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THE ROLE OF REGULAR COURTS IN CONSTITUTIONAL INTERPRETATION AND ITS IMPACT ON PROTECTION OF HUMAN RIGHTS IN ETHIOPIA: LAW AND PRACTICE

By

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DECLARATION

I hereby declare that " **The Role of Regular Courts In Constitutional Interpretation And Its Impact on Protection of Human Rights In Ethiopia: Law And Practice**" is my own original work which has not been presented for any degree or examination in any University and the sources used have been duly acknowledged and cited.

Desalegn Birhanu Wegasa

Signed_____

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The Role of Regular Courts in Constitutional Interpretation and Its Impact on Protection of Human Rights in Ethiopia: Law and Practice

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ACRONYMS

Art. - Article

CCI - Council of Constitutional Inquiry

EPRDF - Ethiopian peoples' revolutionary democratic front

ed.- editor

edn.- Edition

eds.- editors

ECHR -European Convention on Human Rights

FDRE - Federal Democratic Republic Of Ethiopia

G.A - General Assembly

HOPR – house of peoples representatives

HoF - House of Federation

HRC – human rights commission

IBR - International Bill of Rights

Ibid - The same

Id.- The same

ICCPR- International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

No.- Number

NN&P - Nation, Nationality and People

SNNPR- Southern Nations, Nationalities and Peoples Region

Procls. - Proclamations

Procl.- Proclamation

P. – Pag**e**

UDHR - Universal Declaration of Human Rights

UN - United Nation

U N. Doc.- United Nations Documents

UNHCHR - United Nations High Commissioner for Human Rights

UNGA - United Nations General Assembly

WWII- World War II

ABSTRACT

A constitution is the basic law by which a nation, people or group organize and govern themselves. It is thought as an instrument by which government is limited or controlled. A constitution is considered supreme because it comes directly from the people. A constitution does not attempt to cover every event. Looking at provision of different countries' constitutions entail us generality as a characteristics feature of a constitution i.e details are not discussed in the constitutions. Thus, when a new situation arises, or even a new variation of an old situation arises, the constitution is often looked as a guide. At this juncture the issue of constitutional interpretation arises.

The system and practice of constitutional interpretation of Ethiopia has created confusion regarding the respective role of the Regular Courts and the House of Federation. From the very beginning the empowerment of a political organ (i.e House of federation) to decide on constitutional disputes has inherent weakness for it lack the essential qualities from adjudicatory organ i.e the principles of judicial independence, impartiality and competence do not feature in the interpreter of the constitution. Moreover, the wisdom of excluding Regular Courts from adjudication of the constitutional disputes is questionable and has negative effects on the protection of human rights.

The main objective of the study is to investigate the possible adverse impact of constitutional interpretation on the protection of human rights. The study also tries to determine the role of regular courts and to explore the scope of power of House of Federation /Council of constitutional Enquiry/ as well as the practices on the matter of constitutional interpretation. Lastly, the study tries to show the incompatibility (mismatch) of laws and practices in the aforementioned matter and more importantly argue the need of independent and impartial body for constitutional interpretation in Ethiopia. In addition, the study recommends the amendment of the existing laws.

Key words: Regular courts, constitutional interpretation, human rights, Ethiopia

CHAPTER ONE

INTRODUCTION

1.1. Background of the Study

Ethiopia's modern constitutional developments have presented distinctive human rights challenges. Ethiopia introduced federal system of government in 1995 by adopting the Constitution of Federal Democratic Republic of Ethiopia (herein after FDRE) after being troubled by civil war for close to ten decades. From the aftermath of the downfall of the Derg, the new government embarked on ethnic-based federalism under the 1995 Constitution. The Constitution recognizes various ethnic groups as units of self-government, or "Nations, Nationalities, and Peoples" (NN&P), with powers to secede or form their own states within the Federal Democratic Republic of Ethiopia.[1] This was considered as a paradigm shift in the history of Ethiopia, because it is a move from the policy of unification and one culture to recognizing multiculturalism and acknowledging diversity.

The other hallmark of the 1995 FDRE Constitution is the vast array of rights it espouses, including both individual human rights and ethnic group rights.[2] There is a plentiful and generous recognition of human rights in the Constitution. Interestingly, the Constitution provides broad human rights protections in conformity with international human rights laws and principles. A quick glance at chapter three of the text of the Constitution will indicate that almost all types of rights recognized in the International Bill of Rights are granted a constitutional status.[3] Such recognition is of immense significance in setting the standards and laying down the foundation for the growth of a vibrant human rights culture. It also establishes the fact that in Ethiopia any violation of human rights, if tolerable at times is a mark of our falling short of our constitutional commitments. It signals a collective rejection of the idea that one can disregard

[1] The constitution of Federal Democratic Republic of Ethiopia (Proclamation number,1/1995, preamble., Art. 39) (herein after FDRE constitution).
[2] Minasse Haile, The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development, 20 Suffolk Transnat'l L. Rev. 1, 46 (1996) (herein after Minasse Haile).
[3] Tsegaye Ragassa, Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia, 3(2) (2009) Mizan Law Review 287, at 297 (herein after Tsegaye R.).

human dignity with impunity. More positively, it states in explicit terms that we, as a country, are one that honours, and is constrained by, the humanist value that human dignity and worth is fundamental to our system of governance. Nevertheless, the task of concretizing these rights and converting the same into legally consumable commodities[4] is yet to be done.

For most, if not for all states, the most crucial institution in the protection of human rights is the judiciary. The question, however, is whether there exists well established system, strong and competent institutions to protect and enforce these rights especially from the angle of constitutional interpretation since it has great impact on the protection of human rights that enshrined under the FDRE Constitution. The FDRE Constitution states that the judiciary has the duty to enforce the fundamental rights and freedoms in the Constitution.[5] Practically, yet, when a constitutional dispute arises, courts must forward the case to the HoF for adjudication in Ethiopia. As a result, the judiciary has been stripped of one of its most powerful tools in guarding against the infringement of constitutionally guaranteed human rights which is the power of constitutional review. In this regard, Ethiopia's current constitutional interpretation system has presented human rights challenges. In addition, a well-developed system of Constitutional interpretation that ensures protection of human rights granted under the Constitution is lacking in actual practice. Therefore, these facts impress and motivate the writer to deal with the issues and come up with some propositions in making it meaningful.

In any country with democratic governance (aspirationally theoretically or immediately practically), the judiciary, as part of the trias politica, is one of the most important institutions of human rights protection. The judicial branch is at the forefront of the effort at discharging the protective responsibility of the state apropos of human rights. Nonetheless, in Ethiopia HoF, a political organ that represents the political interests of Ethiopia's ethnic groups, has dominated the power of Constitutional interpretation at the exclusion of the judiciary. This situation currently negates the proper protection of human rights in the country and need immediate response for the proper protection of human rights enshrined under the FDRE Constitution. Therefore, the study explores Ethiopia's system of non judicial Constitutional review and investigates its impact on the protection of fundamental human rights and freedoms particularly

[4] Ibid.
[5] FDRE Constitution Supra note 1, Art.13(1).

it deals with the impact of constitutional interpretation on the rights to fair trial in Ethiopia. This piece also seeks to raise some questions that help us think fruitfully about how to protect human rights in Ethiopia especially from the angle of system of Constitutional interpretation. Lastly, the study seeks to inquire into the role of the judiciary in the Constitutional interpretation and its effort in the protection of human rights in Ethiopia as well as its impact on the protection of fundamental human rights particularly on the rights to fair trial.

1.2. Statement of the Problem

The system of constitutional interpretation in Ethiopia seems to develop vulnerable rules to be abused. Today practical and legal problems in relation to constitutional interpretation are prevailing under the Ethiopian federation. As a result, it has brought negative consequence on protection of human rights particularly on the rights to fair trial in Ethiopia.

In fact the power of rendering final decisions on constitutional issues has been vested in the hand of House of Federation (HoF) under the Constitution.[6] However, it is specified under Article 84(2) Amharic version of FDRE Constitution that only Proclamations enacted by parliament, if being contested as unconstitutional could be brought before the HoF/Council of constitutional Inquiry/ (herein after CCI). This article seems to limit the power of HoF and establish the role of regular courts in Constitutional interpretation and judicial organ has role in settling constitutional disputes. However, Proclamation Number 798/2013 and 251/2001) under Article 2(5)and 3(1) respectively have extended the definition of law given under Article 84(2) of FDRE Constitution to any law including subordinate legislations, like regulations and directives enacted by the executive organ. Both proclamations (herein after Procl.) wiped out the power of regular courts to adjudicate constitutional disputes. This fact has showed the contradiction of above said proclamations with the FDRE constitution.

In addition, in practice when a constitutional dispute arises courts forward the case to the CCI/HoF for adjudication. Surprisingly, the regular courts are reluctant to entertain cases having to do with constitutional matter and shy away from entertaining any un/constitutionality issues. There is a perception that judiciary has been wiped out of the power of constitutional

[6] Id., Art. 62(1), 84(1)).

interpretation which is most powerful tool in guarding against the infringement of constitutionally guaranteed human rights. However, Art. 84(2) that empower regular court to adjudicate constitutional issues and Article 13(1) of the Constitution state that the judiciary has the duty to enforce the fundamental rights and freedoms in the Constitution. Here, there is an indication of inconsistency between the Constitution and practices.

The other key issue which demands proper consideration is the procedure of constitutional interpretation (judicial referral) in Ethiopia that imply while regular courts have confronted with cases that have constitutional disputes, they referred to CCI then after investigation if this organ was satisfied it directs the case to HoF for final decision on the issue of law and even it could be remanded again to the CCI from HoF if it deems necessary for more investigation. Really, this is complex circulation of case from one organ to the other and has its own implication to delay justice which amount to deny justice.

Having the above points in mind, the current constitutional interpretation system has showed that courts have no role in controlling or checking the constitutionality of the legislation, executive organ's enactments and decisions. As a result, the principle of separation of powers, the principle of check and balance and the independence of judiciary is being put in doubt in current situation of Ethiopia.

Consequently, fundamental rights and freedoms enshrined under the FDRE Constitution could be affected. Because, the HoF which is political organ operating within the context of a federal government dominated by a ruling party, the Ethiopian People Revolutionary Democratic Front (EPRDF) has an excess of power in all branches of government[7] particularly it has dominated the power of constitutional interpretation. As a result, fundamental rights and freedoms may lose out to political considerations favoring the ruling party and the executive. In particular, the rights to fair trial such as the right to be tried before independent and impartial organ, the right to speedy

[7] Minasse Haile, Supra note 2, p. 446 (arguing that the Constitution's creation of a powerful federal government undermines any rights it confers); Minasse Haile, Comparing Human Rights in Two Ethiopian Constitutions: The Emperor's and the "Republic's"--Cucullus Non Facit Monachum, 13 Cardozo J. Int'l & Comp. L. 1, 30-32 (2005) [hereinafter Haile] (noting that the Constitution suspends basic human rights in times of national emergency); Alemante G. Selassie, Ethnic Federalism: Its Promise and Pitfalls for Africa, 28 Yale J. Int'l L. 51, 93-96 (2003) (arguing that the Constitution's support of ethnic federalism militates against the concept of human rights).

trial, the right to appeal, the right to presumption of innocence, the right to be heard etc. and the substantive rights such as the right to identity have been negatively affected. This may be expressed as follows: the procedure before the CCI/HoF does not involve a mandatory duty on the CCI/HoF to hear the complainant parties,[8] a case could be decided without directly hearing the parties thereto. The other point is that the decisions of the HoF have erga omnes effects, binding on any other similarly situated party, as they constitute precedents for similar cases.[9] In this regard the decision on a constitutional issue by the HoF could affects the right to appeal of losing party against the decision or affects the rights of non parties to take justiciable matter to judicial organ in the future.

In conclusion, the thesis has more or less tried to indicate the consequences of constitutional interpretation on protection of human rights in general and specifically on the rights to fair trial such as the right to speedy trial, presumption of innocence, etc.

1.3. Research Questions

Questions which the study investigates into include:

- What types of legal problems arise under the FDRE Constitution with regard to constitutional interpretation?
- What are the possible impacts of constitutional interpretation on human rights protection?
- How do courts and HoF/CCI interact in matters involving constitutional interpretation?
- What is the delimitation of jurisdiction between HoF/CCI and regular courts with regard to constitutional interpretation in general and of human rights part in particular?
- What is or what should be the role of judiciary in the process of constitutional interpretation especially with regard to human rights part of the FDRE Constitution?
- Does the practice on matters involving constitutional interpretation conform to the laws?

1.4. Literature review

[8] The HoF 'may' call upon the parties involved to give their opinion, and is permitted to do so when it deems fit to hear the parties. But this falls short of imposing on the HoF any duty to hear the parties involved. See A proclamation to consolidate the house of the federation of the federal democratic republic of Ethiopia and to define its powers and responsibilities, Procl. No. 251/2001, Art. 10

[9] Id., Art. 11(1)

As explained above, countries vest the power to adjudicate constitutional issues and resolving conflicts in the hands of different institutions. Based on their historical and philosophical reasons, the Constitutions of various states adopted different mechanisms to interpret the constitution and to adjudicate the constitutionality of laws and decisions of government bodies.[10] Some countries have strong judiciary in their constitutional history like the United States of America. Other states have fragile judicial system in their legal history and not trust their ordinary courts to empower them in order to adjudicate constitutional issues. For instance, Ethiopia preferred a political organization (HoF) for authoritative constitutional interpretation under 1995 FDRE Constitution. Therefore, whether the power to adjudicate constitutional issue is vested in the hands of ordinary courts or independent Constitutional Courts or other institutions like the HoF of Ethiopian, the choice of these institutions are inevitably based on the past legal history and customs of constitutional interpretation of these countries.

The new Ethiopian Constitution of 1995 has captured the attention of quite a good numbers of scholars, regarding mechanisms for interpreting the constitution and reviewing constitutionality of laws and decisions of government bodies. Pursuant to Article 62 and 83 of the FDRE Constitution, the final authority in constitutional interpretation is vested in the second chamber, HoF. The act of vesting the power to adjudicate constitutional issues in the HoF, the second chamber, having no law making function and political organization under the FDRE Constitution created a disruptive effect on knowing the exact role of judiciary under the Ethiopian federation as various scholars written on issue of constitutional interpretation.[11] Even though some scholars tried to establish the role of regular courts in constitutional interpretation, none of them has clearly demarcated and shown the extent of the power between the regular courts and the HoF/CCI on issues of constitutional interpretation. Anyways, there are diverged opinions among authors regarding the scope of the power of the HoF vis-à-vis courts in Ethiopia. It is difficult to

[10] Mauro Cappelletti, The Judicial Process in Comparative Prospective (Oxford: Clarendon Press, 1989), pp. 312-313. (herein after cappelletti)

[11] Over the last 20 years the discussion on constitutional interpretation in Ethiopia has obtained greatest attention. This is essentially because of the unprecedented system of constitutional interpretation designed in the 1995 of FDRE constitution. Every writer espouses his idea in isolation from the others. As a result we see that divergent and isolated positions have been taken for example on the scope of the power of the HoF and the role of courts vis - a-vis constitutional interpretation. See Getachew assefa, All about words: discovering the intention of the makers of the Ethiopian constitution on the scope and meaning of constitutional interpretation, 24 (2) Journal of Ethiopian Laws (Dec. 2010) at 139-175. (herein after Getachew)

deal with all literatures in the area but an attempt is made to see briefly some of the important works which are deemed to have relevance to the paper. Accordingly, we can have three views as to the power of the HoF and of the courts in interpreting the constitution.

The first category of understanding provides that courts are wiped out from the power to review the constitutionality of laws made by state and federal legislature and determination of the scope, meaning and content of provisions of the constitution.[12] According to this view, courts have only the role of enforcing provisions of the constitution and they can do so to the extent it does not involve interpretation of the constitution. The argument is made based the presumption that there are some provisions of the constitution which are explicit and clear which do not require interpretation and it is in such cases that courts are required to apply the provisions of the constitution.[13]

The argument is however open to challenge at least for the ground that based on the indeterminacy theory, constitutional texts are general, vague, and abstract that may require interpretation and construction of a given provision based on some values that are not explicitly provide in the text of the constitution.[14] To use Assefa's expression in this regard, to think that it is possible to apply the constitution without interpreting it is more of "a myth than a reality".[15]

The second view of the power of the HoF/CCI and of the courts in interpreting the constitution is reflected in an article by Getachew.[16] Getachew's finding on the power of courts in interpreting the constitution is made by relying mainly on the intention of the makers of the constitution as reflected in the Minute of the Constitutional Assembly after reviewing existing literatures in the

[12] This view is mainly reflected by Yonatan Tesfaye which is solely based on the mechanical theory of judicial power that requires courts to apply a law as it is clearly available in the text. And to him constitutional interpretation is both the determination of the scope, meaning and content of a given constitutional provision and the review power of the constitutionality of laws enacted by the federal and state parliament. See Yonatan Tesfaye Fessha , Judicial Review And Democracy: A Normative Discourse On The (Novel) Ethiopian Approach To Constitutional Review, 14 Afr. J. Int'l & Comp. L. 53 (2006), p. 141.
[13] Ibid.
[14] Luc B. Tremblay, General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law, 23 (4) Oxford Journal of Legal Studies (2003), p.535 (herein after Luc B.)
[15] Assefa Fiseha, the Concept of Separation of Powers and Its Impact on the Role of the Judiciary in Ethiopia, in Assefa Fiseha and Getachew Assefa (eds.) , Institutionalizing Constitutionalism and the Rule of Law: Towards a Constitutional practice in Ethiopia, 9 Ethiopian Constitutional Law Series 67 (2010) (herein after Assefa Fiseha).
[16] Getachew, Supra note 11, p. 139-175.

area. Accordingly, the reading of the article revealed that he came up with three new findings as to the power of courts regarding to constitutional interpretation. First, contrary to what is argued by Yonathan, he concluded that it is up to the power of courts to determine the meaning, scope and content of a constitutional provision in resolving factual disputes before them so long as they are not faced with 'constitutional dispute'.[17] Second, courts cannot pass a decision up on issues of constitutionality or settling constitutional disputes irrespective of the type of cases and regardless of the fact that the legislations are apparently unconstitutional.[18] Third, different from Takele and Assefa, Getachew argued that all constitutional disputes-whether involving federal or state proclamation, regulation, directive, or decision of federal or state organ or official- are precluded from the jurisdiction of courts rather within the power of the HoF/CCI.[19]

It is worthy to make analysis of Getachew's argument which he concluded that it is up to the power of courts to determine the meaning, scope and content of a constitutional provision in resolving factual disputes before them so long as they are not faced with 'constitutional dispute'.[20] Indirectly, Getachew concluded that if there is disagreement on the meaning of constitutional provisions/text/, courts have been prohibited to determine the meaning, scope and content of a constitutional provision. From the very beginning involving in the determination of the meaning, scope, and content of constitutional provision is necessary so long as there is disagreement on the meaning of constitutional provision. So, doesn't it mean that determining the meaning, scope and content of a constitutional provision is engaging in constitutional interpretation? The study will analysis this point.

Second, the way Getachew justifies his argument in the foregoing discussion does not seem to be plausible enough. He argued that Art.84 is not about the power and functions of the HoF but the procedures to be consumed by the CCI when settling disputes involving the constitutionality of federal and state laws; hence cannot be employed to decide the power of courts vis-à-vis the

[17] Ibid.
[18] Id., p. 165.
[19] Id., p. 167, the point here is made by condemning the proposition that courts are empowered to review laws and decision s of government bodies other than the constitutionality of laws which is fundamentally made based on Art.84(2).
[20] Id., p. 168.

HoF.[21] However, is it not true that the powers and functions of the CCI are inseparable from and derivative of the powers of the HoF? It seems that it is because of the inseparable nature of the powers of the HoF and the CCI concerning constitutional interpretation that we (including Getachew himself) used to write as the HoF/CCI.[22] If Art.84(2) is principally about the procedures of the CCI in settling disputes involving the constitutionality of laws enacted by state and federal legislatures as Getachew pleads, can we think of other procedures that the CCI would employ when it faces constitutional disputes involving issues other than the constitutionality of laws issued by state and federal legislatures? The study will try to answer this question.

The third category of understanding regarding the power of courts vis-à-vis the HoF, which is mainly advocated by Assefa, Takele and Besselink and provides that courts in Ethiopia are excluded from interpreting the constitution only when the un/constitutionality of laws by state and federal legislative bodies is questioned; and in all other cases, it is not the intention of the maker of the Constitution to preclude courts from interpreting the constitution.[23] They build their argument from different provisions of the constitution and principles. Accordingly, Assefa asserted that the judiciary is duty bound to "respect and enforce" the provisions of chapter three of the constitution and to ensure the observance and enforcement of the constitution is achievable if courts have certain degree of interpretive power in the constitution.[24] Moreover, he forwards strong argument that owing to parliamentary supremacy in Ethiopia, yet subject to constitutional supremacy, it could be soundly argued that courts' power is foreclosed only if it involves the determination of the un/constitutionality of laws enacted by federal and state legislatures as it is clearly provided under Art.84(2) of the constitution. [25]

Takele on the other hand gives more emphasis on Art.79(1) and Art.78 of the constitution and explained that courts are constitutionally apportioned with the power to see any case of justiciable matter other than those the constitutionality of laws enacted by federal and state

[21] Id., p. 166-167.
[22] Ibid.
[23]Takele Soboka, Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory, *African Journal of International and Comparative Law* 19.1 (2011), at 99–123 (herein after Takele).
[24] Assefa Fiseha , Supra note 15.
[25] Id. , p. 15.

legislatures is in question.[26] He even argues that if there is clear unconstitutionality of laws, there is no need for courts to refer the case to the CCI/HoF because, in such case, there is no constitutional dispute (in his expression "interpretation dilemmas") and courts can set aside the application of such laws.[27] However, including both Assefa's and Takele's work, most of the literatures aforementioned failed to address the procedure of constitutional interpretation and its impact on protection of human rights in Ethiopia. Most of these literatures also do not give more attention to the consequence of constitutional interpretation in Ethiopia particularly its consequence on the rights to fair trial such as the right to be tried before an independent and impartial body, speedy trial, presumption of innocence, appeal, identity right etc.

Besselink's article on the protection of human rights in Ethiopia is also worthy of consideration for it is an, if not the most, insightful textual readings of the FDRE Constitution's interpretative system.[28] He sharply analyzed the respective role of the HoF/CCI, and the judiciary relative to the interpretation and enforcement of the fundamental rights and freedoms of the Constitution. Accordingly he seems to endorse the view, at least partially, that Art. 84(2) suggests a much more limited exclusive jurisdiction of the CCI and the HoF: only the power to give an authoritative interpretation of the Constitution with a view to establishing the un/constitutionality of federal and state legislation is reserved to the CCI and the HoF.[29] He also concludes that whether the matters involving the executive action relates to human rights violations or other matters in which allegation is made that there is an issue of constitutionality of the executive action involved, the HoF/CCI has jurisdiction which is not exclusive but shared with the judiciary.[30] But he does not go further to show as to how the competence between the HoF/CCI on the one hand and the courts on the other can be shared.

