjudication by the Council, the judiciary, practicing lawyers and the public in general. The CCI is establishing a growing reputation as the super-jurisdiction of appeals for cases that pass through the judicial system. This is also supported by the Council's registry data, as 25 of the 37 cases recommended by the CCI since 1991, are cases entertained by ordinary courts. It is presently becoming a rising trend for litigants to automatically seek constitutional interpretation when dissatisfied with a court decision; lawyers are increasingly using the CCI as a forum of last resort after exhausting all judicial routes. What is surprising in this regard is that many of the 25 accepted court cases were brought before the CCI after receiving a final judgement from the Federal Supreme Court Cassation Bench. At times, the parties to the case have even failed to cite a constitutional dispute during the course of their litigation in the ordinary courts. This clearly shows that litigants are utilizing the CCI and constitutional interpretation as a safety net option rather than an all-out first choice.

The constitution, being a framework document, discusses all issues which courts are likely to entertain, however this shall not be seen as a license for the CCI to review all the cases by the

judiciary. Article 83 of the constitution is quite clear in that it allows constitutional interpretation under limited circumstances where the issue raises a constitutional dispute. Thus, a mere enforcement of constitutional rights or the incidental reference to a constitutional provision does not warrant constitutional interpretation. The constitutional spirits and principles might through one way or another be reflected in the case but the CCI will only have the mandate to review it if such case raises a constitutional dispute.

3.2. Horizontal Application of Constitutional Rights

The constitutional rights stipulated under the FDRE constitution envisage both a vertical and horizontal application. Vertical application refers to the application of constitutional rights in the relationship between individuals and government; whereas, horizontal application refers to the application of the constitutional to the relationship between and among subjects/private parties⁹⁵.

By virtue of article 13(1) of the constitution, vertical application of constitutional rights is established under the Ethiopian system as the legislative, executive and judicial bodies of both (regional and federal) governments are constitutionally obliged to respect and enforce the rights recognized under chapter three of the constitution and provisions of constitution as a whole. The specific reference of governmental bodies and the non-inclusion of private parties have persuaded many to claim that the Ethiopian constitutional system doesn't envision a horizontal application of constitutional rights⁹⁶.

However, a more comprehensive look at the constitution indicates that the Ethiopian constitutional setup has recognized horizontal application like many of the modern and progressive constitutions around the world. Primarily, the reading of article 13(1) alone is sufficient to indicate that the Ethiopian system has embraced horizontal application. Article 13 (1) reads as

⁹⁵Efrem Tamirat, "Constitutional Review: The Ethiopian Perspective", (2015, Unpublished, AAU Law Library) p. 105

⁹⁶Adem Kassie Abebe, "Human Rights under the Ethiopian Constitution a Descriptive Overview", Mizan Law Review Vol. 5 No. 1 (2011), p. 44

“All Federal and State legislative executive and judicial [emphasis added] organs at all levels shall have the responsibility and duty to respect and enforce the provision of this chapter”

Under this specific provision the judicial organ of the state is tasked with the duty of respecting and enforcing the fundamental rights under chapter three of the constitution. Thus, this is a provision which permits the indirect application of constitutional rights as the judiciary would have to apply the constitutional norms on the private cases it entertains. This is similar to the wording under Article 1 Paragraph 3 of the German Basic Right which states that the basic rights shall be binding as directly valid laws, and not only on the legislative and the executive branch of government but also on the judiciary.

Our constitution doesn't stop there but goes even further to hint that it has also endorsed the direct horizontal application of constitutional rights. Article 9(2) states that;

All citizens, organs of the state, political organization, other associations as well as their officials have the duty to ensure the observance of the constitution and obey it.

This particular provision shows that an individual whose constitutional right has been infringed by an Ethiopian citizen can apply before either the ordinary court or the CCI, as the case may be, for the redress of the violations. The reading of article 9(2) indicates it is not only the state that is obliged to respect the constitutional right of individuals but individual subjects themselves must respect the constitutional rights of others. Hence, both private parties and governmental bodies could be found guilty of violating constitutional rights.