In order to have democratic and legitimate Constitution as much as possible the FDRE Constitution should specify the powers of the three wings of the government. According to

[26] Takele, Supra note 23
[27] Ibid.
[28] Leonard F.M. Besselink, 'The Protection of Human Rights in Federal Systems – the case of Ethiopia' in proceedings of the 14th international conference of Ethiopian studies (Nov. 6 , 2000, Addis Ababa), Vol. 3, in Getachew, All about words: discovering the intention of the makers of the Ethiopian constitution on the scope and meaning of constitutional interpretation.
[29] Ibid.
[30] Ibid.

Justice R.R. Mzikamanda, Sub- Saharan Africa requires strong, stable, sustainable democracies to deal with the countless of challenges facing the region.[31] Hence democracy must be nurtured and protected. The role of independent judiciaries will be critical in that process. Without an independent judiciary, there can be no protection of rights, including minority rights, the rule of law, and therefore, no democracy.[32] Hence an independent judiciary is a guarantee to democracy[33]and protection of human rights.

In this study, FDRE Constitution and other related proclamations are the principal legal documents. Therefore, relevant FDRE constitutional provisions and the provisions these proclamations related to constitutional interpretation has been analyzed, since the writer's aim is to show the role and power of regular courts on the issue of interpretation of constitutional disputes and its possible impact on the protection of human rights.

1.5. Objectives of the Study

The main objective of this study is to investigate the role of regular courts in case of constitutional interpretation and its impact on protection of human rights in Ethiopia. In doing so, the study try to determine the scope of the power of the HoF vis- a- vis constitutional interpretation in general and particularly on the human rights part. To this end the study forwards the following points as its chief objectives.

- Examine legal problems arise under the Ethiopian federation with regard to constitutional interpretation.
- Explore the possible impacts of constitutional interpretation on human rights protection.
- Determine the scope of jurisdiction between HoF/CCI and regular courts with regard to constitutional interpretation particularly in case of human rights issues.
- Investigate the role of judiciary in the process of constitutional interpretation especially with regard to human right part of the FDRE constitution.
- Analyzes how do courts and HoF/CCI interact in matters involving constitutional interpretation.

[31]Justice R.R. Mzikamanda, The Place of the Independence of the Judiciary and the Rule of Law in Democratic Sub-Saharan Africa (paper Presented on November 14, 2007), p. 10.
[32]Tsegaye Regasa, Courts and the Human Rights Norm in Ethiopia, in proceedings of the symposium on the role of the courts in the Enforcement of the Constitution (Addis Ababa: May 19-20, 2000) at 144-120 (herein after Tsegaye Ragasa).
[33] Ibid.

- ❖ Compare and contrast the practices with the laws on matters involving constitutional interpretation.

In conclusion, this study tries to explore the problems existing in connection with settling constitutional disputes under the FDRE Constitution and its negative impact on the current human rights situation in Ethiopian. It also emphasis on the role of judiciary in protection of human rights enshrined under the Constitution.

1.6. Significance of the Study

This research has great importance in showing the problems existing on the protection of human rights with regard to constitutional interpretation in Ethiopia. This study has great contribution in showing ways of avoiding the confusion with respect to constitutional interpretation in Ethiopia. In its findings, the study has tried to show, how the power of courts are being put in doubt by different laws. This study also suggests the ways in which challenges and threats to the independence of the judiciary can be dealt with to ensure the protection of human rights in Ethiopia. So, this research has instigated the concerned organs, to give attention to this paradoxical issue and come up with consistent practices with provisions of laws. In particular the study has paramount importance for the regular courts, parliament and executive (HoF) to arrange their practice according to the Constitution, at least to give more value for the protection of human rights under the FDRE Constitution. In addition to this, it will be used by potential researchers as a literature source for further study.

1.7. Research Methodology

This study tries to explore the role of regular court on the matter of constitutional interpretation under the FDRE constitutions and other relevant laws. Furthermore, this study will try to shows the adverse effects of the constitutional interpretation on the protection of human rights. To this effect more importantly the study analysis practical cases and interviews of concerned bodies on the issue of constitutional interpretation. Further since it is a doctrinal research its research methodology is qualitative one. In furthering its purpose the study also has attempted to make an appropriate review of the existing literature and minutes of constitutional assembly on constitutional interpretation to come up with the best mechanism of adjudicating constitutional issues. To this effect, the study has also set up the proper conceptual, legal and theoretical

framework, which serves as springboard to determine the role of regular court to resolve issues of constitutional disputes and promote protection of human rights in Ethiopia.

And from among the documents used, the FDRE Constitution and the Proclamation number 798/2013 and 251/2001 are considered as the main legal documents up on which this study will be based. These laws and their respective practices will be analyzed and compared in detail in order to point out their incompatibility and its possible effects on the proper protection of human rights. Furthermore, decided cases on the issue of constitutional interpretation and their respective impacts on the protection of human rights will be analyzed as much as possible.

1.8. Limitation and Scope of the Study

In an attempt to deal with aforementioned issues, the scope of the study is limited to the system of constitutional interpretation at federal level. To this effect, the scope of the study is limited to the review of the various laws deal with constitutional interpretation in general and draws the already existing limited experience of constitutional interpretation as exercised by the federal courts, CCI and HoF. Furthermore, the writer give much emphasis and understand the whole concept of this work by having in mind that the issue of constitutional interpretation ensued in the court, the procedures followed by interpreter and then the effects of those procedures on the substantive and procedural rights of individuals.

The researcher of this study faced with a number of limitations and challenges. But I attempt to list briefly some of the important challenges which are deemed to have relevance to the study. Accordingly, although it is essential to get different sources that serve as secondary qualitative data, the Faculty Library does not have enough reading materials that are conducive and easily accessible to the researcher. Because of the financial shortage to cover the existing cost of inflation and the uneasily accessibility of the constitutional interpreter bodies, the researcher was mostly forced to depend on secondary sources. Particularly efforts to make interview with top official of HoF hadn't been successful. However, efforts to collect primary data were made to some extent, and more reliance is placed on secondary materials available at the websites of the institutions and scholarly materials written on the constitutional interpretation.

1.9. Organization of the Study

In brief, the study explores the mechanism as well the practice of constitutional interpretation and its impact on human rights protection in current situation of Ethiopia. The study will be divided in to five chapters, each of which has its own sections and subsections. Particularly, Chapter one introduces the background of the study, statement of the problem, research question, literature review, and objective of the study, significance of the study, research methods and limitation of the study. Chapter two gives a brief explanation of the terms and concepts used in the study. It defines terms like constitutional interpretation. It explores the conceptual and theoretical framework of constitutional interpretation. Chapter three explain briefly about normative framework of constitutional interpretation under the FDRE Constitution. Particularly, it deals with the historical overview of constitutional interpretation in Ethiopia, Constitutional interpretation under the FDRE Constitution of 1995, Legal ambiguities and practices with regard to constitutional interpretation, and power of courts in constitutional interpretation in Ethiopia. Chapter four mostly emphasizes on the consequences of constitutional interpretation and its effects on the protection of human rights in particular. Furthermore, it deals with the role of courts in the interpretation of constitution and its impact on the protection of human rights. To achieve its goal, the study identifies the practices of courts and HoF in the constitutional interpretation and its possible problems on the protection of human rights. The last chapter of this study by way of conclusion and recommendation examines the best way of addressing the constitutional interpretation and the proper protection of human rights in Ethiopia.

CHAPTER TWO

CONSTITUTIONAL INTERPRETATION, HUMAN RIGHTS PROTECTION AND THE JUDICIARY: MAKING THE NEXUS FROM THE ANGLE OF THEORETICAL ANALYSIS

This chapter is totally devoted to conceptual and theoretical analysis of constitutional interpretation in general. More importantly, there will be discussions about the link between constitutional interpretation, separation of power and protection of human rights. However, it will be incomplete if we directly go to constitutional interpretation without considering the nature of Constitution of democratic society.

2.1. The Nature of Constitutional Democracy

To begin with, the primary question will be what do we mean by Constitution? It is difficult to give one comprehensive definition or meaning for the word Constitution. But there is a common understanding of it as the fundamental law of a state under which the relation between the ruling and the ruled, the states and the federal governments or in general among all these institutions is regulated.[34] Aristotle and Plato once stated that for people to realize their best wishes and ideal life so as to create good and just citizens; the constitution is the best system. It may be granted by the emperor as it was the case in Roman law or it may be taken as the supreme law of the land as is the case today. But still it is an important means to regulate the relation between/ among governments and individuals.

The Marxists used to understand it as a "de facto" law which came into existence with the appearance of state and political power, while others refer it to a 'de jure" juridical act or document designed to regulate social relations at different levels. This indicates the progressiveness of its development which is contingent upon the changes in socio- economic and politics of a state. It should be noted that a constitution cannot bring radical change to the entire

[34] Henry C. Black, Blacks Law Dictionary (1991), p.311 (herein after Black.)

social life at a time. The 1787 American constitution for example, said nothing about abolishing slavery. Thus, constitutional history is in state of flux.[35]

Constitution may differ according to their forms as written and unwritten. In terms of amendment as a rigid and flexible or based on their duration as a permanent and provisional. Despite their difference in form, content and purpose, written constitutions have still two common features, the law which can be amended through special procedure even when it can be identified as flexible.[36]

By and large it can be concluded that a constitution is a political and legal document which the most important rules about the government of a country in which the relationships between government and or individuals is regulated.

According to indeterminacy theory: indeterminacy in literary fiction is permanent; the gap will never be filled or closed; sometimes indeterminacy is deliberately planted by the author with the intention of leaving a gap that the interpreter themselves can fill, by the process of realizing or concretizing the text.[37] From the angle of this theory, almost the framers of Constitution make Constitution a charter of liberties and not just a set of constitutive rules. The framers prefer to write general provisions than the specific provisions. Many provisions of the Constitution are drafted in general terms. All these facts push us to give more attention towards the notion of Constitutional interpretation. Because of the fact that Constitutional provisions are general, vague and abstract, constitutional interpretation is necessary. At this juncture allowing substantial discretion to the authoritative interpreters or other Constitutional actor is also necessary. Therefore, Constitutional texts are general, vague, and abstract that may require interpretation and construction of a given provision based on some values that are not explicitly provide in the text of the constitution.[38]

Generally, Constitution does not attempt to cover every event. Looking at provision of different countries' constitutions entail us generality as a characteristics feature of a constitution i.e details are not discussed in the constitutions. Thus, when a new situation arises, or even a new variation

[35] Veniami Chirkin, Constitutional Law and Political Institutions (1985), p, 12-16.
[36] Stanley De Smith and Rodney Brazies, Constitutional Law and Administrative Law (8th ed.,1998), p.3.
[37] Brian McHale, Constructing Postmodernism, Routledge, (1993), ISBN 0-415-06014-1, p. 36.
[38] Luc B., Supra note 14.

of an old situation arises, the constitution is often looked as a guide. At this juncture the issue of constitutional interpretation arises.

2.2. Constitutional Interpretation: Conceptual and Theoretical framework

2.2.1. Conceptual Framework of Constitutional Interpretation

Sometimes constitutional adjudication or review may be interchangeably used in the place of constitutional interpretation in this work. To begin with, the term interpretation has no specific and single meaning and thereby various legal scholars understood and defined it according to their view and philosophy of law. For instance, Webster defined interpretation as: "The act or process of discovering the meaning of a statute."[39] On the other hand, others more importantly define it as the process in which a judge, a lawyer or any other person who is put in a position where he must search for the meaning of law, constructs from the words of law, a meaning which either believes to be that of the legislatures or which he proposes to attribute to it.[40] From this concept, it is possible to point out the constituents of interpretation. It is the determination of the exact meaning of statute, what the legislature has actually said, ought to have said, but fails to specifically address in reality.

Black has also defined the word interpretation as an art of ascertaining the meaning of a certain statute, whether it is a contract, will, or other in a certain way.[41] Though this definition can be extended to constitutional interpretation, there are factors that make its interpretation special. We are to give meaning to a document which is superior to other laws in which the social, economical and political aspects of a society are reflected in general terms. So caution should be undertaken. Bishop Hoadiys Serman, on preaching before the king in 1717, described this as: Whoever hath an absolute authority to interpret any written or spoken laws, it is he who truly the law giver, to all intents and purposes and not the person who first spoke or who wrote them.[42]

[39] Webster's, New Word Dictionary for Young Reader, (Simon and Schuster publisher), p. 387.
[40] N. Binda, The interpretation of Statutes and General Clauses Act, (4th ed., 1965), pp. 1-2 (herein after N. Binda).
[41] Black, Supra note 34, p. 817.
[42] William Lockhart, American Case Book Series, (6th ed.,1986), p. 498.

Another conception of interpretation is the method of drawing of assertions with regard to matters which are not mentioned in the law, but which are within its sprit.[43] The rule of interpretation is emanated or based on the ambiguous concepts in words, phrases and absurd sentences in a certain legal provision. Because, for different individuals, these words, or phrases and absurd provision of a statute may give rises to different postulates of the law.[44] However, as matter of fact it should be commonly recognized that the issue of interpretation is not raised where the language of the law is so clear for those who apply and use it in their daily life.[45] Because in principle, the issue of interpretation comes into picture where the law is unclear, where ambiguity in the language of the law is created and even where there exists absurd provisions which calls for interpretation of that law.[46] Hence it is possible to contend that 'the provisions of a certain law may call for interpretation when the text of the law is supposed to construed in different ways and when general language is used in a certain legislation which must have been intended to have some limitation put up on it.'[47]

In addition, even if the language used is not very general and it is too clear, the application of words or phrases in a given provision of the law may not be the specific dictionary or popular meaning of that word or phrase. It may be rather a more extended or limited message with regard to matters to what the law- maker is intended to include under that specific context.[48] This is because, once the law-maker has defined a certain word or phrase as having a certain meaning, then it is only that meaning which must be given to it unless there is a change not envisaged at the time of the making of the constitution or a repugnancy in the text of the constitution.

Generally, it is not as such plain concept to define in a single notion. This concept can be understood by looking a kind of its goal and function. On the account of this fact, different interpreters use the Constitution for different kind of decisions at different levels of government

[43] Yefederation Dimts Ye Ethiopia Federalawi Democratic Republic Mikir Bet 02 kutur 01, (1998), p.27 (herein after yefederation dimtsi).
[44] N. Binda, Supra note 40.
[45] Yefederation dimtsi, Supra note 43.
[46] Ibid.
[47] Interpretation generally takes place whenever the meaning of legal document must be determined, since, the object of interpretation is to find out the meaning of the legal document which is obscure or ambiguous and it is the art or process of determining the meaning of a written document such as constitution and the interpretation of written document is fundamental to the process and the practice of the law.
[48] Yefederation dintsi, Supra note 43.

as well as in different areas of private life.[49] For instance, judge interpret and apply the constitution based on the meaning of words in the Constitution and the intention of the authors of the Constitution, the precedents set by past judges as well as on their own value judgments.[50] Other legal scholars cannot reach to consensus on the meaning of the constitutional interpretation as they define and understand differently from different perspectives and angles. For instance, Fredirik Schaver contends that:

> *"What counts as an interpretation and even what counts as the constitution will vary from theory to theory depending on which kinds of reasons are recognized by the theory and which cases are hard cases according to the theory?"*[51]

As he endeavors to point out, the meaning of constitutional interpretation is something which is individual relative which means that the meaning of constitutional interpretation varies from case to case, from theory to theory for different individuals and organs based on their qualification and degree of understanding of legal terms. Webster on his part defines constitutional interpretation as that part which is in accordance with or authorized by the constitution of a state or the framers of the constitution.[52] According to him, constitutional interpretation is therefore the act or the result of explaining what is not immediately plain or explicit or unmistakable as being in accordance with the constitution of a state.[53]

In general, these scholars seem to limit the meaning of constitutional interpretation solely to the message of the Constitution. However, in most legal systems, like those which follows the American model of constitutional interpretation and the European model too, in addition to understanding the meaning of the constitutional provisions, it pertains to declaring the constitutionality of legislation (both at the federal and state level), any decision of public officials, the allocation of power between different government organs and the like.[54]

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[49] Susan J. Barsion and Walter Sinoh- Armstrong, Contemporary Perspectives on Constitutional Interpretation, (West View Press, 1993), p. 2.
[50] Id, p. 3.
[51] Id, p. 27.
[52] Ibid.
[53] Ibid.
[54] Ibrahim Indris, Constitutional Adjudication under the 1994 FDRE Constitution, Ethiopian Law Review, vol. I, No.1 (2002), p. 70; see also the constitution of French Art. 58-60; the 1949 basic law of the federal republic of Germany (herein after German constitution); Art. 93; the Constitution of Italy Art. 134.

Thus, even if there is no unique meaning of the phrase constitutional interpretation, it is possible to commonly define it as a term which reveals a meaning, ascertaining the message of the constitution, evaluating whether a given law is enacted in conformity with it or not and declaring the constitutionality of the decision of government officials and others. Here ascertaining the message of the legislature in the constitution helps to declare a certain official act or law is being unconstitutional and is no more applicable. Thus, it should be noted that interpreting laws, decision of organs of a state or public officials and other customary practices in conformity with the constitution would also be the meaning of constitutional interpretation.

2.2.2. Scope of Constitutional Interpretation

As it may be the case, the scope of constitutional interpretation is variably understood in different legal systems. The scope of interpretation is neither susceptible to a clear-cut and uniform application nor is directed towards the expression of a single notion. For instance, in the United States and in those countries which follow its model, the scope of constitutional interpretation refers to expounding a provision of a constitution through interpretation and also overriding a legislative act as contradictory to the constitution.[55]

On the other hand, in countries which follow the European model, the scope of constitutional interpretation is much more complex. For instance, in French constitution, the constitutional council exercises its jurisdiction over electoral issues pertaining to the national assembly and senate, the president and referenda, conflicts regarding the division between the legislative domain and regulation, the constitutionality of international treaties, the rules of the chamber of parliament.[56] In Germany as the basic law provides, the jurisdiction of the German federal constitutional court is very wide which means, it includes the interpretation of the basic law, adjudication on constitutional complaints filed by anybody and on controversies between the constitutional organs and between two states of the federation.[57] In Italy, the jurisdiction of the Italian constitutional court includes entertaining conflicts of jurisdiction between different state

[55] Ibid.
[56] French Constitution, Supra note 54.
[57] Germany Constitution, Supra note 54.

authorities and between regions, allegations against the president of the republic, the president of the council of ministers and ministers; and constitutional review of laws.[58]

In short, the previous assertions envisages as there is no comprehensive and uniformly applicable rule in a multitude legal systems on the scope of constitutional interpretation. Rather each system follows its unique approach based on its distinct constitutional objectives and goals.

2.2.3. Purpose of Constitutional Interpretation

In the previous topic I have discussed the very nature and overview of constitutional interpretation and now this is the time to discuss some points on why constitutional interpretation is necessary for a country with their political system has adopted constitutional supremacy. Whether, well-established or non-well established constitutional systems, disputes over constitutional matters are inevitable. In this case, question of constitutional adjudication will come on the spot and the organ that is entitled to exercise the task will do over the matter. But someone may raise an issue and ask a question why we need constitutional interpretation? What purpose does constitutional interpretation has? Here in below, I will discuss important points on it.

First, the very purpose of constitutional interpretation is ensuring constitutional supremacy. The supremacy clause of the constitution is a shorthand expression of the fact that constitutional principles are sources of 'an objective normative value system, a set of values that must be respected'[59] whenever laws are passed, interpreted or applied, and decisions are made or actions are taken. It is a local *Grundnorm* which, once established, becomes a wellspring of the normative order from which a country's overall legal system, institutions, procedures, processes and substantive principles flow.[60] The objective normative order and value system established by

[58] Italy Constitution, Supra note 54.
[59] I. Currie and J. de Waal, 'Application of the Bill of Rights', in I. Currie and J. de Waal (eds), The Bill of Rights Handbook, 5th edn, Juta (2005), p. 32.
[60] E. McWhinney (ed.), Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review, 5th edn, Martinus Nijhoff (1986), p. 114.

a constitution should provide a yardstick against which the legal validity of legislations and governmental (in) actions are measured.[61]

Constitutional interpretation also protects individual rights from being violated both by executive and legislative branches of government. The legislature may enact laws that violate constitutionally guaranteed individual rights. The executive branches may execute or implement laws in contrary to the overall essence of constitutionally protected individual rights. In addition, the executive branch may enact unconstitutional and suppressive regulation and directives. In this case, it is the role of the constitutional interpreter that can reject unconstitutional legislations and remedying unconstitutionally implemented laws and policies. This role of constitutional interpreter is more relevant now a day where individual interest is overridden by community interest. For instance, when extradition agreements are signed between countries, individual rights may be at stake. When individual rights become vulnerable to both executive and legislative abuse, the role of constitutional interpreter is essential in reviewing the motive behind an extradition request which await an individual upon return to a requesting state.[62] When the government declares not to issue the passport, the right to liberty and movement may also be at stake. When individual rights become vulnerable to both executive and legislative abuse, the role of constitutional interpreter is essential in reviewing the motive behind of the declaration of not to issue the passport.

Constitutional interpretation has also the purpose of implementing uniform applicability of constitutional norms throughout the country. If there is no centralized mechanism of constitutional adjudication, the same constitutional principles will have the tendency of being implemented differently within a country. In a system where there is a centralized institution means of implementing that has final say on constitutional matter, it has the tendency to establish uniform and consensual practices all over the country. According to Zylberberg P, centralized mechanism of constitutional adjudication "constitutes the judiciary as an institutional means of imposing centralized political values on local bodies across a diverse political landscape."[63] But

[61] W. K. Geck, Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices, 51 Cornell Law Quarterly 250 (1996).
[62] Trucy Hughes, Extradition Reform: The role of the judiciary in protecting the rights of a requested individual,9 B.C.int'l and comp.L.Rev.293 (1986), .p.294 http://lawdigitalcommons.bc.edu/iclr/vol9/ accessed on 2/4/2013.
[63] Zylberberg , Problem of Majoritarianism In Constitutional Law: A Symbolic Perspective 37 McGill L. J. 27, (1992), P.61.

this does not mean that the same principle does not apply to other system that the entrust power to interpret constitutional matters to other institutions like French constitutional council or the Ethiopian HoF.

Constitutional interpretation is very essential for those countries that are following the civil law legal system. In the civil law legal system, there is no concept of precedent and the lower courts are not obliged to follow the path of the higher courts. In this case the existence of centralized constitutional adjudication will help the judicial branch to have a common consensus on those basic constitutional principles addressed by the constitutional interpreter.