What are the practical implications of having indirect horizontal application as opposed to indirect horizontal application?

“Giving constitutional rights direct horizontal effect would make it possible for a private party to sue another private party in an ordinary court or in the Constitutional Court merely on the ground of an alleged violation of a constitutional right.”⁹⁷ In this regard constitutional provisions are viewed in similar vein as any provision within a normal legislation is. Thus, anyone can, relying on the provision of the constitution, claim rights and seek redress for their violation

⁹⁷ColmO’Cinneide and Manfred Stelzer, Cited at note 17 (2013), p. 194

On the other hand, in an indirect horizontal application of constitutional rights, the constitutional rights violated are not invoked directly as they are but in conjunction with other statutory obligations imposed on the violator. Thus, in this regards the individual claiming the violation of his constitutional right has to present it in combination with an analogous right he holds by virtue of an ordinary legislation. This is the case in the German system, which has only embraced indirect horizontal effect, were there is no possibility for an individual to allege such a violation directly before the BVerfG (Federal Constitutional Court of Germany). However, the claim can be directed instead against the ordinary judgment⁹⁸.

It had been discussed earlier in the discussions under chapter one that the mere acceptance of the principle of horizontal effect without deploying the appropriate structural set-up is a futile exercise⁹⁹. This is typical of the Ethiopian constitution which has in principle accepted direct horizontal application of constitutional rights but hasn't given the CCI the mandate to review individual complaints of constitutional right violation by private parties. As a result, despite the official acceptance of the direct horizontal application under article 9 (2) of the constitution, cases pertaining to violations by private actors can't be submitted directly to the CCI.

Article 5 (1) of proclamation no. 789/2013, which lay out the circumstances under which the CCI may accept cases arising out of court of law, states that;

Any person who alleges that his fundamental right and freedom provided under the Constitution have been violated due to the final decision rendered by government organ or official may submit his case to the Council for constitutional interpretation.

Thus, according to the CCI re-establishment proclamation it is only when a person alleges that his constitutional right has been infringed by a government organ that he can institute an action before the CCI. This in turn means that an individual can't bring a violation of a constitutional right by a private party directly before the CCI.

However, this doesn't necessarily imply that there can't be any form of direct horizontal effect to constitutional rights as ordinary courts aren't barred from enforcing a constitutional right after

⁹⁸ Alfredo Narvaez Medecigo, Rule of Law and Fundamental Rights: Critical Comparative Analysis of Constitutional Review in the United States, Germany and Mexico (2016) p. 197

⁹⁹ Id, p. 193

receiving an application of violations by a private party¹⁰⁰. This power of ordinary courts to give direct horizontal effect to constitutional rights shall, however, be qualified by the fact that they can't in the process engage in any sort of constitutional interpretation. If the court in question receives such an application for a direct horizontal application of a certain constitutional right and if the application of such right requires interpretation the court is duty bound to refer the case to the CCI by virtue of article 62(1), 83 of the constitution and article 4(1) of proclamation no.789/2013.

The impact of the apparent exclusion of the CCI from the direct horizontal application of constitutional rights might be mitigated by the fact that Article 5(1) allows individuals to bring an action before the CCI if they believe that the action of a government organ has affected their fundamental rights. Article 2(6) of the same proclamation defines government organs as;

6."government organ" means the legislative, executive and judiciary organs of the federal government or states;

Therefore, the final decision of court at all levels can, upon the request of an interested party, be reviewed by the CCI as to its compatibility with the constitutional norm. As has been established earlier, ordinary courts are entitled to make direct horizontal application to constitutional rights. Thus, an individual who had pleaded before a court for the direct application of his constitutional right who is later dissatisfied with the verdict can again present his case before the CCI claiming that the court's decision has violated his fundamental right.

3.3. Review of Cases Entertained by the CCI

3.3.1. Review of the CCI Recommendations

The *Crowne Plaza*¹⁰¹ case was a trademark dispute between an American based hotel chain named "Six Continent Hotels Inc." and a homegrown Ethiopian hotel "Crown Hotel". The case started when Six Continent Hotels Inc. made a move towards registering one of its many hotel trademarks "Crowne Plaza" before the Ethiopian Intellectual Property Office (EIPO); and a notice was subsequently issued on Ethiopian Herald to call for any objections against the

¹⁰⁰ See Article 13(1) of the FDRE constitution and Article 3 of Proclamation no. 789/2013

¹⁰¹Six Continents Hotels Inc. v Crown Hotel (File No. 1866/08, FDRE Council of Constitutional Inquiry, April 13, 2017) (Unpublished)

registration of such trademark¹⁰². Subsequently, Crown Hotel made an objection claiming that its already recognized trademark would be heavily affected and its clients misled if the EIPO accepts a similar trade mark with the name “Crowne Plaza”¹⁰³.

The department of Trademark and Industrial Design Protection and Development within the EIPO, after assessing the similarity of the two trademarks, rejected the application to register “Crowne Plaza”¹⁰⁴. Subsequently, the EIPO reversed its decision and continued the registration process contrary to the remarks made by the department¹⁰⁵. Crown Hotel aggrieved by the decision, petitioned a complaint before the EIPO appeals committee. The appeals committee upheld the registration but criticized the grounds under which the initial decision by EIPO was made; the committee commented that the act of resuming the registration after the clear disapproval by the department of Trademark and Industrial Design Protection and Development was a wrong act that shouldn’t be repeated¹⁰⁶. However, the appeals committee held that the department shouldn’t rely on the Trademark proclamation alone when assessing the similarity or difference of trademarks to be registered, but should also rely on the other laws of the country such as the investment proclamation¹⁰⁷. Therefore, committee held that the decision by the EIPO to resume the registration process, considering the investment returns “Crowne plaza” brings to the country, is workable¹⁰⁸. The Federal High Court which was the next pitstop for this case also upheld the appeal committee’s verdict on the above-mentioned grounds¹⁰⁹.

The Federal Supreme Court Cassation Division which saw the case heavily criticized the lower court decisions. It held that the lower courts verdict to grant trademark protection to a trademark which they considered to be similar to an existing and registered mark (as this can be grasped by the assessment rejection made by the department of Trademark and Industrial Design Protection and Development) upon investment considerations alone is erroneous¹¹⁰. It further argued that none of these investment laws justify to setting aside of the particularly relevant criteria under

¹⁰² Id, p.1

¹⁰³ Ibid

¹⁰⁴ Id, p.2

¹⁰⁵ Ibid

¹⁰⁶ Id, p.3

¹⁰⁷ Ibid

¹⁰⁸ Ibid

¹⁰⁹ Id, p.5

¹¹⁰ Ibid

the trademark proclamation no.501/2006 nor can investment considerations serve as an excuse to register a similar trademark¹¹¹.

Six Continents Hotels Inc., claiming that the cassation bench decision to reject the registration of its “Crowne Plaza” trademark violated its fundamental right and freedom provided under the Constitution, applied for constitutional interpretation before the CCI¹¹². Six Continents emphasized that the cassation bench acted outside its powers under article 80(3)(a) by assessing the similarity or not of the trademarks, which is an issue of fact¹¹³.

The CCI also held that the cassation bench was acting outside its constitutional mandate as it was weighing the facts of the case when determining the similarity of the trademarks “Crown Hotel” and “Crowne Plaza”¹¹⁴. The council further substantiated its argument by stating that the Ethiopian government has an obligation to care for the economic and social welfare of its citizens under Article 41(4-7) and 43 of the constitution and hence it must create a suitable ground for foreign direct investment¹¹⁵.