Constitutional interpretation has also the role of protecting and enforcing the well established principle of separation of power. When I say well established principle of separation of power in this context I am not talking about Montesquieu's understanding of the principle of separation of power[64], rather I am talking about the Westminster's model of separation of power. If either the legislative or the executive branch of government violates this principle of separation of power, the judiciary will help us to control them through system of constitutional interpretation. As Alexander Hamilton said, the legislative branch is the most dangerous branch of government and it requires a strict control by the other branches of government. As he reasoned out, since the judiciary is the least dangerous branch of government, it can properly control the dangerous power of the legislative branch via the mechanism of constitutional interpretation.[65]

2.2.4. Theories of Constitutional Interpretation

Given the unavoidability of the overlaps and interdependence between governments within federation and the consequent likelihood of intergovernmental competition and conflicts, all federations are interested in adjudicating of disputes and resolve conflicts. Disputes may arise over adjudication of the exact scope of power assigned to each other of government by the

[64]According to Montesquieu, the three branches of government must be separated personally, institutionally and as well as functionally. He argues that in order to achieve his version of separation of power, one person is not allowed to be a member of more than one institution or branch of the government. Moreover, to implement Montesquieu's version of separation of power, all the three branches of the government must stand independently of the other branch and they should have separate existence exercise the function of the other branches. See Sharon Krause, The Sprit of Separate Powers in Montesquieu: The Review Of Politics, vol. 62, No. 2 (Spring, 2000),pp. 231-265.

[65] In Westminster's model of separation of power, we cannot find Montesquie's version of absolute separation of power. In westminster's model, there is a fusion of power between the legislative and executive branches of the government and at the same time a member of executive branch of the government is allowed to be a member of the legislative branch and vice versa is true.

Constitution, from conflicts of laws passed by different governments in areas of concurrent jurisdictions, from non-governmental bodies challenging the legal jurisdiction of a government and from challenges that a law contravenes a constitutionally established right.[66] In order to resolve such constitutional disputes, a strong, autonomous and impartial tribunal necessitates, especially for the federal states. But the competent organ of government to adjudicate constitutional related issues differs from country to country. For historical and philosophical reasons, constitutions have adopted different mechanisms for constitutional interpretation. The (dis)trust that the states have over the judiciary, the differing commitments to natural law or legal positivism, the differing application of the notion of separation of powers, have influenced in one way or another, the nature and scope of the national institution established to review issues of constitutionality.[67]

Pre-WW II Europe trusted its legislature and led to the horrors and that in turn led to a shift in paradigm, for instance in Germany to the evolution of constitutional court.[68] Hence there is different answer in legal theory for the question which body or which judge is competent and authorized by the Constitution to interpretation the Constitution.

Broadly speaking, many federal systems have vested this important power either in their ordinary courts or separate constitutional courts. Accordingly, these courts not only have the power to interpret the constitution, but are also and even more importantly entitled to decide on the conformity of the laws with the constitution. What is common in all is the fact that there is a commitment to a "constitution" that reflects the society's fundamental value and a law that contravenes this constitution should cease to exist by some kind of procedure. Yet although constitutional review through the court is in principle based on the principle of subjecting legislation to a higher law, one can grasp from various literatures and practices of the world countries, three answers are given in legal history as briefly explained below.

2.2.4.1. The Diffuse System

[66] Ronald L .Watts, Comparing Federal Systems (3rd Edition, Institute of Intergovernmental Relations, (Queen's University Press, London, 2007), p.158.
[67] Cappelletti, Supra note 10, p. 115-131.
[68] Assefa fiseha, Federlism and The Accommodation of Diversity in Ethiopia (Wolf legal Publisher, 2007), p, 398.

It also called the American system /decentralized system/ that accord every branch of the judiciary the right to constitutional interpretation. In principle any court has the power to interpret the Constitution and declare any law or decision of an executive body unconstitutional, if such a law or decision violates the Constitution, final appeal being reserved to the federal Supreme Court. This has been the case since the famous decision of chief justice John Marshal of the U.S. in Marbury v. Madison[69] in 1803. Since then many other countries including the India have adopted it. Some traces of it also exist in Switzerland where the courts have the power to disregard cantonal laws. In Switzerland judicial control is not, however, allowed over federal laws.

What characterizes the decentralized system of judicial review in U.S is the requirement of the presence of real controversy and adverse parties[70]for the court to decide constitutional question. Besides the United States supreme court would insist that the matter must be justiciable and must not involve political questions. The ordinary courts decide constitutional issues in the process of disposing their routing function and review of constitutionality is, therefore, something that comes to the courts incidental to the case.[71] The logic of the decentralized system in a nutshell, it is the duty of the judge to apply and interpret the law and in doing so if the judges find a contradiction and consistency between two laws of different hierarchies, it is the duty of the judges to apply the higher law.[72]

In the decentralized (diffuse/American) model of judicial review of constitutionality, control of constitutionality of legislative acts and executive conduct is exercised by all regular courts of all

[69] Marbury v. Madison 5 US 1 Cranch 137 (1803), cited in Asseffa Fiseha, Federalism and Accommodation of diversity in Ethiopia, p. 399.

[70]This is judiciary invented doctrine from article III of United States constitution. Thus, the court declines to give advisory opinions and to adjudicate what the German constitutional court does by way of abstract review. It is established that federal judges will not render an opinion or decide a case unless there is an actual dispute between litigants before the court. The courts settle the adverse interests and the decision must have effect on the parties. The case is then said to be justifiable. It is one of the mechanisms of self-restraint developed by court over the years to avoid head on clashes with the other branch of government.

[71] For more comprehensive treatment of the differences see Allen Brewer- Carias, Judicial Review in Comparative Law (Cambridge: Cambride University Press, 1989), p. 131-135 (herein after Brewer)

[72] This was the essence of Hamilton's argument in the federalist papers No. 78 which John Marshal was to further develop in his famous Marbury v. Madison decision. He wrote, "The interpretation of law is the proper and peculiar province of court. A constitution is, in fact and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body."

tiers.[73] In other words, the supremacy of the constitution is controlled solely by the regular judiciary, and questions of constitutionality of a legislative or executive act or decision arises incidenter, that is, in the context and during a specific litigation between parties.[74] In the incidental judicial review, the court rules on the (un)constitutionality of a law or act just as a matter of course alongside all other factual and legal disputes involved in a case pending before it.[75] The effect of the judicial determination of the (un)constitutionality of a dispute is inter partes, and its application does not extend to non-parties to the case.[76] However, as a matter of exception, the effect of (un)constitutionality of a dispute becomes erga omnes, binding upon all entities in the country's territory, if the case has been appealed to the Supreme Court and is given a final decision thereby.[77] Since all courts are entitled to rule upon the (un)constitutionality of a law or act just as a matter of course in the determination of concrete factual cum legal disputes that come before them from time to time, the issue of referral of constitutional disputes does not normally apply in the diffuse system. To the extent that a concrete litigation before a regular bench requires constitutional interpretation or declaration of unconstitutionality, each court of all tiers is a constitutional court. Conversely, the Supreme Court is just as much a part of the traditional judiciary, adjudicating concrete controversies between litigants, as are the lower federal and state courts.[78]

2.2.4.2. The Concentrated System

In the centralized system of judicial review,[79] the power to pass judgments on the constitutionality of a law or conduct is vested exclusively in a separate body whose sole duty is to act as a constitutional judge.[80] Such an organ could be a Constitutional Court, a Supreme

[73] H. Hausmaninger, 'Judicial Referral of Constitutional Questions in Austria, Germany, and Russia', 12 Tulane European and Civil Law Forum (1997) at 25 (herein after Hausmaninger).
[74] Ibid.
[75] Cappelletti, Supra note 10.
[76] Hausmaninger, Supra note 73.
[77] Cappelletti, Supra note 10, pp. 85–6; Brewer, Supra note 71, p. 93.
[78] H. Schwartz, 'The New East European Constitutional Courts', 13 Michigan Journal of International Law (1992): 741, 743. (Herein after Schwartz).
[79] With the solitary exception of Portugal, which has adopted a mix of centralised and decentralized judicial review, all European countries adhere to the centralised model. See A. Alen et al., 'The Relations Between the Constitutional Court and the Other National Courts, Including the Interference in this Area of the Action of the European Courts', 23(8–12) Human Rights Law Journal (2002) at 304, 308.
[80] Brewer, Supra Note 71, p. 185.

Court or a separate special body such as the French Conseil Constitutionnel.[81] The purpose of such special institutions is invariably to judge the validity of a law or act 'with simple and rational logic, completely separate from the need to settle disputes in specific cases and acting as a negative legislator'.[82]

Distinct from and independent of the ordinary courts, the constitutional court serves as a watchdog for the enforcement of the supremacy of Constitution. The court as such does not involve itself in the ordinary settlement of disputes unless the case relates to a constitutional question. However, it does not restrict itself to constitutional issues emanating from specific cases. It can also decide differences of opinions or doubts on the compatibility of federal or state law with the basic law upon the request of a few public bodies.[83]

Unlike the diffuse system where judicial review takes place in the context of resolving a concrete case that gives rise to it, the primary function of constitutional courts of the concentrated systems is confined to abstract review. This mode of judicial review, therefore, 'is not to adjudicate controversies between individuals or between them and their government, but rather to guide interpretations of that nation's Constitution, regardless of how the interpretational issue arises'.[84] Disputes necessitating direct interpretation of Constitution and testing other legislations and/or executive conduct against the same can be channeled to the special constitutional body either by virtue of a direct action (principaliter) by interested parties or through specified state bodies or a referral by the court. Thus, constitutional interpretation can be initiated by government bodies, private parties or a judicial referral requesting the constitutional body to interpret provisions of the constitution and to test the constitutionality of the contested legislation, decision or conduct.
But, the constitutional courts, despite their specific national designations, are an entirely separate institution from the traditional judicial branch of the state. Nor are they part of the executive or legislative arms of the same. As Crisaffuli observes:

[81] See Alen et al., Supra note 79, p. 305.
[82] Brewer, Supra note 71, p. 192.
[83] See basic law Art. 93 for more on the German Constitutional Court see Rainer Arnold, ' The German Constituitional Court and Its Jurisprudence in 1996, Lars Mammen, A Short note on the German Federal Constitutional court and its Power to review legislation,(European Human Rights Law Review 6:4 (2001)), p. 433-438.
[84] Schwartz, Supra note 78.

> [*the European Constitutional Court] is neither part of the judicial order, nor part of the judicial organization in its widest sense . . . [T]he Constitutional Court remains outside the traditional categories of state power. It is an independent power whose function consists in ensuring that the constitution is respected in all areas.*[85]

Judicial referral in the concentrated systems is discretionary, leaving the regular judge to decide whether it is warranted. The constitution-interpreting body does not have the power to initiate a constitutional issue;[86] it renders a decision only when a constitutional issue comes before it, through a referral from a court or via a direct application by private parties. Its decision should be limited to the question of constitutionality of a law or decision, and excludes concrete constitutional adjudication, which remains within the jurisdiction of the courts.[87] Once given, the designations greatly vary from one country to another: constitutional court, constitutional tribunal and constitutional council are a few of the common names. It is generally a *sui generis* court as its constitutional position is positioned 'within the state organization opposite to the other, more "traditional" state powers – legislative, executive and judiciary and therefore does not come under the constitutional title that relates to the latter'. The decision of the constitutional court produces erga omnes effects,[88] in the same way as does the decision of the Supreme Court in the diffuse (American) system.

2.2.4.3.The Mixed System

The mixed systems of judicial review apportion constitutional adjudicating powers between the regular judiciary and a separate constitutional-interpreting body. The mixed system of constitutional review has been principally practiced in Latin American countries such as Colombia, Venezuela, Peru and Brazil, and in a few European states, namely Portugal and in a limited form in Switzerland.[89] Just as in the American system of diffuse judicial review, any party to a civil or criminal proceedings or the court which is a forum thereof can raise the constitutional question particularly constitutionality of legislative or executive acts, and courts of

[85]Quoted in L. Favoreu, 'American and European Models of Constitutional Justice', in D. S Clark (ed.), Comparative and Private International Law: Essays in Honour of John Henry Merryman on His Seventieth Birthday, Duncker and Humblot (1990), p. 105, 112.
[86] Brewer, Supra note 71, p. 193.
[87] Id., p. 194.
[88] Ibid.
[89] Id., p. 263.

all levels are empowered to rule on the constitutionality of the challenged law, decision or Act.[90] Such cases are thus review incidenter and involve concrete review. Like the diffuse judicial review, the regular courts can rule the meaning of the constitution and on the (un)constitutionality of a law, but with inter partes effects.[91]

However, a party to a concrete judicial proceeding can appeal to the constitutional court (or similar tribunals) to reverse a decision of the regular court upholding or rejecting the (un)constitutionality of a law the content of which potentially affects the outcome of the concrete litigation. Or a sitting judge can refer, ex officio, the constitutional issue to the constitutional court for the latter's interpretive guidance, pending which the proceeding before the court stays. Only the decision of the constitutional court has erga omnes effects. As in the centralized systems, the proceedings before the constitutional court would be limited to abstract review of constitutionality of a law, pending which the related proceedings (concrete dispute) would be stayed until the outcome of review of constitutionality was handed down. The decision of the concrete dispute would still remain within the exclusive jurisdiction of the regular courts, appealable only to the higher judicial tier in accordance with normal civil or criminal procedures. The jurisdiction to hear final appeal on the concrete aspect of the case would be reserved for the highest regular court (normally the Supreme Court, or its cassation division).[92]

The Ethiopian Constitution has apportioned the duties of constitutional interpretation between two bodies: the judiciary and the CCI/HoF. The boundary between the powers of the regular judiciary and those of the HoF, which is an amorphous hybrid of quasi-judicial, semi-executive bodies, has been a subject of rumbling debates. As will be discussed in more detail in chapter three, the Ethiopian system of constitutional interpretation is more of a mixed system rather than the concentrated or diffuse system per se because constitutional interpretation has been apportioned between the regular judiciary as organ to adjudicate constitutional issues, and the CCI/HoF which have also been given the powers to interpret the Constitution without rendering a final decision on questions of fact. Because, it is arguable that judicial powers, at both federal

[90] Id., pp. 266–7.
[91] Id., p. 266.
[92] Id., pp. 267–9.

and state levels, are vested in the courts only.[93] Judicial powers naturally include the power to interpret, apply and ensure the observance of the Constitution. Short of this, the grant of judicial powers would add up to little substantive effect. On the other hand, '[a]ll constitutional disputes'[94] that the court deems necessary to refer to the CCI/HoF for interpenetrative guide[95] and that the CCI/HoF consider as necessitating constitutional interpretation[96] shall be decided by the House of Federation.

To be sure, both the diffuse system and the concentrated system of judicial review, or the mixed system that is a hybrid of both systems, are compatible with common law and civil law legal systems and have been used in many countries across the globe.[97] Arguably, the mixed system of judicial review is one in which the maximum protection of the Constitution (Constitutional Supremacy) is established.[98]

2.3. The Role of Judiciary in Constitutional Interpretation and Protection of Human Rights

In the modern constitutional State, the principle of an independent Judiciary has its origin in the theory of separation of powers, whereby the Executive, Legislature and Judiciary form three separate branches of government, which, in particular, constitute a system of mutual checks and balances aimed at preventing abuses of power to the detriment of a free society. To discuss the role of judiciary in constitutional interpretation and protection of human rights, it is necessary to discuss the relationship between constitutional interpretation and separation of power.

2.3.1 Constitutional Interpretation Versus Separation of Power

To examine the relationship between constitutional interpretation and separation of power, let me begin with brief explanation about the concept of separation of power because one can extract role of judiciary in constitutional interpretation from the theory of separation of power.

[93] FDRE Constitution, Supra note 1 Art. 79(1). The word 'only' in italics comes from the controlling Amharic version of the Constitutional provision.
[94] Id., Art. 83(1).
[95] Id., Art. 84(2).
[96] Id., Art. 84(1).
[97] Brewer, Supra note 71, p. 263.
[98] Ibid.

Accordingly, what do we mean by separation of power? The doctrine of separation of powers traces back to Aristotle and J. Locke. A renowned French political philosopher, Baron de Montesquieu,[99] designed a particular feature of separation of powers. He proposed the need for three branches of power in every government. The first is the legislative who enacts laws or amends those already enacted. The second is the judiciary whose function is dispute settlement through interpreting the laws already enacted by the legislator. The third is the executive who enforces laws through making peace and war, establishing public security and the like. He argued that the existence of separation of power helps to promote liberty, individual security and protect against tyrannical government. Lockhart described this as:

> *When the legislative and executive powers are united in the same person, or the same body of magistrate, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.*[100]

The same is true when judiciary is not separated from other branches. When it joined the legislature the life and liberty of a subject will fall under arbitrary control and the judiciary will be turned into the legislative organ. When it is with the executive, judge will behalf in violation and oppression for consideration of political desire of the executive. Thus, the separation of power is decisive for the liberty.[101]

Even if Montesquieu's idea is challenged for being inapplicable to modern government as it is abstract and does not provide a systematic relation among the three branches, he suggested three elements in separation of power. The first is the separation itself so as to maintain stable political system. The second is separation of power of function in order to minimize interference that avoids chaos in the overall machinery of the government. The third is separation of persons.[102]

Today however, there is no pure separation of power either in function or in personnel. The Americans have incorporated a concept known as check and balance to the proposed principle of separation of power. There is overlap in exercising power among the three branches though their

[99] Sharon Krause, Supra note 64, p. 231-265.
[100] Lockhart, Supra note 42, p. 498.
[101] J.C.N Paul and C. Calapham, Ethiopian Constitutional Development (1956), p. 48 (herein after Paul).
[102] Mohammed Benti Sirag, The Power of House of Federation to Interpret the FDRE Constitution, (1997).

respective function is regulated by law. Where article I of the U.S Constitution bestows all legislative function to the Congress, article I and II in turn make the President play an important legislative function in proposing legislations, adjourning the two Houses and calling the Congress for special sessions. The Congress also shares the executive power of the President through establishing the executive departments and demarking the lines of authority among them. The Senate can also refuse to approve the choice of important officials by the President. The two houses have control over the budget which is the sword and purse of all the three branches. Both the Congress and the President exercise some power of judiciary. While the Congress exercise control in nominating the federal judges, the President involves in approving them. Courts on their part have legislative and executive power through interpretation. They can perpetuate enacted laws as constitutional or reject them by declaring unconstitutional.[103]

In France, Montesquieu principle was interpreted literally. There was theoretical separation of power. By law, the parliament is legislative body where it also selects the cabinet which is the executive body. The judiciary was absolutely isolated from the legislative as the power to scrutinize the constitutionality of laws is given to a separate independent organ.[104]

Peltason had rightly asserted the principle of separation of powers from the perspective of modern Constitution in the followings:

> "*It is sharing of powers by separated institutions… where each department is given a voice in the business of the others, and each is made dependant on the cooperation of the others in order to accomplish its own business*."[105]

This overlap of power may facilitate or disturb the smooth exercise of one's governmental branch function. This can be manifested through constitutional interpretation. The interrogative issue "who the interpreter should be?" is dependent upon the way of appreciation of the principle of separation of power in a legal system. States have empowered institutions with constitutional interpretation for various rationales. The discussion here under is about the practice of some states.

[103] W.F. Murphy, American Constitutional Interpretation, (1986), p. 48-52 (herein after Murphy).
[104] Paul, Supra note 101.
[105] Crown and J.W Peltason, Crown and Peltason's Understanding of the Constitution (10th ed., 1958), p. 22.

2.3.2. Constitutional Interpretation and Separation of Power in Some States

The U.S. Supreme Court is empowered with constitutional interpretation on the basis of judicial supremacy principle. It is true that the U.S constitution does not clearly state the power of judicial review, but the system is well established and become a tradition through practice. The subject of constitutional review, however, gained considerable attention only after 1803 when the American Supreme Court in *Marbury V. Madison* asserted its power to review the conformity of legislation with the constitution and to disregard a law held to be unconstitutional.[106] The judicial supremacy is justified for the need to have a final judge at times of dispute among the different branches of government and for institutional competence. Had interpretive function was vested in the legislative or the executive, they would have exercised it improperly as they are busier for legislative and administrative commitments.[107] Thus, the U.S courts, particularly the Supreme Court, have the power to hold any law or official act unconstitutional and hence make it unforceable. Interpretation enables the judiciary to check the legislative and the executive.[108]

Unlike the Americans, the British courts are not the ultimate guardians of the constitution. The principle of parliamentary sovereignty has precluded courts from striking down parliamentary legislation for its unconstitutionality. But they have the power to interpret the acts of the parliament. A famous British economist and journalist, Walter Baehot, said that: 'there is nothing the British parliament cannot do except transforming a man into a woman and a woman into a man.'[109] Therefore, it is up to the parliament to declare any law of itself or administrative act as unconstitutional.[110]

A number of other European countries have adopted, by and large, a different model of constitutional review. In most of the European countries the power of constitutional review is assigned to a single organ of state. This may be either a supreme court or a special court created

[106] Marbury v Madison (Supreme Court of U.S 1803 5U S. (1(Granch) 137, 2, L.Ed.60 in D. Kommers and **J.** Finn, American Constitutional Law: Essays, Cases and Commentary Notes (2000) 25. Cited in Yonatan tesfaye, Judicial Review And Democracy: A Normative Discourse on The (Novel) Ethiopian Approach To Constitutional Review, Hein Online 14 Afr. J. Int'l & Comp. L. 53 (2006).
[107] Murphy, Supra note 103, p.182.
[108] Henry J. Abraham, The Judicial Process: An Introductory Analysis of the Court of U.S, England and France, (6th ed.,1993), p. 272.
[109] Id , p. 288-289.
[110] Ibid.

for that particular purpose. This system is called a concentrated system of constitutional review.[111] For instance, states like Germany and Italy have special constitutional tribunals. Such tribunals are outside the ordinary court structure. The federal constitutional court of Germany has an exclusive power to determine constitutionality of law.[112]

In France, where it is considered that "constitutional review through an action in the courts would conflict too much with the traditions of French public life", constitutional review is exercised by a body other than a court. It is the Conseil Constitutionnel, a political body, which exercises constitutional review.[113] The Conseil Constitutionnel challenges the constitutionality of a law only before it is promulgated by parliament. Hence the reason some authors refer to the system as a preventive system of constitutional review.

The institution of constitutional review in France is sometimes described as another "European Model". This is partly because of the fact that the Conseil Constitutionnel deals only with constitutional questions. However, the Conseil Constitutionnel is a political body composed of members appointed by three bodies: The President of the Republic, the National Assembly and the Senate. Its whole structure is essentially political. Moreover, in contrast to the other systems of constitutional review, the Conseil Constitutionnel does not deal with constitutionality of law as a result of a challenge in the ordinary courts by way of defense. As indicated earlier, examination of Bills before promulgation is typically the only way envisaged for dealing with questions of constitutionality.

The system of constitutional review adopted by various African countries appear to be broadly based on these western models of either the American or European system of control, notwithstanding with some modifications or adjustments. There was no disposition to adopt an original or, if you want, an "African system of review".

In some of these African states, the power of constitutional interpretation is vested on all ordinary courts while the highest court in the system provides for the uniformity of jurisdiction.

[111] Capelletti, Supra note 10, p. 136-146.
[112] Assefa F., Supra note 67 , p. 290.
[113] See generally J. Bell, French Constitutional Law (2001), p. 1-27.

This is what is earlier referred as the decentralized or diffused system of review. In Nigeria, for example, the Constitution confers authority on the High Court, Court of Appeal and the Supreme Court to interpret and enforce the provisions of the Constitution. The courts are also vested with the power to rule on all matters relating to the constitutionality of legislation with the power to make final decision resting on the Supreme Court.[114] Botswana, Gambia, Guinea, Malawi, Ghana, Seychelles, Sierra Leone, Tanzania and Swaziland have also adopted a similar system of review.[115]

This system of review posits the judge as the guardian of the Constitution. That is, in fact, what a judge of the Botswana Court of Appeal said in a leading judgement on sex discrimination in citizenship matters:

> *The Constitution is the supreme law of the land and it is meant to serve not only this generation but also generations yet unborn. It cannot be allowed to be a lifeless museum piece; on the other hand the Courts must continue to breath life into it from time to time as the occasion may arise to ensure the healthy growth and development of the state through it....We must not shy away from the basic fact that whilst a particular construction of a constitutional provision may be able to meet the designs of the society of a certain age such a construction may not meet those of a later age.. .I conceive it that the primary duty of the judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society.*[116]

The majority of the African countries have, however, adopted the concentrated system of constitutional review. In these systems, constitutional matters are dealt with by specialized constitutional courts with special qualified judges or by ordinary supreme courts or high courts or their special chambers in a special proceedings. In South Africa, for instance, the Constitutional Court is the court of final instance on constitutional matters.

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[114] Constitution of Nigeria (1999), Chapter seven, sec 230ff.
[115] A. Mavcic.A Tabularprentation of constitutional/Judiciarl eview around the world, available on http://www.concourts.net/tab/index.html (accessed on 20-07-2013)).
[116] Unity Dow v Attorney General, (const) 623, (1992) at p.668.

Commenting on the need to empower the courts with the power of constitutional review, Chaskalson P said:[117]

> *The very reason for establishing the new legal order [in South Africa], and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights through the democratic process.*

Benin has as well adopted the concentrated system of constitutional review. Its unique Constitutional Court [118] has the power to rule on the constitutionality of laws in general before their promulgation. It also has the power to rule on the constitutionality of treaties and international agreements. Interestingly, the Court can act on its own motion to determine the constitutionality of laws and regulations that threaten the fundamental rights of people and public liberties.[119] Angola, Benin, Burundi, the Central African Republic, Egypt, Equatorial Guinea, Gabon, Madagascar, Mali and Togo have similarly established specialized courts (i.e. Constitutional court) to exclusively deal with constitutional matters. Countries like Burkina Faso, Cameroon, Chad, Niger, Sudan, Zaire and Zambia have, on the other hand, vested the power of constitutional review either in the high courts or their specialized chambers.

A number of African states, it seems, are also influenced by the French model of constitutional review. The system of constitutional review in Morocco, which has some sort of political and preventive review, is one such good example. In line with the practice of the Conseil Constitutionnel of France, the Constitutional Council in Morocco practices a preventive control on the constitutionality of laws.[120] The constitutionality of a law is examined prior to its adoption. The Council, according to article 77 of the Constitution, is composed of four members nominated by the King, four other members nominated by the President of the Chamber of Representatives after consultation with the groups and another member who serves as the

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[117] A. Chaskalson quoted in Lord Lester of Herne Hill, The Challenge of Bangalore: Making Hunan Rights a Practical Reality, (1999) Commonwealth Law Bulletin 47, 50.

[118] The Court coalesce the task of a state sponsored human rights institution with the stature and institutional gravitas of a constitutional court. It can be considered a hybrid institution that encompasses the competencies typically associated with constitutional courts and a human rights mandate generally advanced by state sponsored human rights institutions. See generally A. Rotman, Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights, **17** Harvard Human Rights Journal (2004) at 289**.**

[119] Ibid.

[120] Ibid.

President of the Constitutional Council and who is as well appointed by the King. Each member of the Council, including the President of the Council, is appointed for a period of six years. The right to refer to the Council any legislation to examine its constitutionality is reserved to the King, the Prime Minister, the Speaker of the Parliament or 25% of the members of the Parliament. A similar political and preventive review is adopted by Algeria, Comoros, Djibouti, Ivory Coast and Mozambique.[121]

The recent constitutional exercises undertaken by some African countries do not as well depart from the usual trajectory of adopting either the European or American model of constitutional review. Currently, the Kenya Constitution provides the power of constitutional review to the High Court, the Court of Appeal and the Supreme Court.[122] The High Court is the court of first instance for cases involving the constitutionality of legislation. The High Court shall also have unlimited original jurisdiction in all matters relating to the interpretation and enforcement of the provisions of the constitution. The Court of Appeal, by way of appeal, may also decide on cases that involve the interpretation and enforcement of the provisions of the Constitution. The Supreme Court, on the other hand, have appellate jurisdiction to hear appeals on similar matters from the Court of Appeal or from any other court or tribunal. The constitution makers in Kenya, it seems, are intending to adopt the American model of constitutional review.

From the above discussion, as true for most, if not all, system of government around the world, the court is empowered with the inherent power to interpret laws. It is difficult, perhaps, impossible to imagine a court having no power to adjudicate matters appearing before it. Even in the most despotic system, this is not that disputable at least, de jure.

In the context of Ethiopia at the time of drafting of the 1995 Constitution there is a fear if proper safeguard were not created the Constitution itself would be in danger is being perverted and distorted by the government that would be in power. Resolutely, the Constitution created an independent and impartial judiciary which is fully empowered judicial power. To ensure this

[121] Today close to 100 countries have same form of constitutional review. See MI. Aboul - Enein, The Emergence of Constitutional Courts and the Protection of Individual and Huma Rights: A Comparative Study, in AO Sherif and E Cotran (eds) The Role of the Judiciary in the Protection of Human Rights (1997) , p, 314.
[122] The new keneya constitution - 2004 available on http://www.kenyaconstitution.org (accessed 20-07-2013).

independence and impartiality the Constitution further proscribed any sort of interference by any governmental body, government officials or from any other sources.

Accordingly, they shall exercise their function in full independence and shall be dictated solely by the law and no judges shall be removed from his duties before he reaches the retirement age determined by the law except in case of disciplinary measure as decided by the judicial council and resignation due to health or other personal reasons. More essentially the constitution prohibits the establishment of any special court or ad hock courts which take judicial powers away from regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures as per Art.78(4) of the FDRE Constitution. Therefore, as a matter of principle the Ethiopian judiciary is created in the way that ensures /that does not jeopardize/ its inherent adjudicatory power, personal independence of judges and institutional independence and impartiality of the courts. If that is the case, what is the problem that makes the Ethiopian judiciary powerless, in matter of Constitutional interpretation in line of practical realities?

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Judiciary is an organ of a government which interprets the law in any system of government. As we see from most, if not all, countries' Constitutions, judiciaries have the power to interpret and settle Constitutional disputes. Yet, in fact, Ethiopia seems follow peculiar approach in solving constitutional question unlike any one of the above methods. Ethiopia established House of Federation for interpreting the Constitution, which is neither a court nor an independent organ. House of Federation is a political organization, because its members are elected by regional state councils as pursuant to Article 61(3) of the FDRE Constitution. However, this does not mean that the House of Federation has exclusive power to solve constitutional issues in Ethiopia. Furthermore, judicial organs also share the power to entertain the issues of constitutional disputes because courts have inherent power to determine the constitutionality of laws and adjudicate constitutional issues. In addition, even though most scholars as well as the practices in Ethiopia are not in a position to support the view; the Constitution by itself empowers judiciaries to entertain the constitutional issues.

2.3.3. Human rights versus the Judicial Review

Modern Constitution almost invariably contains explicit provisions recognizing and protecting certain rights of individuals. Of course the inclusion of such provisions, even in a nation's most fundamental legal document, does not necessarily guarantee their effective existence. For instance over 200 years of American constitutional history, and similar constitutional democracies of the 20th century, it has been the concept of judicial review- courts interpreting and applying constitutional provisions in the context of litigated cases – that has given efficacy and meaning to such provisions.[123] The interplay between written constitutions and constitutionally protected rights of individuals is thus a critical feature of contemporary constitutionalism. Judicial review is a more complex phenomenon. Not in terms provided for in the United States' constitution, it has nonetheless been established feature of the American constitutional landscape since the landmark decision of the Marshal court in *Marbury V. Madison* in 1803.[124] And on the whole, it has worked more or less effectively for almost two centuries and has provided a pattern for 20th century constitutionalists that are now a pervasive one.

But judicial review has also been the source of ongoing controversy. Some still question the entire concept doubting its legitimacy. Criticized as undemocratic by many, it is applauded by others as the only effective way to ensure that constitutional protections of individuals – many of which are anti-majoritarian in character are meaningful.[125] Much of the current debate over judicial review, especially in America, accepts its existence and focuses instead on matters of scope, standards, timing and the like. The most significant threat to the effectiveness of judicial review as the means for insuring that rights protection of constitution are effective seem to be the intensified politicizing of the process, especially in the U.S Still the issue has universality to them that strongly suggests engagement in a comparative dialogue, so that each of us may learn from the experience of others. This seems especially productive where the underlying values reflected in the rights provisions of specific constitutions are similar as is the case with Ethiopia.

2.4. Pros and Cons of Vesting Constitutional Interpretation in Judiciary

[123] James O'Reilly, Human Rights and Constitutional Law , (1st ed., Round Hall Press, Kill Lane Ireland, 1992), p. 147.
[124] U.S (I Cranch) I 37, Supra note 106.
[125] James O'Reilly Supra note 123 p.149.

Generally, there is no consensus on the matter of vesting the power of constitutional interpretation in the hand of judicial organ of the government. There is strong argument that claims courts must be avoided from constitutional interpretation particularly determining the constitutionality of statutes, since judges are not directly accountable to the public at large.[126] Proponents of extra-judicial constitutional interpretation (i.e. those who want to take the power of constitutional interpretation away from the courts) argue that judicial interpretation is undemocratic. It is so because it permits unelected judges, who are accountable to nobody, to nullify the acts of democratically elected legislatures who are accountable to the public. They point out that when a supreme court or a constitutional court declares a statute unconstitutional, it is overturning what appears to be the popular will. When judges reject the products of majoritarian democracy, they argue, they engage in counter-majoritarian law making.

The counter-majoritarian problem finds its roots in the broader structural theory about popular sovereignty and majoritarian governance. A theory which is based on the premise that important decisions like the power of constitutional interpretation should not be uncoupled from the electorate or a body that represents the electorate.[127] It is based on this theory that constitutional scholars question the legitimacy of judicial review: why should a majority of justices appointed for life be permitted to outlaw as unconstitutional the acts of elected officials or of officers controlled by elected officials? In the words of Alexander Bickel, who for the first time labelled this question as the "counter-majoritarian difficulty, the root difficulty is that judicial review is a counter-majoritarian force when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That without mystic overtones is what actually happens. It is the reason the charge can be made that judicial review is undemocratic.[128]

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[126] Aharon Barak, The Judge in Democracy (Published by Princeton University Press,41 William Street, Princeton, New Jersey 08540, 2006), p. 91.

[127] T.W. Ruger, A Question which Convulses a Nation the Early Republic's Greatest Debate about the Judicial Review Power (2004) Harvard Law Review **857.** Cited in Yonatan tesfaye, Judicial Review And Democracy: A Normative Discourse On The (Novel) Ethiopian Approach To Constitutional Review, Hein Online 14 Afr. J. Int'l & Comp. L. 53 2006 p. 141.

[128] **A.** Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics as cited in **J.** Perry, The Constitution in the Courts: Law or Politics? (1994) 16**.**

The counter-majoritarian problem has given rise to a considerable amount of literature that some have even started to wonder if this has become an obsession that has gripped the minds of constitutional theorists. The centrality of this dilemma to constitutional theory can hardly be overstated.[129] Some of the most important works in constitutional jurisprudence are attempts to resolve or dissipate the counter-majoritarian problem.[130]

Some of these constitutional theorists argue that those who view judicial review as an anti-democratic force do so because they have a "reductionist" view of democracy. For them democracy is more than majority rule. They argue that judicial review does not undermine democracy. In fact, it enhances democracy. Others, while conceding that it is an anti democratic force, still stress that it is an important institution that we need to retain if we are going to have effective constitutional governance and democracy. As a result, proponents of this argument have often attempted to reconcile judicial review and democracy rather than to regard it as an illegitimate institution in a democratic society. More often than not the debate turns on the definition of democracy.

The definition of democracy is a matter of deep controversy. Political science theorists diverge greatly about what democracy mean. As pointed out by Ronald Dworkin, there is no consensus as to which kinds of arrangements or combination of arrangements as far as representation, election or allocations of power are concerned provide the best available version of democracy.[131] The particular conception of democracy to which a constitutional theorist adheres determines and often explains his or her position on the counter-majoritarian problem.

Any majoritarian version of democracy understands democracy in procedural terms. According to this position, the outcome of important matters should be determined according to the will of the majority of citizens or their representatives.[132] Any law that the government legislates and

[129] A. Farber and S. Sherry, Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations (2002) 144.
[130] R.J. Lipkin, Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism (2000) 8.
[131] R. Dworkin; Freedom's Law: The Moral Reading of the American Constitution (1996), p. 15.
[132] Id., p. 16.

policies it adopts should be the ones that have received the blessing of the majority.[133] Democracy is thus primarily seen as a means of arranging and managing representative government in which the core principle is the rule of the people, often equated with the rule of the majority. This, many believe, provides the very essence of democracy. For these theorists, who explain democracy in procedural terms, policy choices must be made by those representative of and accountable to the electorate.[134] Judges are supposed to follow these choices of the majority. They should not be allowed to reject the products of majoritarian democracy. Allowing a judge to do so would be to effectively transform such a judge into "a philosopher king, sitting in judgments on the wisdom and morality of all society's social policy choices".[135] Any government that allows judges to stop the acts of the legislature, they conclude, has lost the essential characteristics of a democratic system.

For others, however, democracy is not content-independent. They see democracy as 'a regime characterized by certain ends and values towards whose realization a certain political group aim and works.'[136] There are fundamental values to the "democratic enterprise" which cannot be amended or destroyed by the majority government. As a result, they argue, the political majority has no "exclusive claim" on the meaning of democracy and the Constitution.[137]

Based on this understanding of democracy, they contend that an effective democratic society implies the existence of institutional limitations on the power of the majority government. The desire to ensure that majoritarian branche adheres to limitations imposed by constitution calls for some form of institutional constraint. This, they contend, can best be achieved by the judiciary - an institution that is free from majoritarian pressure. According to them, the judiciary is best suited to interpret the constitution and to protect its principles.

Therefore, in conclusion there is strong and sound arguments that claims, empowering the judicial organ to interpret the constitution as well as review the constitutionality of legislations

[133] B. Brian, Democracy and Power: Essays in Political Theory (1991), p. 25.
[134] M.H. Redish, The Constitution as Political Structure (1995) at 8.
[135] Ibid.
[136] N. Bobbio, Democracy and Dictatorship (1989) at 157.
[137] E. Chemerinsky, The Vanishing Constitution, Harvard Law Review (1998) 76-77. Cited in Yonatan Tesfaye, Judicial Review And Democracy: A Normative Discourse On The (Novel) Ethiopian Approach To Constitutional Review, Hein Online 14 Afr. J. Int'l & Comp. L. 53 2006, p. 141.

enacted by the parliament are used as stepping stone to ensure the principles of constitutionalism.[138]According to this line of argument, when judges interpret the provisions of the Constitutions and void harmful laws, they give expression to the fundamental values of the society, as they have evolved throughout the history of that society.[139] Thus, they protect constitutional democracy and uphold the delicate on which it is based and so that, they prevent the idea that considered democracy as the mere rule of the majority.[140] This supporter of judicial review of the constitutionality of statutes of the parliament claims that through judicial review, we are faithful to the fundamental values that we imposed on ourselves in the past, that reflect our essence in the present, and that will guide our national development as a society in the future.[141] This group argued that democracy is more than a mere populism; it is a lawful exercise of powers conferred by the Constitutions.[142] For instance, Beverley McLachlin argued that, when the courts hold a law to be invalid, they are not limiting parliamentary supremacy; rather they are merely expounding the limits that the Constitution imposes on the parliament.[143] Therefore, McLachlin further argued that, the claims that says, empowering the judicial organ to review the constitutionality of the statutes, enacted by the parliament may result in; replacing the parliamentary supremacy by the judicial supremacy is not true, rather it is a myth.[144]

The other arguments that claimed, it is inappropriate to empower judges, who is not accountable to the public to entertain the constitutionality of the laws enacted by the parliament is also criticized by the supporter of judicial review. Aharon Barak argued that, it is a mistake to assume that to be a true democracy, every organ of the state must be accountable to the public as the legislature is.[145] Even though, accountability to the people is necessary; different type of accountability is there for the judiciary, not the same type of accountability to that of the legislature.[146] Hence judge is not a politician, so his or her accountability is differs from the

[138] Aharon Barak, Supra note 126, p. 95.
[139] Id, p. 93.
[140] Ibid.
[141] Ibid.
[142] Beverley McLachlin, 'Charter Myths'(33 U.B.C, Rev., 23,31,1999) as cited in Aharon Barak, The Judge in Democracy (Princeton University Press,41 William Street, Princeton ,New Jersey 08540, 2006), p. 94.
[143] Ibid.
[144] Ibid.
[145] Aharon Barak, Supra note 126, p. 94-95.
[146] Ibid.

accountability of a politician.[147] Therefore, a judge's accountability is not expressed in a regular election by the people; rather it is expressed in accountability to the legislature, which can respond to a court's ruling with legislation.[148] It is expressed in accountability to the legal community, by the need to give reasons for every judgement- reasons that are accountable on appeal and stand open to public scrutiny, and it is expressed in accountability for judicial misconduct.[149] ''The most important question is not whether every organ of the government is accountable as the legislature is, rather the question is whether the system as a whole fits our concept of democracy.''[150]

The first argument that claimed judges are give expression to their subjective beliefs is also attacked by this group. For instance, according to Aharon Barak, the judge gives expression not to his own beliefs but to the deep underlying beliefs of the society and so that, the key concept is judicial objectivity which underlies the judicial review of the constitutionality of statutes enacted by the parliament.[151] With regard to judicial review, Justice Iacobucci of the Supreme Court of Canada wrote excellently as follows:

> *Democratic values and principles under the charter demand that legislators and executive take these into account; and if they fail to do so, courts should stand ready to intervene to protect these democratic values as appropriate…..Judges are not acting undemocratically by intervening when there are indications that a legislative or executive decisions was not reached in accordance with the democratic principles mandated by the charter.*[152]

Generally, from the above discussions, one can understand that two competing interests exist. The first interest is that preventing the regular courts to interpret the Constitution in general and review the constitutionality of the legislations enacted by the parliament. Because, courts are not elected by the people or not accountable to the public as well as they are based on their subjective belief. In addition, there may be bad court practices in the history of certain states and they cannot be accepted even by the people as the custodian of rule of law or as a result of legal

[147] Id., p. 96.
[148] Ibid.
[149] Ibid.
[150] Ibid.
[151] Id., p. 95.
[152] Vriend v Alberta (I.S. C. R. 493, 566-67, 1998) as quoted in Aharon Barak, The Judge in Democracy (Published by Princeton University Press,41 William Street, Princeton, New Jersey 08540, 2006), p. 95-96.

system that specific state accepted for centuries may not favor judicial review. Second, the ordinary courts are empowered by the Constitution to adjudicate the constitutionality issues and to interpret the Constitution as a whole, like the U.S. A, Canada, India and others; they have no problem since whether it is the issue of constitutionality or other issue, in all cases courts have the power to entertain it under the Constitution. But the problem comes, if ordinary courts are prohibited to adjudicate Constitutional issues in general. If this so other organ must be established under such Constitution in order to interpret the Constitution as a whole and determine the constitutionality issues in particular. The relationship between this organ that must be established for the purpose of constitutional interpretation and the ordinary courts may complicate the issue of constitutional adjudication, unless managed in a good manner under the Constitution itself and other relevant laws.

We can categorize those states prohibit their ordinary courts from constitutional adjudication into two groups. The first groups are those who preferred to establish an independent Constitutional Courts for the purpose of determining constitutional issues rather than vesting this power in the hand of ordinary courts. Here again we have no problems, because they prefer the constitutional courts which is independent from all the three government branches.[153] Hence there is no more suspicion, on the independence, impartiality and effectiveness of the constitutional courts. Most of the states practicing the civil law legal traditions established independent Constitutional Courts for the purpose of constitutional adjudication rather than vesting this power in the hand of regular courts. Therefore, the writer thinks that it is a matter of their legal histories that make these states to establish independent constitutional courts, not their lack of commitment to ensure the principle of constitutionalism, rule of laws and check and balances among the three branches of governments. Since as one can observe from legal history, there is no judge made law principle and most of the time judges are not allowed to review the constitutionality of the legislations of the parliaments in the continental legal system. Hence countries like Germany, Austria, French and others preferred to adjudicate the constitutionality issue by their independently established Constitutional Courts.

[153] The European Constitutional Court is neither part of the judicial order, nor part of the judicial organization in its widest sense, the Constitutional Court remains outside the traditional categories of state Power. It is an independent power whose function consists in ensuring that the constitution is respected in all areas. See Takele, Supra note 23, p. 6.

The great problem comes with those states preferred neither of the above two methods of constitutional interpretation. Some countries like Ethiopia are introduced unique methods of adjudicating the constitutional issues as discussed above. Here one can not sure, whether or not; the principle of constitutionalism in general and rule of law in particular will be enforced under such system. For instance, 'where a political organ like HoF is empowered to give final decision on constitutional interpretation, it is too difficult to talk about the independence, impartiality and effectiveness of such institutions.'[154] If believing the judiciary for this great responsibility is not accepted as a result of legal practices in the past, in a certain country, it is better to establish an independent constitutional court with the best mechanisms that cope up with the legal context of that particular state. But why certain countries afraid to do so like Ethiopia, and preferred the less independent, impartial and even not effective and efficient organ to conduct constitutional interpretation remains a paradox.