This is a case in which I believe the CCI had made serious errors in giving its recommendation. There are various points which I believe the CCI missed in assessing this case and I have listed each of them in accordance with their relevance;

- I. Initially we have established under chapter two that there will be constitutional dispute if there are two or more persuasive arguments on a given constitutional issue¹¹⁶. Under this specific case the constitutional dispute is whether the cassation bench went above its power under article 80(3)(a) and assessed an issue of fact. In this regard, we can say that there isn’t a constitutional dispute as the cassation bench was quite careful and articulate in its verdict when stating that investment considerations shall not be one of the criteria or serve as an excuse to remove the criteria placed under the trademark proclamation for granting registration¹¹⁷. The

¹¹¹ Ibid

¹¹² Id, p.7

¹¹³ Ibid

¹¹⁴ Id, p.8

¹¹⁵ Ibid

¹¹⁶ Getachew Assefa, “All About Words: Discovering the Intention of the Makers of the Constitution as on the Scope and Meaning of Constitutional Interpretation”, *Journal of Ethiopian Law*, Vol.24 No.2 (2010), p.168

¹¹⁷ Six Continents Hotels Inc. v Crown Hotel (File No. 1866/08, FDRE Council of Constitutional Inquiry, April 13, 2017) (Unpublished), p.6

bench avoided comparing the similarity of the trademarks; on the contrary, it assessed what considerations should be taken into account when making the similarity comparison. The technical department within the EIPO came up with a decision indicating the similarity of the trademark and hence the incompatibility for registration of Crowne Plaza (the latter of the two trademarks). However, the EIPO office upon reapplication, amended its decision and accepted the registration by claiming that the department reached its verdict by only assessing the trademark proclamation while it should have also consulted the investment proclamation. The benches assertion is that the EIPO's change of decision, which was subject to the inclusion of investment consideration, is unjustified by law. The cassation bench didn't at all weight the factual similarity of the trademarks but it rather criticized the legal basis under which the lower courts and the EIPO accepted the registration while clearly admitting the apparent similarity of the trademarks.

- II. Furthermore, under the guise of constitutional interpretation the CCI went further to the extent of justifying the lower courts judgement to include investment considerations as a determinant factor. The CCI went beyond the constitutional question presented before it, which was whether or not the cassation bench went above its power under article 80(3)(a), by laying out what the considerations should be made when determining distinctiveness of trademarks under the trademark proclamation. Neither the constitutionality of the Article 6 of the trademark proclamation nor the specific act of omitting investment consideration when determining similarity of trademarks was the issue. However, the CCI mixed the constitutional question with non-constitutional questions in rendering its recommendation.
- III. The route under which Six Continents brought the case was through article 5(1) of the CCI re-establishment proclamation. And in this provision states that this interested party who requests for constitutional interpretation must show that his fundamental right and freedom provided under the Constitution have been violated due to the final decision rendered by government organ. But this begs the question, what fundamental right was violated by the cassation bench's decision? The applicant to the CCI in its application and the council in its recommendation have only addressed the violation

of Article 80(3)(a). Can we consider the mere encroachment of jurisdiction by the cassation bench as a violation of the fundamental rights or should such encroachment be followed with a violation of the fundamental rights and freedoms under chapter three? I am of the opinion that the trespass in jurisdiction has to also result in the violation of chapter three human or democratic rights. Because, the re-establishment proclamation under article 5 was quite specific that such applications after the final decision of a court (or any government organ) must involve a fundamental right violation. In the case at hand no fundamental right violation was submitted to the council.

On the contrary, what could have been invoked is the violation to the property rights under article 40 of Crown Hotel by the decision of the EIPO and the Federal High Court to compromise its intellectual property rights with the inclusion of investment considerations, a criterion that is too distant and unenvisaged by the law.

If the violation is on any other part of the constitution, the applicant can request the court to submit the case to the CCI for constitutional interpretation or upon rejection itself submitted the issue to the council. In the same vain had Six Continents believed that the cassation bench was overstretching its jurisdiction it could have requested to submit the case to the CCI or upon its rejection for referral submit it directly to the CCI.