In such systems which empower other organs for the purpose of constitutional interpretation, not independent from politics like Ethiopia; it is naive to think that the democratic principles incorporated under the text of the Constitution are implemented in a good manner. Therefore, it is also impossible to think that an organ (HoF), which is selected by the regional state council as per Article 61(3) of the FDRE Constitution is not biased in favor of the government, especially under the current dominant ruling party (EPRDF) under the Ethiopian federation. Hence, if the power to adjudicate constitutional issues vested in the political organ, rather than in the ordinary courts or independent Constitutional Courts, this organ, may naturally interprets the Constitution and adjudicate the constitutionality issues in line with the ideology and political interests of that specific ruling parties which elected the members of this adjudicatory organ rather than in line of the intention of the covenant of the nation (Constitution). Finally this ways of employing constitutional interpretation mechanism through an organ which is intermingled with the ruling political parties, is not promising to ensure the principles of democracy in general and far from enforcing the principle of constitutionalism, which incorporated under the text of the

[154]Solomon Emiru Gutema, Compatibility of the Revised Oromia National Regional State Constitution of 2001 With the FDRE Constitution With Respect to Adjudication of Constitutionality Issues And Its Possible Effects, (thesis submitted for Partial Fulfillment of the Requirements For the Degree of Masters of Laws [Ll.M] In Constitutional And Public Law, (Addis Ababa, Addis Ababa University, 2011)).

Constitution practically. This may show lack of confidence or commitment to practice the principles of separation of powers, check and balances, independence of judiciary and ensuring the principle of rule of law by those governments which preferred a political organization for the purpose of constitutional interpretation by excluding ordinary courts and fail to establish an independent Constitutional Courts for the same purpose.

In conclusion, as we observe from various countries legal system, the most democratic countries ever seen on the earth likes 'the United States of America preferred their ordinary courts for the task of constitutional interpretation'[155] rather than recognizing other organ under their Constitution for this purpose. Hence, as the writer thinks vesting the power of constitutional interpretation in the hand of ordinary courts or independent constitutional courts is a sign of strong commitment to ensure the principle of democracy in general and the principle of constitutionalism in particular while failing to do so and establishing other organs which are not independent from the influence of the government or ruling dominant political party system shows, lack of commitment to enforce the democratic principles, particularly the principle of constitutionalism or fail to ensure these principles though there is a commitment to do so by a certain government.

[155] Ibrahim Indris, Constitutional Adjudication under the 1994 FDRE Constitution in Ethiopian Law Review, vol.I, No.1 (2002), p. 70.

CHAPTER THREE

CONSTITUTIONAL INTERPRETATION, PROTECTION OF HUMAN RIGHTS AND THE JUDICIARY IN ETHIOPIA

3.1. Constitutional Interpretation: Historical Overview

A brief examination of the legal history of Ethiopia reveals that constitutional interpretation does not have a gratifying history. For instance, when we look at the time in which Ethiopia has gain the first Constitution of 1931, it did not include a specific provision on constitutional interpretation.[156] One may even argue that such conception of constitutionalism was not possible during that period. When we look at the 1955 Constitution Art.122 declares that: "all future legislation, decrease, orders, judgments, decisions and acts inconsistent there with shall be null and void." This provision has been subjected to two different arguments in whether there have been constitutional/judicial review/. According to the C. N Paul and C. Clapham, the revised Constitution had a departure from past Ethiopian political tradition by ensuring judicial review.[157] Meaza Ashenafi also shares this view and say that 'constitutional review was possible under the 1955 revised Constitution.'[158]

As Yonatan Tesfaye puts it "the fact that the 1955 Constitution did not explicitly empower a specific organ to exercise the power of constitutional review does not exclude such a possibility."[159] He assimilates this history to the constitutional review of America in which it demonstrates a court may exercise constitutional review without explicit authorization of the

[156] Yonatan Tesfaye, Whose Power Is It Anyway: The courts and Constitutional Interpretation In Ethiopia 22 (2008) Journal of Ethiopian law, p. 131 (herein after Yonatan T.).
[157] Paul Supra note 101, p.165.
[158] Meaza Ashenafi , Ethiopia: process of democratization and development" in A- An-narim (ed) human reports under African constitutions (Philadelphia: university of pennsy) Vania Press, 2003), p. 30.
[159] Yonatan T., Supra note 156.

Constitution. However, there is a contrary opinion to this argument. Those who argue against say that since the power structure envisaged by the constitution recognizes the indisputability of the power of the emperor and grants him a legislative power; make it almost impossible to talk of constitutional review. George Krecznowicz also pointed out the power of the Emperor to quash any decisions rendered by the courts would make exercise of constitutional review pointless.[160] As to the opinion of the writer of this work the second argument is more persuasive than the first on the ground that the emperor has the power to review any decision of the courts. This makes the courts' exercise of constitutional review meaningless.

The 1987 Constitution on the other hand has brought with it the designation of an institution that exercises the power of constitutional review. It contained express clauses on the interpretation of the Constitution and determination of the constitutionality of legislative acts. The state council was empowered to control. However, no significant case was reported.[161] Distinct from all the above Constitution, the current FDRE Constitution provides detailed provision on constitutional interpretation.

3.2. Constitutional Interpretation Under FDRE Constitution

After over throwing the military government, a federal form of government which made ethnicity its base was established. The founding of this form of government was taken as a manifestation for the recognition of different ethnic groups found in the country. Up on the adoption of the 1995 FDRE Constitution, the federal system of government was introduced in Ethiopia with the elements of federalism. Among the fundamental elements, the right to self-determination is granted for every nations, nationalities and peoples of Ethiopia. Five pillars of constitutional principles are recognized, which includes popular sovereignty, supremacy of Constitution, principle of sanctity of human rights, secularism and accountability of the government officials for their conducts.[162] The concept of constitutionalism and rule of law have been introduced subsequent to the coming into force of the FDRE Constitution. Based on this, the Constitution guaranteed the right of self-governance by establishing nine regional states under the current Ethiopian federation. The principles of rule of law, division of powers between

[160] Meaza Ashenafi, Supra note 158.
[161] Id.,p.132.
[162] FDRE Constitution, Supra note 1, Art. 8-12.

federal and regional states, independence of judiciary, separation of powers, principle of check and balance as well as other democratic features of government are incorporated under the text of the FDRE Constitution. More importantly, two-third of the Constitution devoted to the recognition of fundamental rights and freedoms.

The FDRE Constitution ensured that every legislation, government acts, decisions and conducts must be in line with the supreme law of the land. It means that the government institutions and officials are the servants of the nations, nationalities and peoples while Constitution is their manual or guidance. In the federation, every law must be compatible with the FDRE Constitution most of the time on important points like ensuring rule of law, separation of powers, check and balances among the three branch of governments. Since conflicts or disputes are inevitable in federation, the Constitution has provided mechanisms of resolving constitutional disputes and other conflicts.

3.3. The Purpose of Constitutional Interpretation Under the FDRE Constitution

The supremacy clause of the Constitution is a shorthand expression of the fact that constitutional principles are sources of 'an objective normative value system a set of values that must be respected [163] whenever laws are passed, interpreted or applied, and decisions are made or actions are taken. It is a local Grundnorm which once established becomes a wellspring of the normative order from which a country's overall legal system, institutions, procedures, processes and substantive principles flow.[164] The objective normative order and value system established by a Constitution should provide a yardstick against which the legal validity of legislations and governmental (in) actions are measured.[165]

Under the Ethiopian Constitution, [a]ny law, customary practice or a decision of an organ of state or a public official risks nullity if it deviates from the constitutional Grundnorm, the objective legal order sought to be installed by the Constitution.[166] As well as all citizens, political

[163] I. Currie, Supra note 59.
[164] Whinney, Supra note 60.
[165] W. K. Geck, Supra note 61.
[166] FDRE Constitution, Supra note 1 Art. 9(1).

organizations, other associations and their officials, all organs of the state have an explicit 'duty to ensure observance of the Constitution and to obey it'.[167]

Nevertheless, the Constitution cannot create a track from which no one can deviate. It is simply not humanly possible.[168] The best that can be hoped for is for it to provide an overarching framework that can 'facilitate the co-existence of all socially constituted entities, extending in size from the socially constituted self to the political community-at-large'.[169] A deviation from the constitutionally established 'objective legal order' is obviously unconstitutional, but questions arise in relation to the determination of whether a law, decision or practice of a state organ is indeed unconstitutional. Therefore, it is necessary to provide for an institutional guarantee for insuring against or remedying executive or legislative encroachments on the values and principles so consecrated.

Constitutional interpretation also protects individual rights from being violated both by executive and legislative branches of government. Legislative organ may enact laws that violate constitutionally guaranteed individual rights. The executive branches may execute or implement laws in away contrary to the overall essence of constitutionally protected individual rights. In addition, the executive branch may enact unconstitutional and suppressive regulation and directives. In this case, it is the role of the constitutional adjudicator that can reject unconstitutional legislations and remedying unconstitutionally implemented laws and policies. This role of constitutional adjudicator is more relevant now a day where individual interest is overridden by community interest.

3.4. The Scope of Constitutional Interpretation under the FDRE Constitution

Though not exclusively, the FDRE Constitution attempted to point out the scope of Constitutional interpretation. From the close reading of Article 84 of the Constitution and Article 3 of the Proclamation No. 798/2005 called to re-enact for the strengthening and specifying the powers and duties of the Council of Constitutional Inquiry of the Federal Democratic Republic of Ethiopia amend and consolidate the power of FDRE Constitutional

[167] Id., Art. 9(2).
[168] C. Willis, Essays on Modern Ethiopian Constitutionalism: Lectures to Young Lawyers (unpublished, on file with the author, Addis Ababa University, 1997), p. 30.
[169] Id., p. 3.

Inquiry, it has been provided in an express way and it is comprised of the decision on the constitutionality of legislative act, the decision of any organ or official act of the government and interpretation in grasping the correct message of the provisions of the constitution.[170] These three fundamental instances which are within the scope of constitutional interpretation in Ethiopia are separately enumerated as follows:

3.4.1. The Determination of the Constitutionality of Legislative Acts

As aforesaid, the issue with respect to the constitutionality of legislative acts is one of those three instances which demands constitutional interpretation. It is the way of annulling or overriding any legislative act (both at the federal state level) whenever it is found to be unconstitutional.[171] In this regard Art. 84(2) of FDRE constitution states that: "Where any federal or state law is contested as being unconstitutional and such a dispute is submitted to it by any court or interested party, the Council shall consider the matter and submit it to the House of Federation."

Moreover, Art.3 of the proclamation of the Council of Constitutional Inquiry strengthens the point by stating that: "when the unconstitutionality of any law…. is submitted in writing to the Council, it shall consider the matter."[172] Here it is possible to observe that the phrase any law reveals every other law enacted or promulgated by both the federal or state legislature including international treaties in contestation with the supreme law. The organ ordained to interpret the Constitution declares all legislative acts null and void whenever such acts are contrary to the Constitution. In determining the constitutionality of legislative act, the CCI may develop and implement the rule of procedure which it believes to be helpful to investigate and decide on constitutional matters.[173]

3.4.2. Any Customs, Decision of Any Organ or Official of the Government

[170] FDRE Constitution, Supra note 1 Art.84.
[171] See annex how the attorneys of the suspects of corruption claim the phrase 'in exceptional circumstance' in the provisions of Art. 19(6) the FDRE Constitution.
[172] Proclamation to re-enact for the strengthening and specifying the power of constitutional Inquiry of the federal democratic republic of Ethiopia, proclamation No. 798/2013, Art. 4(2) (herein after Procl. No. 798/2013).
[173] Id., Art.16(6).

An act or decision of a government organ or a public official or any customs which is contrary to the constitution are all legal issues that demands constitutional interpretation through the appropriately mandated organ under the law.[174] Any aggrieved party could thus petition on the constitutionality of an administrative act or a decision of any public official whenever it infringes his fundamental rights or where his constitutional interest is at stake because of that act. i.e any person who alleges that his fundamental rights and freedoms have been violated by the final decision of any government institution or official may present his case to the interpreter organ for constitutional interpretation.[175] But, it should be noted that any party to the case could brought his case before the organ mandated to constitutional interpretation only after he has exhausted all the means before the organ to consider the validity of an order or action of a public body.[176]

3.4.3. Interpretation of Constitutional Provisions

Under the Ethiopian context the interpreter of the Constitution is authorized to entertain the provisions of the Constitution whenever there is disagreement on the message of the constitutional provisions is created.[177] The FDRE Constitution does not state in an express way whether it arises in or out of the court litigation. However, pursuant to Art. 4 and 5 of the Proclamation of CCI has specifically enumerated as it could be ensued both in and outside of the court litigation.[178]

The author of this work argue interpretation on the provisions of the Constitution may emphatically arise both in the court during the course of litigation and outside the court. Interpretation on the provision of the Constitution has ensued in the court where any party having a case before a court requests and there is a need for constitutional interpretation in deciding the cases. To put otherwise, where a law's meaning is disputed between the parties before the court, the decision involves its interpretation.[179] This is true because whenever non

[174] FDRE Constitution, Supra note 1 Art.9(1).
[175] Proclamation No. 798/2013 Supra note 172, Art. 5(1).
[176] Ibid.
[177] Yefederation dimtsi, Supra note 43, p, 29.
[178] Proclamation No. 798/2013 Supra note 172, Art. 4 and 5.
[179] Heinrich Scholler; notes on constitutional interpretation in Ethiopia, (Friedrich Ebert Stiftung Press, 2003),p, 16 (herein after Scholler).

consensus exists between the parties about the meaning of certain provisions of the Constitution or any laws, issues of constitutional interpretation arises.

3.5. The Power of Regular Courts in Constitutional Interpretation under FDRE Constitution

Judicial power is among the controversial powers of the three departments of government. Yet the power of the judiciary to interpret the Constitution is the most contested area in constitutional law scholarships. In principle, it could be said that constitutional interpretation is vested up on the ordinary judiciary. This principle does not however always hold true in all countries and depending on the type of legal system, the institution involved in constitutional interpretation varies.[180] Accordingly, the Ethiopian Constitution has apportioned the duties of constitutional interpretation between two bodies: the judiciary and the CCI/HoF even though the scope of their respective power is still a contested area in post 1995 Ethiopian constitutional history and many contending literatures have been witnessed in the last one and half decade regarding the issue. Most of the literatures address the area of constitutional interpretation in Ethiopia from the perspective of two main issues; which are whether or not constitutional dispute and constitutional interpretation as employed by the Constitution meant one and the same and what is the scope of the power of the HoF vis-à-vis the judiciary in constitutional interpretation. Many of the literatures respond to these questions differently and the disagreement has flared up when one looks the late published Article by Getachew.[181]

To respond the first issue it is true that there is constitutional limitation imposed on the judiciary that the power of constitutional interpretation is vested to the HoF/ the CCI/[182] and this raises the argument that courts in Ethiopia cannot interpret the Constitution. The supporter of the understanding that the two terms are employed in the Constitution differently, argued that constitutional interpretation refers to the review of constitutionality of laws made by state and

[180] It can be taken different institutions which are vested with the power to interpret the constitution like the US Supreme Court in the United States, the Constitutional Court in Germany and South Africa, and the Constitutionel Counseil in France. The nature, legitimacy and scope of the power of these institutions vary as well.
[181] Getachew, Supra note 11.
[182] FDRE Constitution Supra note 1, Art.62(1), 83, 84 There constitution uses the two terms, constitutional interpretation and constitutional adjudication, almost equal times and there is disagreement among authors as to whether they are employed to connote the same message in the constitution.

federal legislators whereas constitutional disputes involves cases of concrete/real dispute between parties involving constitutional issue.[183] Others still argue that constitutional interpretation is more than reviewing of the constitutionality of laws and includes the determination of the scope, meaning and content of a constitutional provision in question.[184] According to this view, dealing with constitutional interpretation requires the determination of the meaning of constitutional dispute; thus, constitutional dispute is both the task of determining the scope of specific constitutional provision and ascertainment of the constitutionality of laws made by state and federal law makers.[185]

Interestingly, Takele argued that the two terms should not be seen differently instead constitutional dispute should be construed to mean constitutional interpretation; and in this way, constitutional dispute refers to interpretational dilemma or disagreements, not the disposition of interpretive function by the HoF involving factual disputes.[186] The reason for the argument is that constitutional dispute cannot be meant the determination of factual or concrete cases between parties because the HoF is not vested to interpret or resolve factual disputes rather disputes in their abstract form.[187] A concurring argument is reflected by Getachew that constitutional dispute is said to be arisen when there is a "disagreement between two or more constructions of constitutional principle or rule each of which is forcefully persuasive".[188] He reaffirms that constitutional dispute does not involve factual dispute rather involves interpretation in terms of the text of the Constitution like the task of filling the gaps in the Constitution and he argues that constitutional dispute is nothing but a precondition to exist in order to the HoF/CCI engage itself in constitutional interpretation.[189]

[183] Assefa Fiseha, „Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation" (June 2007) 1(1) Mizan Law Review 10. (herein after Assefa) It seems that the assertion as to the meaning of constitutional interpretation is given based on the fact that the constitutionality of legislations may be contested up on the complaint lodged by any of the organs under Procl. No. 798/2013 in the absence of real parties in dispute.
[184] Yonatan Tesfaye, Supra note 156, p. 133-134.
[185] Id., p. 134.
[186] Takele, Supra note 23.
[187] Ibid.
[188] Getachew, Supra note 11, p. 156.
[189] Getachew also asserted that the two terms are part of the same continuum and it is the presence of constitutional dispute that leads to constitutional interpretation. See in general Id, p. 156-166

Considering the fact that the HoF is vested to see only abstract cases of constitutional issues, it seems plausible to understand the two terms as inseparable. The Point which may strengthen this way of understanding is that it is provided in the enabling legislation (Proclamation No.251/2001) of the power and responsibility of the HoF is required to interpret the Constitution and the term resolving constitutional disputes is not employed.[190] More convincing is that, as Getachew revealed, what one can find from digging in to the Minute of the Constitutional Assembly is that there is no distinction made between the terms by the Assembly while dealing with the pertinent provisions of constitutional interpretation and it does not seem that the makers of the constitution has intended to make distinction between the terms.[191]

Therefore, the phrase 'constitutional dispute' that appears only once in article 83(1) of the Constitution must be taken to mean 'constitutional interpretation'. If taken to separate meaning, the consequence would be to place the power of resolving all constitutional disputes within the jurisdiction of the CCI/HoF. This not only far exceeds the powers of the latter as defined under Art. 62(1) of the Constitution and Art. 4(1) of Proclamation 251/2001, it also wipes away the power of the judiciary and their independence as guaranteed under article 78 of the Constitution. As Willis forewarned:

> *It is one thing to have a superior constitutional body, whether it is the Ethiopian House of the Federation (which meets twice a year), the French Conseil Constitutionnel (which entertains cases before they are promulgated), or the U.S. Supreme Court (that accepts one hundred cases out of the twelve to fifteen thousand applications each year) decide now and then an individual case with broad societal implications. Requiring them to decide each and every mundane case that comes down the hike in which the constitutional principle is implicated is irrational – it cannot, it will not be done – in Ethiopia or elsewhere, for that matter.*[192]

[190] Takele, Supra note 23.
[191] Getachew, Supra Note 11, p. 162. A reading of the Minute of the constitutional Assembly will not give us that the Assembly uses the terms to connote different meanings instead, the Assembly repeatedly forwarded that any sort of constitutional dispute or interpretation is the jurisdiction of the HoF. See also the discussion of the constitutional Assembly on Art.62, 83 and 84.
[192] Ibid.

In conclusion, despite the dilemma created by the usage of the word 'dispute' under article 83(1) of the Constitution, the power of the HoF is limited to constitutional interpretation which by itself is limited to exclusive power to check constitutionality of legislative acts. It is the regular judiciary's proper province of adjudicating concrete cases of mainly indirect but also direct constitutional issues. Therefore, according to Art.62 (1) and 83(1) task given to the HoF is the power of constitutional interpretation.

The other issue is that whether courts are completely deprived of the power of constitutional interpretation. There are diverged opinions among authors regarding the scope of the power of the HoF vis-à-vis courts in Ethiopia. It is difficult to deal with all literatures in the area but an attempt is made to see briefly some of the important works which are deemed to have relevance to the paper. Accordingly, we can have three views as to the power of the HoF and of courts in constitutional interpretation.

The first category of understanding provides that courts are wiped out from the power to review the constitutionality of laws made by state and federal legislature and determination of the scope, meaning and content of provisions of the Constitution.[193] According to this view, courts have only the role of enforcing provisions of the Constitution and they can do so to the extent it does not involve interpretation of the Constitution. The argument is made based the presumption that there are some provisions of the Constitution which are explicit and clear which do not require interpretation and it is in such cases that courts are required to apply the provisions of the Constitution.[194]

The argument is however open to challenge at least for two reasons. First, based on the indeterminacy theory, constitutional texts are general, vague, and abstract that may require interpretation and construction of a given provision based on some values that are not explicitly

[193] This view is mainly reflected by Yonatan Tesfaye which is solely based on the mechanical theory of judicial power that requires courts to apply a law as it is clearly available in the text. And to him constitutional interpretation is both the determination of the scope, meaning and content of a given constitutional provision and the review power of the constitutionality of laws enacted by the federal and state parliament. See Yonatan T., supra note 156, p. 141.
[194] Ibid.

provide in the text of the Constitution.[195] To use Assefa's expression in this regard, to think that it is possible to apply the Constitution without interpreting it is more of "a myth than a reality".[196] This is not to justify that courts in Ethiopia can dispose any sort of constitutional issues because there is an intended limit by the makers of the Constitution on the power of courts to interpret the Constitution. However, this is to remind those who argue that courts are allowed to apply the Constitution when it is explicit or clear since constitutions are indeterminate and the direct application of a constitutional text that seems clear or explicit may at times end up to result in absurd outcome. Second, direct application of constitutional provisions by courts may be challenged based on the nature of judicial power. Judicial power in strict sense is determining what the law says, not application of the law without looking at what the law is. If judges are considered as persons through which the law is to be applied, their function is an administrative proper, not judicial.[197]

With this regard Yonatan Tesfaye argued that courts are expected to enforce the provisions of chapter three of the constitution only to the extent that it doesn't engage them in interpretation.[198] He also goes further and argues that if issues of constitutional interpretation arise in the courts in the process of enforcing the constitution, the courts should refer the matter to the CCI. His view on this point boils down to the thought that existed during 1900 which named as "received law".[199] Based on this theory, law is held as fundamental, absolute and immutable. It contained, by implication, the answer to every constitutional question which might be arised in relation to any state or federal statutes.[200] All that was necessary was for the court to apply the appropriate word or clause of the Constitution; the correct conclusion was presumably self-evident to any competent judge. Bascoe Ponal in 1930 called this theory the "Slot- machine theory of law.[201] By reflecting the same thought as this one what Yonatan did was, like many followers of this theory, he denies the unavoidability of interpretation in any stage of handling a case by courts. In

[195] Luc B. Tremblay, General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law (2003) 23 (4) Oxford Journal of Legal Studies , p. 535.
[196] Assefa Fiseha, Supra note 15.
[197] Vincent M. Barnett, Constitutional Interpretation and Judicial Self-restraint, 39 Michigan Law Review (1940) p. 166.
[198] Yonatan Tesfaye, Supra Note 156, p.140-141.
[199] Kelly Harbison, The American Constitution: Its Origins And Development 537-539(34 ed, W.W. Norton And Company, Inc. New York, Wayne State University).
[200] Ibid.
[201] Ibid.

addition, this theory since it give too much attention on the mechanical aspect he wrongly denies judicial discretion and makes the duty of a judge an act which can be performed by any who knows where such law is written.