The second case I will discuss is representative of the most common mistake made by the Council regarding its role of assessing evidence. The Council is often wrongly involved in the process of requesting, assessing and weighing evidence¹¹⁸. In principle, the Council is mandated by virtue of Article 84 of the constitution to give constitutional interpretations to a constitutional issue. In doing this the council is making a legal determination rather than a factual one. The council shall limit its recommendations purely to the settling of legal disputes. This is also the practice in Germany where the constitutional court refrains from calling and reviewing evidence¹¹⁹. However, the constitutional court may judge the constitutionality of the standard

¹¹⁸ See *W/o Azebe Tufa v AtoAlemayehuMengistu* (File No. 1866/08, FDRE Council of Constitutional Inquiry, December 13, 2016) (Unpublished),

¹¹⁹ Alfredo Narvaez Medecigo, Rule of Law and Fundamental Rights: Critical Comparative Analysis of Constitutional Review in the United States, Germany and Mexico (2016) p. 192

with which the ordinary courts weighed the evidence and gave their verdict¹²⁰. Nevertheless, this should be done without calling for the presentation of new evidence. There is also a practical justification for restricting the constitutional arbiter from calling and evaluating evidence. Constitutional courts don't have the luxury of time to entertain and resolve disputes of fact. Limits such as these are necessary because the council is a single tribunal backed by handful professionals but charged with the mammoth task of reviewing hundreds of cases annually. Restrictions of this sort are necessary so that constitutional review of judicial decisions in individual complaints procedures does not distract constitutional courts from their unique task of ensuring that laws respect the Constitution.

In CCI's recommendation for the case between W/roAzebe Tufa and AtoAlemayehuMengistu the council called for additional evidence to be sent to it from different government agencies¹²¹. After receiving the response from agencies, the court weighed the newly received evidence and gave its recommendation accordingly. The applicant (W/roAzebe Tufa) had initially lodged the CCI application claiming that the acts of the ordinary courts to give a verdict without appropriately hearing and weighing the necessary evidence is against the constitutional provisions of Article 35(1), Article 25-equality and Article 37-access to justice¹²². Even if the council is convinced that the ordinary courts had reached their decisions unconstitutionally without properly hearing and assessing the possible evidences, the best the council can do is give recommendation to remand the case and have the evidence reevaluated. However, the council can't itself call for evidence nor evaluate such evidence.

3.3.2. The Implication of the CCI decisions on Finality Clause

Finality clause is one of the notable features of a modern legal system. The law favors finality because litigation, at some point, must end so the courts can hear other business and the parties can move on with their lives¹²³. Without a certain end to litigation, the judicial system could come to a standstill, giving those parties with vast resources the chance to postpone a final judgment and thwart justice, while dwindling the trustthe population has on the judicial

¹²⁰ Ibid.

¹²¹ W/o Azebe Tufa v AtoAlemayehuMengistu (File No. 1866/08, FDRE Council of Constitutional Inquiry, December 13, 2016) (Unpublished), p.1

¹²² Id. p.3

¹²³ Sigmund G. Popko, "Putting Finality in Perspective: Collateral Review of Criminal Judgments in The DNA Era", Law Journal For Social Justice, Vol. 1.1 (2011), p.1

system¹²⁴. Finality clause is often seen imbedded in other legal principles such as res judicata and period of limitation.

The CCI's recently established reputation as the super-jurisdiction of appeals, for cases that pass through the judicial system, has severely eroded the principle of finality. This is quite visible as more than half the cases to which the CCI gave its recommendation were litigations that had received final judgement from courts. Thus, if the CCI continues to usurp more jurisdiction that belongs to courts it is in effect compromising the finality of their judgment and hence their credibility.

Many of the CCI staff members and handful of lawyers, I interviewed during my research, seem to support the apparent and unconstitutional expansion of jurisdiction by the Council despite its negative effects on the finality clause. They claim that erosion of the finality clause is a small sacrifice made for the potential correction of a judicial error. This assertion, however, isn't convincing as we can never know with 100% certainty that no error of law or fact was made during trial or appellate proceedings¹²⁵. Regardless of our absolute certainty we must impose an end to litigation at some point or else the case could conceivably go on *ad infinitum*¹²⁶. Professor Paul M. Bator in addressing the impossibility of avoiding judicial error and the need to come to terms with them, said the following;