The second view of the power of the HoF/CCI and of the courts in interpreting the Constitution is reflected in the late published article by Getachew.[202] Getachew's finding on the power of courts in interpreting the Constitution is "fresh" and is made by relying mainly on the intention of the makers of the Constitution as reflected in the Minute of the Constitutional Assembly after reviewing existing literatures in the area. Accordingly, the reading of the article revealed that he came up with three new findings as to the power of courts regarding to constitutional interpretation. First, contrary to what is argued by Yonatan, he concluded that it is up to the power of courts to determine the meaning, scope and content of a constitutional provision in resolving factual disputes before them so long as they are not faced with 'constitutional dispute'.[203] Second, courts cannot pass a decision up on issues of constitutionality or settling constitutional disputes irrespective of the type of cases and regardless of the fact that the legislations are apparently unconstitutional.[204] Third, different from Takele and Assefa, all constitutional disputes-whether involving federal or state proclamation, regulation, directive, or decision of federal or state organ or official- are precluded from the jurisdiction of courts rather within the interpretation power of the HoF/CCI.[205]

To justify his argument and challenge those who rely on the terminology employed under Art.84 (2) of the Constitution to support courts interpretive power, he forwarded two points; a) relying on Art.84(2) alone to determine the respective powers of the HoF and courts is inappropriate because the provision is not meant to determine the jurisdiction of the HoF rather mainly meant to lay down procedures for the CCI when dealing with constitutional disputes of the federal or state law; b) Art.84 is not about regulating the powers and functions of the HoF concerning resolving constitutional disputes but it is meant to provide the powers and functions of the CCI,

[202] Getachew Assefa, Supra note 11, p. 139-175.
[203] Id., p.168.
[204] Id., p. 165.
[205] Id., p.167, the point here is made by condemning the proposition that courts are empowered to review laws and decision s of government bodies other than the constitutionality of laws which is fundamentally made based on Art.84(2).

thus, to say that the power of the HoF is limited to settling constitutional disputes involving federal and state laws based on the interpretation of a single sub-article is not sound.[206] On top of this, he strongly reaffirmed that "there is no another correct way of understanding the understanding of the makers of the FDRE Constitution on this matter".[207]

It is worthy to make analysis of his argument which he concluded that it is up to the power of courts to determine the meaning, scope and content of a constitutional provision in resolving factual disputes before them so long as they are not faced with 'constitutional dispute'.[208] Indirectly, he concluded that if courts have faced with disagreements on constitutional text (which is his definition of constitutional disputes) they have no the power to determine the meaning, scope and content of a constitutional provision. Look here, doesn't it mean that determining the meaning, scope and content of a constitutional provision is necessary while engaging in constitutional interpretation? My answer is yes, since determining the meaning, scope and content of a constitutional provision are necessary when there is disagreement on provision of constitutional text. Strongly speaking, involving in the determination of meaning, scope and content of the provision of the Constitution is amount to involving in constitutional interpretation. Because, both concepts go with each other i.e while courts have confronted constitutional dispute (disagreement on the provision of Constitution what is defined by Getachew) they have involved in determining the meaning, scope and content of a constitutional provision. On other way, if courts do not face with constitutional disputes/disagreement/ there have been no need of determining the meaning, scope and content of a constitutional provision. Thus, there is cause and effect relationship between the determination of the meaning, scope and content of a constitutional provision and the constitutional interpretation. If this is so, in this regard, Getachew's argument lacks comprehensive logical flow.

The writer also contends Getachew's argument for other two reasons as follows. First, it is worthy to make a point right here that Getachew's stand which says that courts in Ethiopia cannot set aside those laws which are clearly and apparently unconstitutional rather such power is left to be the exclusive domain of the HoF seems to be inconsistent with his discussion on the

[206] Id., p. 164-165.
[207] Id., 169.
[208] Id., p.168.

meaning of constitutional dispute and constitutional interpretation.[209] He argued that the two concepts are inseparable and it is the existence of constitutional dispute that leads to constitutional interpretation. On the same discussion, Getachew concurs with Takele that constitutional dispute that leads to constitutional interpretation by the HoF arise when there is "disagreement between two or more equally persuasive arguments*"* of interpreting constitutional text. The otherwise understanding of his argument, however, proves that if a law is clearly unconstitutional, there is no constitutional dispute (since there is no disagreement between two or more equally persuasive interpretations of the text of the constitution) that leads to constitutional interpretation. Thus, no need for courts to refer to the CCI/HoF rather they can set it aside.[210]

Second, the way Getachew justifies his argument in the foregoing discussion does not seem to be plausible enough. He argued that Art.84 is not about the power and functions of the HoF but the procedures to be consumed by the CCI when settling disputes involving the constitutionality of federal and state laws; hence cannot be employed to decide the power of courts vis-à-vis the HoF (emphasis added).[211] However, is it not true that the powers and functions of the CCI are inseparable from and derivative of the powers of the HoF? It seems that it is because of the inseparable nature of the powers of the HoF and the CCI concerning constitutional interpretation that we (including Getachew himself) used to write as the HoF/CCI.[212] If Art.84(2) is principally about the procedures of the CCI in settling disputes involving the constitutionality of laws enacted by state and federal legislatures as Getachew pleads, can we think of other procedures that the CCI would employ when it faces constitutional disputes involving issues other than the constitutionality of laws issued by state and federal legislatures? Even in the discussion of the Assembly on Art.84, the power of the CCI was used interchangeably as the power of the HoF and by no means is the CCI vested with powers regarding constitutional interpretation that the HoF does not. Moreover, there is no separate procedure that the CCI uses to settle disputes other than those involving constitutionality of federal and state laws (for instance regulations) nor does

[209] Id., p. 162-169.
[210] This logical deduction is made based on the fact that if a law is clearly unconstitutional, it is obvious that there is no constitutional dispute because a clear constitutionality does not involve two or more equally persuasive interpretation dilemmas, to which Getachew himself agrees on.
[211] Getachew Supra note 11, p. 166-167.
[212] Ibid.

the enabling proclamation for the CCI, Proclamation No.798/2013, provides separate procedures to be used while dealing with disputes other than those under Art.84(2)of the Constitution.

The third category of understanding regarding the power of courts vis-à-vis the HoF, which is mainly advocated by Assefa and Takele, provides that courts in Ethiopia are excluded from constitutional interpretation only when the un/constitutionality of laws by state and federal legislative bodies is questioned; and in all other cases, it is not the intention of the Constitution to preclude courts from constitutional interpretation.[213] The author have similar stand as to the power of courts in constitutional interpretation. They build their argument from different provisions of the Constitution and principles. Accordingly, Assefa asserted that the judiciary is duty bound to "respect and enforce" the provisions of chapter three of the Constitution and to ensure the observance and enforcement of the Constitution is achievable if courts have certain degree of interpretive power in the Constitution.[214] Moreover, he forwards strong argument that owing to parliamentary supremacy in Ethiopia, yet subject to constitutional supremacy, it could be soundly argued that courts power is foreclosed only if it involves the determination of the un/constitutionality of laws enacted by federal and state legislatures as it is clearly provided under Art.84(2) of the Constitution. [215]

Takele on the other hand gives more emphasis on Art.79(1) and Art.78 of the Constitution and explained that courts are constitutionally provided with the power to see any case of justiciable matter other than those the constitutionality of laws enacted by federal and state legislatures is in question.[216] He even argues that if there is clear unconstitutionality of laws, there is no need for courts to refer the case to the CCI/HoF because, in such case, there is no constitutional dispute (in his expression "interpretation dilemmas") and courts can set aside the application of such laws.[217] However, both Assefa and Takele become silent on how and to what extent HoF and regular judiciary share the power of constitutional interpretation. Lastly, none of them address the procedure of constitutional interpretation and how it affects the rights enshrined under the

[213] Assefa Fiseha, Supra note 15 and Takele, Supra note 23.
[214] Id.
[215] Id. , p.15.
[216] Takele, Supra note 23, p. 67-69.
[217] Ibid.

Constitution. Thus, the following discussion delves in to determination of their respective and how they share power in constitutional interpretation.

Coming back to the main business, it is admitted that in the discussion of the makers there was strong debate that courts should not be vested with the power of interpreting the constitution and most of the justifications to preclude courts from such power was forwarded from the angle of protecting and ensuring group rights.[218] Like what Getachew has rightly pointed out, the Assembly revealed that the Constitution is a political document of the Nations Nationalities and peoples of Ethiopia and it is the political representatives of these groups that should be vested to interpret their covenant, the Constitution.[219] Further, the makers had the fear that if courts are allowed to interpret the Constitution, there is the risk of changing or amending the spirit and content of the Constitution via interpretation like what is witnessed in the American constitutional history. This is however far from concluding that the courts are with no power to interpret the Constitution in all matters.

The reading of the primary discussion on the relevant provisions of the Constitution seems to confirm that courts are excluded from interpreting the Constitution. However, if we look at the discussion of the Assembly made following a questions by one member as to the appropriateness of excluding courts from interpreting the Constitution, whether courts are totally excluded from interpreting the Constitution becomes dubious.[220] In respond to the question, the Assembly explained that the "fact that the power to interpret the Constitution is given to the HoF does not mean that every cases appeared before a court that is claimed by a party as involving constitutional issue is to be referred to the CCI, rather the issue should pass through the various level of courts up to cassation; and so long as it is not said that the decision of these bodies

[218] Minute of the Constitutional Assembly of the Transitional Government of Ethiopia, V.5, December 01-04, 1994. See discussion on Art.62 (1) 83, and 84, the assembly firmly confirmed that the HoF is not within the power structure of the three branches and does not have legislative power in real sense. It is stated that it is a representative of the Nations Nationalities and Peoples of Ethiopia established to interpret l covenant, the constitution. This gives us the inference that the house does not seem an effective organ that puts control on the legislature.

[219] Ibid discussion of the Assembly on Art.62, the Assembly boldly affirmed that the constitution is not a legal document but a political document which contains principles and objectives.

[220] Ibid discussion of the Assembly on Art.83, one member forwarded to the assembly his fear that "if courts are excluded from interpreting the constitution it is difficult to say that there are courts in Ethiopia" and the response given from the house was that courts are not totally excluded from their traditional interpretation power.

involves erroneous interpretation of the constitution, no case is to be lodged to the CCI.[221] More briefly, the issue as to the role of courts in interpreting the Constitution is expressed in the Assembly by giving an illustrative example saying:

…a constitutional issue arises, for one thing, when citizens file a case to courts to ensure their rights and if they believe that the court decides it in contradiction with the constitution. For instance, if members of a football team, while they are expressing their support and happiness in a street because their team won, are accused of conducting demonstration without securing permission from the appropriate authority and if the court before which the case is brought decided they are guilty of the charge, they may arise a question that their act is considered as demonstration contrary to the constitution. During this time if they cannot find a solution from courts through appeal, they may apply to the HoF/CCI requesting the interpretation of "peaceful demonstration" under the constitution (empahis added).[222]

More clearly, it is asserted by the Assembly that "in cases individual rights are at issue the case is to be brought to the CCI after passing the remedies in the hierarchy of courts up to the Cassation level, and in general there is no provision in the Constitution which prohibits individuals who allege their rights are affected contrary to the Constitution to pass through the various levels of courts."[223] The above paragraph, though may not give us a coherent and comprehensive message as to the power of courts in interpreting the Constitution, one may be tempted to argue that the statements of the Assembly reflects the fact that the makers did not intend to oust courts totally from interpreting the Constitution. Instead, it may be inferred from this that citizens may apply to courts that their rights are affected by the act or decision of government body contrary to the Constitution. It is difficult to expect from ordinary representatives (the Assembly) that they addressed all technical details and in their discussion inconsistencies can be detected. However, when the Assembly discussed that the HoF/CCI hears cases after they exhaust the various remedies available in courts, the writer believes that it may meant to say that courts have the power to entertain cases involving constitutional rights and to interpret directly a constitutional provision to determine the scope, meaning and content of that

[221] Ibid discussion of the Assembly on Art.84.
[222] Ibid (the translation from Amharic to English is mine).
[223] Ibid.

constitutional provision. Therefore judicial power is constitutionally guaranteed. From the above discussion, still HoF has the power to final say on rights parts (human and democratic rights) of the provisions of the Constitution after someone exhausts remedies in the channel of regular courts.

In similar token, while giving justification as to why the HoF is vested to interpret human and democratic rights apart from group rights (like self determination), it is disclosed by the Assembly that in the guise of democratic and human rights, the right of Nations, Nationalities and Peoples could be compromised if interpretation of human and democratic rights in the Constitution is given to courts. If this apportionment of interpretation jurisdiction between courts and the HoF is adhered, it is argued by the Assembly that "in case individual rights are in conflict with group rights, it may result in difficulty of which interpretation, the interpretation of courts favoring individual rights or the interpretation of the HoF favoring group rights, should prevail". In such cases, it may result in "constitutional crisis in the country if a body with ultimate interpretive power (HoF) is not established".[224] This view is also inferable from the document which provides brief explanation on the finally adopted draft of the Constitution.

Furthermore, article 5(1) of proclamation No. 798/2005 also states that any person who alleges that his fundamental rights and freedom provided under the Constitution have been violated due to the final decision rendered by government organ or official may submits his case to the council for constitutional interpretation. This particular provision indicates that as individuals could claim violation of his rights by the decision of organ of government. In this case if he believe that final decision rendered by federal Supreme Court /Cassation Division/ violates his right, he has the right to bring the issue before the HoF via CCI. From this any person who alleges the violation of rights provided under the Constitution like in the case of final decision by executive and legislative organ, that person should exhaust all available remedies in the channel of the courts i.e., he should have to exhaust up to the final decision of Federal Supreme Court / Cassation Division/.

[224] Ibid discussion of the Assembly on Art.62.

Therefore, regarding the issue of whether or not courts have the power of constitutional interpretation; the stand of the writer is positive since the courts are constitutionally empowered to determine the scope, content and meaning of a specific constitutional provision absent of deciding the un/constitutionality of legislatives organs' laws. As per Art. 84(2) of the FDRE Constitution it seems that courts have been excluded from the power to review the constitutionality of legislative acts when there is disagreement on the un/constitutionality of these laws. This stand becomes plausible if one reconsiders the fact that a court is required to refer a case before it to the HoF/CCI when it believes that the case at hand is contrary to the Constitution. It is apparent that the court necessarily involves in investigating a law at issue in line with the Constitution because without doing this, it is impossible for the court to decide whether a case before it requires constitutional interpretation.

One can still add a point that solidifies the argument in the preceding paragraphs. Accordingly, among the ground that indicates the power of court in constitutional interpretation, Art.13(1) of the FDRE Constitution has most important place. Assefa rightly argued that Art. 13(1) stipulates 'all Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this Chapter (chapter three) makes it mandatory that the courts engage in the interpretation of the scope and limitation of the rights in the third chapter in order to live up to its duty to 'respect and enforce' the Constitution'.[225] I agree with Assefa in this regard because he tried to establish the power of regular courts in interpretation of constitutional provision in more persuasive way. Close reading of the provisions in Arts. 9(2), 79ft) and 13(1) of the Constitution which together vest judicial power in the courts, and impose on all organs of state, along with others, the duty to respect, to enforce, to ensure the observance of, and to obey the Constitution.

Constitutional interpretation by court of law is highly connected to protecting citizens from the possible administrative abuse. The most important matter with this regard is judicial interpretation of the text of Constitution of fundamental rights and freedoms /rights part/. The FDRE Constitution devoted two-third of the Constitution for recognizing fundamental rights and freedoms. Under the chapter which is dedicated to this purpose indicated that all federal and state

[225] See Assefa Fisaha, Symposium on the Role of Courts at p, 14.

legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the chapter which talks about fundamental rights and freedoms.[226] On the same token, in connection to the supremacy of the Constitution Art. 9(2) state that all citizens, organs of state, political organizations, and other associations as well as officials have the duty to ensure observance of the Constitution and to obey it. The big question is - Is it possible in any way to do what the above articles impose without engaging in the task of constitutional review? To connect it to the point under consideration, since the administrative organs makes decisions that affect the day to day life of individuals, the possible abuse they can inflict on fundamental rights and freedoms is high. So, there must be an organ which easily accessible to see these kinds of issues and give protection to citizens.

In answering the question whether courts have jurisdiction or not one needs to consider what interpretation means and, the practice and devote some consideration on how often the issue of fundamental rights and freedoms comes to the view of courts. Tsegaye Regassa correctly argued that 'enforcement presumes clear understanding.'[227] Understanding requires a degree of value clarification. Interpretation as a mode of value clarification precedes enforcement. As such all activities to enforce either assumes or involves interpretation. Therefore, the unavoidability of the task of interpretation makes it clear that, for any organ in general and the courts in particular, interpretation task assumed under article 9(2) and 13 of the Constitution. In addition, a curiosity also may arise how the judiciary can make a decision without first determine the scope and limits of the right without making interpretation.

From the above arguments it becomes apparent that protection is extended to citizens in the infringement of their fundamental rights and freedoms in the decision of regular courts. Here the Constitution tried to limit the power of HoF federation in relation to the rights parts of provisions of the Constitution (chapter three).

[226] FDRE Constitution, Supra note 1, Art.13.
[227]Tsegaye Regassa, Courts and the Human Rights Norm In Ethiopia: An Overview, In Proceedings of the Symposium on The Role of Courts In The Enforcement of The Constitution 112 (Addis Ababa: Birhanina Selam, 2001).

In addition, constitutional interpretation by courts of law is taken as one of the manifestation of a democratic and limited form of government. Such kind of mechanism become very meaningful with respect to the administrative organs of the government because in most cases its part of the executive branches of the government has the very potential of infringing the rights of citizens recognized under the constitution. Watching the measures /decisions/ of this organ is taken as a guaranty and protection to citizens. In addition, it's also taken as a means for confining the decisions of this organ within the power granted to it by law. Because of this, courts' role with this respect is taken as a means to preserve the separation of power as its set by the Constitution. From this logically it follows that this mechanism also serves as a good input for the rule of law. For the judiciary itself the existence of this mechanism serve as preserving its independence since there is a consensus that taking away judicial matters out of the court's jurisdiction affects its independence. For the administrative branch also having a court to rule against its decision in case of its infringement gives it legitimacy.

Constitutional interpretation by courts of law is taken as constitutional right which even exists in the absence of recognition by a particular statue. But still exclusion is allowed if there is express provision for this effect. When we come to the Ethiopian case, in addition to the recognition of some constitutional principles which support the existence of judicial review mechanism, the Constitution also make inclusion of some articles that have a direct link with the point under consideration. Art. 79(1) of the Constitution stipulates that judicial powers are vested in courts. In addition, Art. 37(1) of the Constitution also adds that everyone has the right to bring justiciable matter and to obtain a decision or judgment by a court of law or any other competent body with judicial power. From these two articles we can understand that a decision on any matters of judicial character rests on the courts. So that as far as human rights is justiciable matter, decision on any of these rights including the decision of interpretation rests on the regular courts in Ethiopia.

To sum up, the most important ground that the Constitution does not also seem to wipe out the role of the judiciary sticks to the terms employed by the text, the relevant Article states: 'Where any federal or state *law* is contested as being unconstitutional...' and the Amharic version which according to Article 106 has the final legal authority in case there is contradiction between the

English and the Amharic versions is even more explicit in stating that the term 'law' refers to laws enacted by federal and state legislative bodies.[228] Thus, from this one can simply infer that other subordinate laws issued by the executive and decisions of governmental bodies were left to the courts. There is another second reason for concluding the same. In parliamentary systems of which Ethiopia is one, the supremacy of parliament, subject of course to the supremacy of the Constitution, requires that all other branches of government are bound to assume that legislation enacted by parliament is constitutional and the courts are prohibited from nullifying such legislation. Thus, administrative acts and decisions of public bodies could be questioned for their constitutionality as well as for their conformity with the constitution by the regular judiciary.

Thirdly, the practice of the CCI as well hinted at this position, at least until the enactment of the laws (Procls. No. 251/2001 and 250/2001). In the case of Addis Ababa Taxi Drivers Union v. Addis Ababa City Administration[229] and in the case of Biyadiglign Meles et al v. Amhara National Regional State,[230] the CCI seemed to rule that remedies concerning the constitutionality of Regulations, as well as violations of rights by the executive have to be sought from the regular courts. Even after the enactment of the Proclamation No.251 and 250 in the year 2001 the practice of ICC hinted this position. For instance, the case was brought to the attention of the CCI on the year 1996 E.C. In this case the constitutionality of a directive for recruitment of students for being accepted in Jimma Teachers' College made by Oromia Education Biro is questioned. Such directive is claimed as contrary to Art. 9/2/ and 25 of FDRE Constitution by depriving blind students whose names mentioned in the case from being accepted in the college because of their disability even if they fulfill all other requirements.[231] In such case the Council rejected the case as being outside of its jurisdiction by mentioning the Amharic version of Art. 84(2) of FDRE Constitution. The surprising fact with this regard is it has been three years since

[228] FDRE Constitution, Supra note 1, Art. 84(2) reads in full: 'Where any Federal or State law is contested as being unconstitutional and such a dispute is submitted to it by any court or interested party, the Council shall consider the matter and submit it to the House of Federation for a final decision.' In this provision, the term law might look ambiguous so as to include even subordinate regulations of the executive. However, its Amharic version makes it relatively clear by specifying the point that 'laws' or Higoch refers to an act of the legislature (Be Federalu Mengistim Hone Be Kilil Hig Awchi Akalat Ye Miwotu Higoch) at federal and state level.

[229] Decision of the CCI on Tirr 17/1992 E.C. (25 January 2000, unpublished).
[230] Decision of the CCI on an application made on Miazia 30 1989 E.C. (8 May 1997, unpublished).
[231] Ethiopian Blind Association v. Oromia Education Beuro and Jimma v.Teacher Training College, Council of Constitutional Inquiry , File No. 16-03-96 (decided on 1/04/1996 E.C) Unpublished (The translation is mine).

the Proclamations that make Regulation and Directions under the jurisdiction of the HoF came into effect.