We must acknowledge that human systems, because fallible humans design them, are themselves inherently fallible. Thus, we must "come to terms with the possibility of error inherent in any [human] process." The best way to deal with this probability of human error, he continues, is to design our systems of justice with sufficient procedures and arrangements such that there exists an "acceptable probability that justice will be done, that the facts found will be 'true' and the law applied 'correct.'¹²⁷

Furthermore, the error is not a verified one but rather an alleged one which should pass through review. Thus, the endless re-litigation of the same issues of law and fact merely because we think we might have gotten it wrong is a waste of resources and suffers from all the negative

¹²⁴ Ibid

¹²⁵ Id. p.3

¹²⁶ Paul M. Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners", Harvard Law Review, Vol. 76 (1963), p.446

¹²⁷ Id. p.451

consequences¹²⁸. The Council in reviewing the case usually takes it from one to two years and during this period it has the authority to suspend the execution of an order given by courts by virtue of Articles 6 and 32 of the CCI re-establishment proclamation. As has been established earlier that since 2005 E.C the number of applications submitted before CCI's has also rocketed. Out of the 2409 cases it has received the CCI has only referred 37 to the HoF, the remaining 2372 cases were deemed not to raise a constitutional issue having been on hold from execution for at least a year. Therefore, if the CCI doesn't adjust the current rate at which it is accepting cases it would inevitably call for more applications to its door steps.

3.4. Conclusion and Recommendations

The following moves by the CCI and the state might possibly arrest the current trend at which the CCI is unconstitutionally accepting and reversing court decision.

- I. The role of the CCI is increasingly becoming that of a 'fire fighters' as the council is rapidly gaining a reputation for its role in correcting the judicial errors made by ordinary courts. Most have even praised the proactive role assumed by the CCI after its re-establishment in 2013. However, we should all remember that the council is not the Supreme court, its duty is to settle only constitutional disputes, not all disputes. The constitutional adjudication process and the ordinary judicial system are two distinct tracks that should be separately operated. The fact that ordinary courts are making mistakes doesn't permit the council to exceed its constitutional mandate and entertain purely judicial matters which ought to have finality in courts. Although the initial fault doesn't justify the correcting fault, the judiciary must sort out its problems in order to preserve its jurisdiction. The HoPR, in enacting the 2013 re-establishment proclamation, might have had the intention of broadening the CCI's mandate to mitigate the impact of the errors committed by the judiciary. However, what the legislator should have done was take measures to enable the judiciary to sort out its own problems. Thus, the legislator shall enact a legislation requiring the judiciary to maintain strict qualification, appointment, and evaluation of judges. The judiciary shall also be granted sufficient budgeting so that it can operate effectively.

¹²⁸ Ibid

- II. According to Article 33 of the CCI re-establishment proclamation, one of the powers given to the Council is the authority to issue a directive. However, more than four years since the enactment of the revised proclamation, the Council is yet to come up with a directive capable of specifying the particulars and procedures of the constitutional adjudication process. If we look at the recommendations given by the CCI we can easily see that the council does not have a fixed or established pattern in deciding on the cases. It is not rare to see the council giving a referral and a rejection recommendation for two similar cases at differing times. Thus, the CCI must issue a directive laying out the procedures of the constitutional adjudication procedure with the aim of ensuring the consistency and credibility of its recommendations.
- III. One of the major reasons for the accumulation of cases presented before the council is the absence of judicial notice of HoF decisions. It has been established under chapter two that there are instances when the courts can enforce the constitution without actually interpreting it. Similarly, once the HoF gives an authoritative interpretation of the constitution there is no need for a similar case to go through the same constitutional adjudication process; courts can simply enforce the interpretation on similar cases. However, many of the cases aren't published hence ordinary courts can't take judicial notice of the decisions in order to enforce the authoritative interpretations. The House of Federation journal of constitutional decisions was last published in 2008 and had only three of the earlier cases. Therefore, the HoF, to minimize its case load especially by reducing the repetitive interpretation of a similar issue, should frequently publish its decisions.

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