The problem in this regard comes together with the enactment of Proclamation No. 798/2013, 250/2001 and 251/2001. In these Proclamations, the CCI and HoF is given the power to entertain the constitutionality of Federal and State laws. In these proclamations the definition given to "law" includes Regulation and Directives.[232] This means the constitutionally recognized courts power on judicial review of constitutionality of laws made by organs other than the Federal and State law making bodies are snatched and given to the HoF by the above cited laws. Here comes the big question. Could the scope of Art 84(2) of the Constitution be broaden or narrowed by the legislator? As far as I am concerned the Constitution is the source of powers and duties of the institutions that it establishes. Further legislations are needed only for providing detail rules so as to make these established institutions workable but not to broad or narrow their scope. Because, the power that given by a Constitution can be taken away only by a Constitution. Even if it is said that the HOPR have the power to enact such legislation, in no way that it can come up with laws that have the effect of contradicting the Constitution. Since this laws narrow the courts' role which wasn't intended by the constitution, it is logical to conclude that they are unconstitutional, and at the end they also contradicts courts' independence as recognized by the Constitution.

Surprisingly, the practice has also been confused with the enactment of these new laws. According to the new laws 'law' (that is subject to the investigation for its constitutionality by the HoF) shall mean Proclamations issued by the federal or state legislative organs, and Regulations and Directives issued by the federal and states government institutions and it shall also include international agreements that have been ratified by Ethiopia.'[233] Thus, by defining 'the law' too broadly to include all conceivable acts of the legislature and the executive, the drafters of the new laws that are supposed to define the role of the HoF and the CCI, have themselves apparently come up with an unconstitutional law. This is so because the federal Constitution is at least clear on this point: it never intended to include Regulations, Directives and decisions of administrative bodies in the way the laws attempted to include. By so doing the

[232] Procl. No. 798/2013, Supra note 172; procl. No. 250/2001 and Procl. No. 251/2001, Supra note 8 Art. 2(2).
[233] Ibid.

drafters of the proclamations have wiped out or at least attempted to wipe out the jurisdiction of the courts.

To elaborate the practices more, let me discuss the case of Coalition for Unity and Democracy (CUD vs PM Meles Zenawi)[234]; In this case Coalition for Unity and Democracy (CUD) make a request to Lideta first instance court to declare the directive issued by the Prime Minister following May 2005 election crisis and it's after math banning demonstrations in the capital for a month. The court referred the case brought before it to the CCI. The CCI considered the matter and declare as directive is constitutional. This is a very interesting case because the Federal First Instance Court to whose bench the case first appeared willfully relinquished its constitutional mandate in its decision held on June 3, 2005 by referring the case to the CCI. This trend seems to conform to what is provided in the new laws for which we have questioned their constitutionality. This also implies that the courts are further stripped of their jurisdiction. However, the fact that the power to interpret the Constitution is given to the HoF does not mean that every cases appeared before a court that is claimed by a party as involving constitutional issue is to be referred to the CCI, rather the issue should pass through the various level of courts up to cassation. Therefore, in cases of the rights part so long as it is not said that the decision of these bodies involves erroneous interpretation of the Constitution, no case is to be lodged to the CCI/HoF.

3.6. The Current Practical Dimension of Constitutional Interpretation in Ethiopia

[234] CUD vs PM Meles Zenawi, Decision of the CCI rendered on 14 June 2005. This is a very interesting case because the Federal First Instance Court to whose bench the case first appeared wilfully relinquished its constitutional mandate in its decision held on June 3, 2005 by referring the case to the CCI. The Court in its brief remark on the application of the CUD rejecting the case for lack of mandate adopted a very literal and positivist approach on the meaning of the 'law' and failed to analyze the link between the law and the Constitution. The case could have enlightened our understanding of constitutional practice better if the Court adopted a different interpretation. The HoF's position would then have been clearly tested in the case. The CUD is a coalition of four opposition parties that participated in the May 2005 parliamentary election and that secured 107 seats but decided to boycott its seats because of allegations of election fraud and vote rigging. While the government argued that there were objective reasons for the one-month ban on demonstrations in the capital, the claim being the opposition is ready for street violence to overthrow the government on unconstitutional means and hence the directive, the opposition on its part claimed it was undertaking peaceful demonstration as provided in the Constitution and wanted to declare the directive as unconstitutional. While there are still controversies on the constitutionality of the directive and no one is able to give conclusive verdict, it is possible to argue that the PM would have been in a much defensible position if he resorted to emergency declaration through the Council of Ministers as provided under the Constitution Article 93.

The present mechanism of constitutional interpretation in Ethiopia seemed to demonstrate mixed system of constitutional interpretation. However, a well-developed system of constitutional adjudication is lacking in actual practice. Currently, there is a general conviction among judges that the courts are not allowed to discuss the provisions of the Constitution and constitutionality of laws when they consider cases. Some judges jokingly argue that they are supposed to follow a hands-off approach when confronted with the Constitutional interpretation.[235] The reluctance on the part of the judges to make any reference to the provisions of the Constitution is reflected in the manner the judges respond to constitutional interpretation.[236] Some judges argue that the courts should not be worried about the constitutionality of a law. They are supposed to apply laws irrespective of their constitutionality. For them, it is only when the law-maker repeals or substitutes the impugned legislation or provision that they cease to apply the law. Others believe that where the issue of the constitutionality of laws arises, the courts are supposed to refer the issue to the Council instead of applying or discussing the impugned law. In its most extreme form, judges' shying away from considering the provisions of the Constitution and constitutionality of the laws has resulted from the reluctance to engage in constitutional interpretation.

Despite the persistent encouragement by the academics the courts have generally been unwilling to engage in the interpretation of the constitution let alone constitutional review. It is rare to find, especially at the level of federal and higher state courts, decisions based largely or solely on the provisions of the Constitution. As recent research indicates,[237] neither attorneys representing individuals nor judges rely on the Constitution of Ethiopia to support their arguments. Even in the cases where the parties have made reference to the Constitution, the judges have avoided any engagement in constitutional debate by deciding cases based on statutes. Most often legal battles

[235]This comment has also some political connotations. Some judges believe that the power to interpret the Constitution is taken away from the courts only because the ruling party does not trust the judiciary. Note should be taken here that the present Constitution has not as such taken away the power of interpreting the constitution from the courts. In the Ethiopian legal tradition, the courts have never been entrusted with the power of constitutional review.

[236]For more see D. Wondwossen, The Role of Courts in the Enforcement of Constitutional Rights of Suspects, in Assefa, the concept of separation of power and its impact on the role of judiciary in Ethiopia.

[237]M. Rakeb, The Enforcement of Human Rights in Ethiopia, available on <http:// www.telecom. net.et/-apap/research> (accessed 17-02-2011). The research, in the aim of assessing the enforcement of human rights in Ethiopia, collected data from all the federal courts and from one of the big regional state, the Amhara State High Court. The Ethiopian Constitution contains a "detailed bill of rights".

are fought at the level of statutory rights and obligations.[238] This is resulted from the system of the current constitutional interpretation in Ethiopia since there is a general conviction that the courts are not allowed to interpret the provisions of the Constitution and constitutionality of laws when they consider cases and they are supposed to follow a hands-off approach when confronted with the Constitutional interpretation.

There is no complex interaction over questions regarding the meaning of the provisions of the Constitution and the constitutionality of laws in the courts of law. The scope of each of the rights guaranteed by the Constitution is still far from being clear. There is no jurisprudence indicating what the right includes, who may exercise it and in what manner. There are no indications as to what extent the government can limit the rights guaranteed by the Constitution. There are also no indications that help us to determine whether any limitations imposed by the government are legitimate. These are all issues that could have been made clear by a body that is suited to discharge the task of constitutional interpretation. The lack or absence of such an institution that suit to discharge constitutional interpretation has denied us the opportunity to have institution(s) that explain constitutional values.

What is most disturbing is that nearly comprehensive bill of rights, which forms a big chunk of the Constitution, has rarely been enforced and protected by the courts. This is disturbing, considering the fact that the content of rights develops over time through on-going interpretation of their meaning in the context of concrete cases.[239] It also the utilization of such forums that has proven to be a critical starting point to build a human rights jurisprudence which will help in the effective legitimation of the human rights standards. Unfortunately, very few court decisions could be identified that directly or indirectly apply or refer to human rights provisions incorporated in the Constitution.[240] The same is also true with the House, which has decided very few cases in the last 17 years.

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[238]Yonatan Tesfaye, Supra note 12.

[239] S. Liebenberg, The Protection of Economic and Social Rights in Domestic Legal Systems, in A. Eide **et** al (eds), Economic, Social and Cultural Rights (2001) 61**.**

[240] M. Rakeb, The Enforcement of Human Rights in Ethiopia, available on <http:// www.telecom. net.et/-apap/research> (accessed 17-02-2011). The research, in the aim of assessing the enforcement of human rights in Ethiopia, collected data from all the federal courts and from one of the big regional state, the Amhara State High Court. The Ethiopian Constitution contains a "detailed bill of rights".

The practical isolation of the courts from the adjudication especially when there are constitutional issues raise the question of the Constitution's continuing role. It seems that the document has become "museum material".[241] The Constitution might still have an important symbolic or inspirational role. Unfortunately, however, it has little or no effect on cases litigated before the courts. Yonatan Tesfaye rightly asserted that: 'The Constitution, as a result, has remained to be that "thin" document whose terms are stated in very general terms.'[242] The reason behind that content of the rights recognized in the Constitution are less developed is a reflection of their exclusion from adjudication procedures by the regular courts. In other words, the absence of institutions that are suited to engage in complex interactions on the meaning of the provisions of the Constitution have made it impossible to develop a constitutional jurisprudence. Although 17 years have passed since the Constitution came into force, Ethiopia has not still to come up with a body of constitutional jurisprudence.

Currently, Ethiopian judges have escaped constitutional interpretation due to a belief that Art. 83 of the Constitution, providing for the HoF's powers to adjudicate constitutional issue, has wiped away the power of the regular judiciary to entertain cases involving constitutional issues. Most scholars and practitioners have perceived as this provision has given rise to the view, in judicial circles that courts are relieved of or, more appropriately, stripped of the duty to interpret and apply constitutional provisions.[243] Thus, most believed that 'the Constitution is taken away from the regular courts and that for the regular judiciary to directly interpret and apply the Constitution would mean that the regular courts were punching above their weights'.[244] Consequently, the regular courts have been reluctant to do anything which makes them engaging in constitutional interpretation. As discussed above, however, Art. 83(1) is not as astonishing and invasive of judicial powers as some have foreseen.

3.7. The Judiciary and Its Roles in Protection of Human Rights

The judiciary, being staffed with judges who are viewed as the oracles of the law, is primarily the protector of the weak from the strong, the poor from the wealthy, and the powerless from the

[241] Yonatan Tesfaye, Supra note 12.
[242] Ibid.
[243] S. A. Yeshanew, The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia 23 (2008) Journal of Ethiopian Law : p, 143.
[244] Takele, Supra note 23.

powerful. The protection of "the worst and the weakest amongst us" is one of the cardinal duties of the judiciary. In a case decided in the Constitutional Court, Justice P. Chaskalson of South Africa is noted to have said the following regarding the eminent role courts play in this regard:

> *The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislations in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is willingness to protect the worst and weakest amongst us that all of us can be secure that our on rights will be protected.*[245]

The test of the moral quality of a civilization is its treatment of the weak and the powerless. The judiciary's primary task is to pursue justice. The courts have it in their tradition to do justice without fear, favour, or prejudice. That is one of the reasons that courts need to be independent. The court is said to be the weakest organ of state. Its weakness is taken as its strength and often it is given the task of watchdog over the powers of the more powerful institutions of the state. In most systems, the court serves as the arbiter of what is and what is not legal or constitutional. The courts are often viewed as indispensable to a vibrant democracy. They act as a check to politics especially when the latter goes awry. They are the voice of reason, the voice of conscience, in a democratic politics that tends to be blinded by the voice of passion of the majority. They are custodians of the principle of rule of law.

The judiciary in Ethiopia has no less important task than the one outlined for courts elsewhere. The Constitution (in its Arts. 78-81) recognizes the establishment of a three-tiered independent judiciary which is vested with all judicial power. Owing to the federal nature of the polity, the establishment of state judicial bodies is envisaged by the Constitution. Consequently, the states have constitutionally established a three-tiered court in their jurisdictions.

[245] S v Makwanyane and Another 1995 (6) BCLR 665 (CC) cited above in Tsegaye Ragasa, Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia, 3(2) (2009) Mizan Law Review 287.

One of the major features of the Ethiopian judiciary is that it does not have the ultimate say on the meaning of the Constitution. Nor does it have the power to rule over constitutionality of legislative organs' laws. This power is granted to the House of Federation cum the CCI (Arts 62 cum 82-84). But the courts can decide on the constitutionality of subordinate laws and determine the meaning, content of the text of Constitution when there is point of disagreement. The perception among most judges and lawyers (as well as the politicians and the lay public), however, is that the Constitution is beyond the reach of the ordinary courts.[246] But this is simply counter-intuitive because of the aforementioned arguments for judicial review in Ethiopia. It is particularly important in the area of human rights law which, although emanations of the Constitution, are presented to courts couched in the languages of procedural laws (especially that of criminal procedure).

While the significance of the judicial power in the process of normalizing politics is less and while its position as the guardian of the constitutional values is even less, the courts in Ethiopia, like everywhere else, have the important responsibility of doing justice without fear, favour, or prejudice. They have the responsibility of making themselves accessible (financially, physically, and culturally/procedurally). They also need to respect the human rights of citizens that, as parties or otherwise, find themselves in their sessions. More importantly, they must enforce the rights of citizens against violations (horizontal or vertical). These being the basics of the judicial task, they cannot do anything less.

It is by now clear that the judiciary must protect human rights. Firstly**,** the courts have the responsibility to respect human rights. They are thus expected to respect, for instance, the rights to fair hearing, bail, due process, appeal, expression, representation by a counsel, etc. By so doing, i.e. through extending respect, they protect human rights from themselves. Secondly, the courts have the responsibility to protect human rights from vertical violators, i.e., governmental bodies who administer rights. To protect citizens from governmental actors is not easy because the courts depend on the selfsame executive bodies for the enforcement of their judgements (or orders, or decrees). The judges are expected to be very innovative in designing mechanisms by which they can make the executive accountable for their violations of the rights of citizens. They

[246] Tsegaye Ragasa, Supra note 3.

must also use a rigorous scrutiny into the activities of the executive, especially the law enforcement officials, when ruling on matters pertaining to arrest, bail, investigation, remand, detention, and imprisonment. But they also must seek and earn understanding, respect, and cooperation from these bodies.

One of the things that the judges have to do in this regard is to bring demonstrable professionalism and technical competence in the area of human rights. In particular, they need to know the steps, techniques and methods by which human rights are concretized. In particular, they need to have a principled approach to the interpretation of legal texts that embody or implicate human rights. They need to bear in mind that rights clauses must always be interpreted liberally whereas power clauses must be interpreted more literally and strictly. They need to manifest dexterity in fleshing out the content and scope of a right. They also need to be efficient in determining reasonable limitations that can be imposed (or not) on the exercise of rights. They need to master the nuances and subtleties of the practical implications of the enforcement of rights. They must realize that human rights protection is ultimately a practical exercise. They must also understand the limits of their powers in this regard especially in constitutional interpretation.

The third category of persons from whom the courts must protect human rights is other people. Other people do what is often termed 'horizontal violation of human rights'. This can be done of course if there is first a legislative framework that protects rights from other individuals or non-state actors. Here, often, the task is to penalize the violator and to redress the victim of the violation.

3.8. Conclusion

In conclusion, the fact that the power to interpret the Constitution is given to the HoF does not mean that every cases appeared before a court that is claimed by a party as involving constitutional issue is to be referred to the HoF/CCI, rather human rights issues in particular should pass through the various level of courts up to cassation. The writer believe that as regards to the power of the courts to interpret the text of the Constitution in general and particularly in relation to rights parts of the Constitution and checking the constitutionality of the subordinate

laws, the courts should be assumed to have the power of constitutional interpretation. This power of court emanate from the fact that fundamental rights need day to day activity of adjudication. Within single day there may be so many violations of fundamental rights. On the other hand, HoF which act as guardians of these fundamental rights meets twice a year. The wondering point here is that the HoF could not accommodate the disputes arises/flooded/ from the four corner of this big populous country in Africa. Because, the administrative organs make decisions that affect the day to day life of individuals, the possible abuse they can inflict on fundamental rights and freedoms is high. From this perspective, HoF is not appropriate organ to response these situations. So there must be an organ which is easily accessible to see these kinds of issues and give protection to citizens. Thus, it is the aim of Constitution to empower regular courts for the purpose of protection of fundamental rights of a citizen in the country.

Surprisingly, still the power of the regular courts to interpret the human and democratic rights parts /chapter three/of the Constitution is not with exclusive power because of the fact that after exhaustion of all remedies in the channel of courts (if the issue should not pass through the various levels of courts up to cassation, no case could be lodged before the CCI/HoF.) any person can take his case to the HoF for the sake of final saying. In addition, whether the matters involving the executive action relates to human rights violations or other matters in which allegation is made that there is an issue of constitutionality laws involved, the judiciary has jurisdiction which is not exclusive power. Most appropriately, I believe, that the HoF is being appellate loci for a case that has begun somewhere and exhausts all remedies (up to cassation courts) in relation to human and democratic rights. On the other hand, HoF should be assumed to have the power to check the constitutionality of laws of legislative organs' (laws enacted only by HOPR and its respective organ, state council) exclusively whenever the constitutionality issues arises. This position has also confirmed by foreign writer called Leonard F.M Besselink.[247]

[247] Leonard F.M Besselink, The protection of human rights in federal systems- the case Ethiopia in proceeding of the 14th international conference of Ethiopian studies (nov. 6, 2000, Addis Ababa, vol.,3 at 1372-1379) cited in Getachew , All about words: discovering the intention of the makers of the Ethiopian constitution on the scope and meaning of constitutional interpretation, (Dec. 2010) 24 (2) Journal of Ethiopian Laws 139-175.

CHAPTER FOUR

THE IMPACT OF CONSTITUTIONAL INTERPRETATION ON PROTECTION OF HUMAN RIGHTS IN ETHIOPIA

4.1. The Concept of Human Rights:

4.1.1. Definition

The question regarding what human rights are and how they should be defined has attracted a number of thinkers who advance a diverse array of theories[248] on the nature of human rights into the details of which it is not the purpose of this piece to go. Thus, it is indeed impossible to give an inclusive definition of Human Rights owing to its vast nature. However, at a very basic level, human rights are two simple words but when put together they constitute the very foundation of our existence and can be defined as entitlements that all human beings assert merely because they are human. As such human rights are basic moral claims invoked for the purpose of enjoying a decent human life rooted in dignity. Often linked to the nature of human kind, they are also asserted as 'natural' rights.[249] They are commonly understood as inalienable

[248] Indeed, a number of theories can be identified on the nature of rights. Prominent among these are the will theory, the interest theory, the claims theory, the entitlement theory, and the entitlement-plus theory. For a crisp summary and the details of their differences from one another, see James W. Nickel, Making Sense of Human Rights (2nd ed). Oxford: Blackwell Publishing, 2006. An excerpt of the earlier version of the same book entitled, "Making Sense of Human Rights" (revised edition), 2004 is available at: http://www.uio.no/studier/emner/jus/humanrights/HUMR4130/h05/undervisiningsmateriale/Nickel%25sense%2014%20sept/%202004.doc. The theories referred to herein above are available on pp. 34-46.

[249] Tied to human nature or human reason, human rights are often, rightly, conceived as antedating government and law. Consequently, human rights are viewed not as grants from government as an expression of the charitable nature of governments but as basic standards for human treatment that all governments need to recognize. Human rights are thus not gifts from government. They are not conferred on citizens by state; they are merely guaranteed by states.

fundamental rights to which a person is inherently entitled simply because she or he is a human being. Consensus among human rights scholars reflects that 'they emanate from fundamental human dignity and worth.'[250] Mariek Piechowiak recognizes and reinforces the consensus when she defines human rights as rights of all human beings acknowledged independently of law.[251] On the other hand, Amparo Tomas, discussing human rights in the context of his argument for human rights based approach to development, defines human rights as "universal legal guarantees that belong to all human beings and that protect individuals and/or groups from actions and omissions of the State and some non-State actors that affect fundamental human dignity."[252]

4.1.2. Development of Human Rights Norms

Human rights laws developed in reaction to massive state abuse of human beings. The modern concept of human rights has also drawn impetus from the experiences of World War II (WWII). As such it is rooted in the experiences of 'legal lawlessness' that characterized the activities of some oppressive regimes.[253] In response to such lawlessness, the international human rights regime developed since WWII. The milestone in the history of the development of the international human rights system is the adoption at the United Nations General Assembly (UNGA) in 1948 of the Universal Declaration of Human Rights (UDHR).[254] The adoption of the

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Reflecting this connection of human rights to human nature, the Universal Declaration of Human Rights (UDHR), in its article 1 says that "All human beings are born free and equal in dignity and rights".

[250] This consensus is reflected in the UDHR both in the preamble (which recognizes "the inherent dignity" of all members of the human family) and article 1 (which stipulates that all human beings, being born free and equal are "equal in dignity and rights"). Note that the language of the UDHR has shaped this consensus.

[251] Mariek Piechowiak, "What are Human Rights?: The Concept of Human Rights and their Extra-legal Justification," in Hanski, R, and Suksi, Markku (eds), An Introduction to the International Protection of Human Rights: A Text Book. (2nd Rev ed). Turku/Abo: Institute of Human Rights, Abo Akademi University, 1999. P.3. (cited in Tsegaye Ragasa, Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia, 3(2) (2009) Mizan Law Review 287.

[252] This definition also reverberates in most other UN Human Rights manuals such as Human Rights and Law Enforcement : A Trainer's Guide on Human Rights for the Police. New York/Geneva: UN, 2005, p. 13.

[253] Developments leading up to the holocaust in Pre-War Germany are taken as examples of 'legal lawlessness'. In the domestic setting, the apartheid regime of South Africa is also taken as an example for such a state. See Richard Abel, Politics by Other Means: Law in the Struggle against Apartheid, 1980-1994. New York: Routledge, 1995 on the route back to a human rights-sensitive system in South Africa.

[254] The UDHR, meant to serve as "a common standard of achievement for all nations", is the single most important instrument that shaped the post-war human rights movement. Today, it forms the core of the International Bill of Rights (IBR). Although it is a declaration of mere 30 articles, it embodies the list of all rights that can be viewed as first, second, and third generation of rights. See Jack Donnelly, "The Universal Declaration Model of Human Rights: A Liberal Defense"(Human Rights Working Papers) available at http://www.du.edu/humanrights/workingpapers/index.html last accessed in May 2009 where he says that "the global

subsequent covenants on Civil and Political Rights (ICCPR) and on Economic, Social, and Cultural Rights (ICESCR) in 1966 (to come into force in 1976) was a gradual but immense stride toward completing what later came to be the regime of the International Bill of Rights (IBR). Through these and other important instruments, the UN has discharged its responsibilities to set normative standards on human rights while also working with specialized UN bodies (e.g. the United Nations High Commissioner for Human Rights [UNHCHR] and the Committees) to develop mechanisms of monitoring and better implementation of rights.

4.2. Human Rights in Ethiopia /Ethiopian Bill of Rights/

4.2.1. Historical development of Human Rights in Ethiopia:

There is no gainsaying that human rights are generously recognized in the contemporary constitutional system of Ethiopia. In this, the FDRE Constitution of 1995 marks a departure from the past. Ethiopia's constitutional past suggests that the concept of human rights was not developed and that the practice of human rights was not one that is a cause of legitimate pride. In the era of unwritten Constitutions, i.e., in the time preceding 1931, citizens were mere subjects of the Emperors having privileges and benefits emanating from the Omni-benevolent Emperors merely on their goodwill. Citizens are not assumed to have rights in the sense of entitlement although they do assume duties towards the emperors (personally) and the government (officially).

Ethiopia had three written Constitutions (in 1931, 1955 and 1987) before the 1995 FDRE Constitution. The 1931 Constitution[255] does not have significant relevance for the human rights discourse as it was primarily designed to reaffirm and fortify the absolute power of Emperor Haile Selassie I.[256] The state was generally not understood to owe duties to its subjects.[257] The 1955 Constitution[258] was adopted in response to the inadequacy of the 1931 Constitution to accommodate the more complex legal and political scenario at domestic and international levels.

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human rights regime is rooted in the 1948 Universal Declaration of Human Rights and its later elaborations, especially the 1966 International human Rights Covenants." P. 1.

[255] Constitution of Ethiopia, (adopted in July 1931). The absence of written constitutions before 1931 does not however mean that there were no (unwritten) constitutions.

[256] For more discussion see, Fasil Nahum, A Constitution for a Nation of Nations: The Ethiopian Prospect (Red Sea Press) (1997), p. 21 (See generally Chapter 2).

[257] Tsegaye Regassa, Supra note 3; see also Paul Supra note 101.

[258] The Revised Constitution of the Empire of Ethiopia, Procl. No. 149 adopted in 1955).

Although this Constitution recognized a handful of rights, their relevance was vastly compromised due to the absolute power of the Emperor, and the absence of an organ empowered to interpret and apply the Constitution.[259] Besides, most of the rights were entangled with claw-back clauses.[260]

The military junta (which called itself the Dergue, which literally means Committee) took power after dethroning Emperor Haile Selassie I in 1974, and it adopted a Constitution in 1987 after 13 years of constitutional lacuna. The 1987 Constitution[261] highly accentuates economic, social and cultural rights due mainly to the socialist tendency of the regime. It was nonetheless a regime beset by fear and there was no fertile ground to foster the recognition and exercise of human rights.[262]

After the fall of the Derg in 1991, the new regime promulgated a Transitional Charter which served as the interim constitution of Ethiopia for the time of the inter-regnum[263]. The Charter, although a terse document that was primarily viewed as a pact[264] among various liberationist movements that overthrow the Derg,[265] extended guarantee to a host of rights as recognized by the UDHR and other international instruments.[266] The accent was on Civil and Political rights. And yet the practice left much to be desired even in these times.[267]

4.2.2. The FDRE Constitution

[259] G Krzeczunowicz, Hierarchy of laws 1(1) Journal of Ethiopian Law 11 (1984).
[260] Tsegaye Regassa, Supra note 3, p., 298.
[261] Constitution of the People's Democratic Republic of Ethiopia, adopted 22 February 1987.
[262] In addition to the four Constitutions alluded to Ethiopia also had the 1991 Transitional Period Charter of Ethiopia which organized the Transitional Government between 22 July 1991 and 21 August 1995. This Charter recognized 'freedom, equal rights and self-determination of all the peoples' as its governing principles.
[263] The Charter being "the supreme law of the land" was the de facto constitution of the time.
[264] A pact is an agreement among warring factions. Such agreements are often viewed as peace instruments.
[265] Almost all of them (except, for example, the trade unions, and the university and others) were representatives of ethno-nationalist groups.
[266] The preamble and article 2 invoke the UDHR as the basis on which all human rights are guaranteed. Political rights of association, assembly, demonstrations constituted then list of rights that dominated the early provisions of the Charter.
[267] There were frequent prohibitions of demonstrations and meetings. There were imprisonments without due process, for example, in relation to the cases of the alleged perpetrators of the Red Terror. see Tsegaye Ragasa, Supra note 3.

After a prolonged transition[268] a Federal Democratic Constitution was adopted in 1994 to come into force in 1995. This Constitution was called the Constitution of the Federal Democratic Republic of Ethiopia (FDRE). The FDRE Constitution is a compact document with an admirable degree of clarity and conciseness. It establishes an ethnic based federal state consisting of regional states delineated on the basis of settlement patterns, language, identity, and consent of the people concerned.[269] The Constitution also represents a major breakthrough in terms of human rights. It was crafted to respond to the underlying causes that triggered the widespread conflict and the ultimate downfall of the Dergue military junta in 1991. It addresses the volatile issues of ethnicity and self-determination.[270]

It is with this mindset that the drafters of the Constitution articulated the Constitution in to 106 articles packed in 11 chapters. In its Preamble, it embodies the principles of self-determination of collectivities, rule of law, democracy, development, fundamental rights and freedoms (of individuals and peoples), equality and non-discrimination, peace, affirmative action, etc. In its chapter three (the chapter that can qualify for being the Ethiopian Bill of Rights), it offers a long list of rights that are divided into two categories, namely that of 'Human Rights' and 'Democratic Rights'.[271] In its chapter two, the chapter stipulating the jural postulates[272] of the new dispensation, the chapter on the "Fundamental Principles", five principles namely, the principles of sovereignty of the Nations, Nationalities, and Peoples of Ethiopia (Art.8); Constitutionalism and Constitutional Supremacy (Art.9); Sanctity of human rights (Art.10);

[268] As per the Transitional Charter, the transition was to be complete in two years. The transitional times were brought to a closure in 1995, two years later than promised. See Terrence Lyons, "Closing the Transition: The May 1995 Elections in Ethiopia," Journal of Modern African Studies, Vol. 34, No. 1 (1996), pp. 121-142 on the transition.

[269] FDRE Constitution Supra note 1, Art. 1, 46 and 47. Currently, there are nine regional states and two city administration under federal administration, Addis Ababa and Dire Dawa. Each level of government, Federal and Regional, has its own legislative, executive and judicial structures. The judicial structure is composed of First Instance, High Court and Supreme Courts at the federal level and in each regional state.

[270] Id., the preamble which starts, 'We the nations, nationalities and peoples of Ethiopia…..' The Constitution serves as an expression of sovereignty which resides in nations, nationalities and peoples of Ethiopia (FDRE Constitution Art. 8).

[271] Id., Arts. 13-44 are devoted to "Fundamental Rights and Freedoms" in general. Arts 14-28 are dubbed "Human Rights" while Arts. 29-44 are dubbed "Democratic Rights".

[272] "Jural Postulates" are the self-evident basic legal axioms underpinning the system. See Heinrich Scholler, (2005) cited in Tsegaye Ragasa, Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia, 3(2) (2009) Mizan Law Review 287.

Secularism (Art.11); and Accountability and Transparency of government (Art.12) were recognized.

The foundational principle that undergirds the normative structure of human rights in Ethiopia is the principle of sanctity of human rights enshrined under Article 10 of the FDRE Constitution which reads as follows: (1) Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable. (2) Human and democratic rights of citizens and peoples shall be respected. This article enunciates the principle of sanctity of human rights in unequivocal terms. A closer examination of the words of the article suggests that: human rights are inherent in the nature of human kind (although the word used to refer to human kind is the narrower "mankind"); they are universal (i.e. applicable to every human); they cannot be subject to any legitimate violation; and they are indivisible. One can thus note that the principle at once spells a host of significant prescriptions about human rights. Thus one notes that they are, in essence, at once inherent, universal, indivisible, and even absolute. This gives the moral force that shapes and influences laws, decisions, practices, and actions taken in the public life of a society.

Rather strangely, the second sub-article of article 10 seems to reinforce the inviolability principle when it said that they "shall be respected". If it is there merely to reinforce the inviolability principle, one would infer, then it is superfluous. But one suspects the existence of something more to it than the emphasis and reinforcement of the principle. The phrase "human and democratic rights" seems to make a distinction between the two thereby pointing to the classification of the list of rights in chapter three into two parts named "Human Rights" (Arts 14-28) and "Democratic Rights" (Arts 29- 44)[273] The important thing about this provision of principle, however, is that all categories of rights are coequally to be respected without one having any superior claim to the other in terms of being prioritized or subordinated. However, one remains wondering as to the wisdom of dividing the list of rights into these two broad categories when there is no prescribed mode of differential treatment of the two categories of

[273] The minutes of the discussion over the draft constitution and at the Transitional Council of Representatives indicate that human rights are those one is entitled to because he or she is merely human whereas 'democratic rights' are those one asserts only if and/or because he/she is a citizen. See Minutes of the Discussion on the Draft Constitution at the Council of Representatives, May 1994 (Amharic).

rights and especially when one notices the fact that the classification used is not congruent with some of the traditionally accepted classifications.

4.2.3. The Distinction Between Human Rights and Democratic Rights'

The Ethiopian Constitution unduly classifies the provisions on fundamental rights and freedoms into human rights (Articles 14–28), and democratic rights (Articles 29–44).[274] Article 10 of the Constitution creates the impression that human rights are those that emanate from the nature of mankind, and democratic rights as those inherent in democracies.[275] The preparatory work of the Constitution moreover suggests that human rights are those rights that a person is entitled merely because he or she is a human being and democratic rights are those conferred only on citizens.[276] The Constitution clearly limits the application of a right to Ethiopians whenever it deems it necessary regarding each right.[277] Moreover, limiting the application of rights to citizens will be inconsistent with international human rights instruments adopted by Ethiopia. The ICCPR for instance applies to all persons within the territory or jurisdiction of ratifying states.[278] Hence, no substantive distinction should be made merely on the ground of whether a right appears under the 'human rights' or 'democratic rights' section.

4.2.4. Application of Human Rights Provisions: Direct and Indirect

Normally, in order to make human rights justifiable, a clause is inserted to the effect that it is resolved as to how the human rights chapter is to be applied in the legal system. Thus, Constitutions predetermine if the human rights chapter is going to have a direct application, i.e.

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[274] For a deeper analysis of the reasons and arguments regarding this classification, see Gedion Timothewos (2010), 'Freedom of Expression in Ethiopia: The Jurisprudential Dearth', 4(2) Mizan Law Review 207-213 arguing that the classification is 'without significant impact' and that any other interpretation of the classification will be 'absurd'. Any difference, if any, seems to be in the underlying reasons for incorporating the different category of rights rather than their practical implications i.e. human rights are recognized because they are imbued in humanity and human nature, and democratic rights are recognized because they are expressions of desirable democratic principles and governance. We should not attach practical significance to the classification especially when to do so runs against clear constitutional provisions.

[275] Some commentators criticize this as artificial and confusing as what are traditionally called human rights are also found in the part dealing with democratic rights. For more discussion on this, see Sisay Alemahu Yeshanew 'The justiciability of human rights in the Federal Democratic Republic of Ethiopia' (2008) 8/2 African Human Rights Law Journal at 275 and 276.

[276] See Minutes, Supra note 273; See also Tsegaye Ragassa, Supra note 3.

[277] Thus the right to vote and be elected, ESC Rights, right to nationality, right to property, and the right to development are clearly granted to Ethiopians. Freedom of expression and the right to association are, however, granted to the benefit of everyone though they are placed in the part dealing with democratic rights.

[278] Art. 2(1) of ICCPR.

to be directly applied to cases in court proceedings as a special regime of law entailing a special regime of remedies. The more frequent practice is that the Constitutions allow an indirect application, i.e., application of the human rights chapter not directly to cases that are presented before a court but rather as tools that indirectly influence laws, decisions, actions, and practices. In situations where indirect application is opted for the human rights chapter permeates the system from behind. It impacts the laws, decisions, policies, actions, and practices in such a way that they take account of the sanctity of human rights. Thus, the human rights chapter serves as a framework of understanding, a tool of interpretation, a guide to public decision-making, and a threshold for public behaviour. In other words, it serves as the spirit that propels the system in the direction of better sensitivity to human rights. Thus, in practice, the human rights chapter serves as the standard against which the propriety (i.e., the constitutionality) of laws, decisions, actions, and practices are measured. They serve as one of the grounds based on which we annul a certain law, decision, action or practice for unconstitutionality. It is important to note that in the case of indirect application, the human rights chapter will get implemented through the instrumentality of other laws or decisions made in harmony with the culture of human rights.

In the FDRE Constitution, the issue of application is dealt with under Art. 13 (1) which reads as follows: "All Federal and State legislative, executive, and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this chapter." One can see from this article that it spells out the principal duty bearers to be the state organs.[279] But it does not tell us about whether we go for direct or indirect application. But since not all organs of government are involved in the task of adjudication, there obviously is no chance for them to directly apply chapter three to resolve a dispute. It is thus safe to conclude that while courts might be expected to face the challenge of direct application, much less is expected of the other two organs. Nevertheless, it is clear that by virtue of indirect application, all organs are expected to be mindful of human rights in all their decisions and actions as they go about discharging their daily responsibilities.

[279] Indeed, one can say that article 13(1) of FDRE constitution is merely a statement of the reach of application of the provisions of chapter three, i.e. a statement as to who is bound by the obligations emanating from the chapter. Consequently, from a strict reading of the provision, one quickly notes that non-state actors are not so bound. But note the argument from art 9(2) which, by assigning the responsibility to obey and ensure observance of the constitution (including chapter three) to "all citizens, organs of state, political organizations, other associations as well as their officials", tends to extend the reach to state and non-state actors alike. See also Tsegaye Ragasa, Supra Note 3.

4.2.5. Interpretation of Human Rights Clauses /Fundamental Rights and Freedom/

Like all laws, laws on human rights (whether they be international instruments or domestic constitutions and legislations) are bound to need interpretation at one time or another in the course of being utilized. Interpretation is one of the most vital steps towards making sense of human rights. To discuss the concept in simple terms and at the risk of oversimplification interpretation can be viewed as the art of determining the meaning (or constructing a meaning out) of a text. We need interpretation when texts (or provisions) are not clear.[280] Texts are said to be unclear when they are ambiguous, silent, inconsistent, or even absurd. In all other cases, i.e., when a text's meaning is clear beyond any disagreement or debate, then we proceed to apply it. Actually, interpretation results from disagreement.

The HoF is in charge of adjudicating constitutional disputes (Art.62 cum 83 of the FDRE Constitution and Proc. 251/2001). The CCI looks into and examines cases and presents its recommendations to the HoF for a final decision (Art. 84). One can thus argue that the human rights chapter of the Constitution is to be interpreted by none but the HoF (of course with the advisory support of the CCI). On the other hand, others including the writer of this work argue for a judicial interpretation of the text of the Constitution particularly provisions of chapter three on the basis of an argument forwarded under chapter three of this study even though interpretation clause of Art. 13(2) does not say much as to who, when, and how of interpretation of chapter three. In addition to telling us the need to ensure our interpretations are in conformity with the principles of the International Bill of Rights (IBR), this article seem to give hint us as to the responsibility to interpret chapter three of the Constitution is judiciary, from the angle of interpretation of laws including interpretation of the Constitution is the cardinal task of the courts.

More importantly, all judicial power rests with an independent judiciary and courts are subject only to the law.[281] The Ethiopian Constitution establishes two parallel judicial structures: one at the Federal level which hierarchically consists of the First Instance Court, High Court and the

[280] Ibid.
[281] FDRE Constitution, Supra note 1, Arts. 78 and 79.

Federal Supreme Court, and other at the State (Regional) level consisting of First Instance (Woreda) Courts, High (Zonal) Courts, and Regional Supreme Courts.[282] There is no explicit prohibition of judicial interpretation although there is the explicit recognition of the mandate of the HoF in case of constitutional interpretation.

Accordingly, as mentioned in chapter three, the supreme power of constitutional interpretation lies with the HoF consisting of representatives of nations, nationalities and peoples including human rights part also. Pursuant to Article 84(2) of FDRE Constitution the power to check un/constitutionality of legislative enactments is exclusively reserved to the HoF in general. This applies also on the legislative enactment relate to human rights matter. The Amharic version particularly makes it clearer as it refers to laws made by legislative organs. On other hand, interpretation of provisions of the constitution, or any petition on the un/constitutionality of an administrative act or a decision or custom is within the judicial jurisdiction of an ordinary court. As Aseffa Fiseha argued that 'the Courts have the residual power to consider constitutionality of cases that, for instance, involve violation of rights by the executive.'[283] Moreover judicial review is a normal business of courts as is implied, in the Ethiopian case, in the vesting of all judicial power in the courts.[284] However, in addition to determining un/constitutionality of legislative enactments which is exclusive power of the HoF, the writer believe that the CCI/HoF is appellate loci for a case (after exhaustion of all available remedy particularly after the decision of Federal Supreme cassation Bench that has begun somewhere in a court of law.

With regard to the legal expertise required in constitutional interpretation, the Constitution establishes the CCI mainly composed of legal experts, to assist the HoF in determining whether there is need for constitutional interpretation and if so, to provide recommendations to the HoF for a final decision.[285] Apparently, the current trend either does not consider the role of the

[282]Note also that the Constitution authorizes the adjudication of personal and family disputes in accordance with customary and religious laws upon the consent of both parties (Article 34(5)). Consequently, Sharia Courts have been established all over the country.

[283] A. Fiseha, 'Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience' Netherlands International Law Review 1,(2005) 21.

[284] FDRE constitution, supra note 1, Art. 79(1). See T. Regassa, supra note 227. The argument which should be noted is what led the US Supreme Court to assume the power of judicial review in Marbury v Madison although the US Constitution did not explicitly grant such power.

[285] FDRE Constitution, supra note 1, Arts. 62(2), and 82 – 84. The Council has 11 members consisting of both legal experts and politicians: the President and Vice President of the Federal Supreme Court, six legal experts appointed

judiciary in the adjudication of constitutional disputes, or it has made an exception to the judicial power of courts.

In Ethiopia, the power to pass decision over constitutional issues lies with the HoF/CCI and the trend of the courts' role is utterly limited to referring cases to the CCI wherever a case may not be resolved without first determining the constitutionality of the law based on which it is to be decided.[286] There should not be confusion between what ought to be (i.e., courts should have some power in constitutional interpretation) vis-à- vis what is the practice as it currently exists, all power of constitutional interpretation concentrated to HoF/CCI/. The HoF is a political organ, and constitutional review inherently requires the involvement of the judiciary. However, practically, it is hard to say that there exists judicial review in Ethiopia. This is true to legislative acts, administrative acts or omissions or custom so long as the issue of their contradiction with the Constitution arises.[287]

4.3. Implications of Constitutional Interpretation on the Protection of Human Rights in Ethiopia

Human rights are fundamental rights and freedoms that are recognized as belonging to everyone in the community. Of selective relevance to the study, it includes the procedural rights particularly the rights to fair trial. Human rights focus on the fair treatment of all people and enable people to live lives of dignity and value.

The international human rights framework makes it clear that both federal and state authorities have responsibilities in relation to the realization of human rights. In particular, Article 50 of the ICCPR expressly provides that in federations such as Ethiopia, the obligations of the Covenants are binding on the federation as a whole and must extend across all parts of that federation, without any limitations or exceptions. This means that in Ethiopia all branches of government (legislative, executive and judicial) and other public or governmental authorities at whatever

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by the President of the Republic upon recommendation by the House of Peoples' Representatives, and three persons appointed by the House of Federation from among its members.

[286] Minase Haile, Supra note 2, p. 54.

[287] Ibid.

level – national, state or local – must act to respect, protect and fulfill human rights.[288] At its most basic level, the study relates to the fundamental issue of access to justice. Access to justice is an essential aspect of the right to a fair hearing. Now let me discuss the practical implication of constitutional interpretation whether it could protect human rights or not in Ethiopia as follows:

4.3.1. Limitation of Government power

Constitutional limits on the power of government are necessary for a true democracy to exist.[289] The means used to limit governmental authority such as separation of powers, checks and balances and promulgation of human rights cannot be enforced without an independent body that can determine whether the government has exceeded the limits of its constitutional authority.[290] Separation of powers is based on the idea that no branch of government should be granted excessive power.[291] Each branch of government has constitutionally mandated responsibilities and obligations and is given the power to fulfill those responsibilities.[292] Branches of government are to act as co-equals and assert their powers as a check and balance on the other branches.[293]

Generally, the current Ethiopian system especially the system of constitutional interpretation including existing practices of constitutional review does not serve to protect the human rights of its individuals because it leaves the federal and state executive organ with virtually unlimited power.[294] The executive branch has the power to do as it wishes with no judicial check on its

[288] Human Rights Committee, General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add13 (2004), [4]. See also Art. 27 of the Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), which provides that a state party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

[289] See Minase Haile, Supra note 2.

[290] Id., P. 53.

[291] Sudha Setty, The President's Question Time: Power, Information, and the Executive Credibility Gap, 17 Cornell J.L. & Pub. Pol'y 248, 248 (2008). Cited in Chi Mgbako and others**,** Silencing the Ethiopian Courts: Non-Judicial Constitutional Review And Its Impact on Human Rights.

[292] See Sean Mulryne, A Tripartite Battle Royal: Hamdan v. Rumsfeld and the Assertion of Separation of- Powers Principles, Seton Hall L. Rev. 279, 297 (2008). Cited in Chi Mgbako and others, Silencing the Ethiopian Courts: Non-Judicial Constitutional Review And Its Impact on Human Rights.

[293] Ibid.

[294] There is no check and balance in Ethiopia because the EPRDF which dominates the executive also represents the majority party in the HOPR. And the executive organ totally dominates the power of constitutional interpretation through which it could be checked by other organs of the government. See also Minase Haile, supra note 2 at 46.

activities. The EPRDF, which dominates the executive, also represents the majority party in the HOPR.[295] Therefore, it is unlikely that the HOPR would be able to curtail the excessive power of the executive branch and there is not a legitimate mechanism to review the constitutionality of the executive branch's acts and decrees. Thus, in the absence of a legitimate mechanism to review the constitutionality of the executive branch's acts and decrees, the Prime Minister and Council of Ministers possess unrestrained political power.[296]

Proclamation No.251/2001 and No. 798/005 which extend the HoF's power of constitutional review, further weaken the judiciary's ability to serve as a check on executive power. It extended the power of HoF on matters of constitutional review to include all acts of the legislature and the executive which precludes the judiciary from any form of constitutional review. According to the Proclamations, the HoF/CCI has the power to check constitutionality of proclamations, regulations and directives issued by the federal and state government and international agreements that have been ratified by Ethiopia.[297]

Thus, the current practice and above mentioned proclamations open the door for the breakdown of separation of powers in Ethiopia as a result of a system in which a political organ (HoF) with strong ties to the executive is the final arbiter of the constitutionality of the executive's political acts. One of the outcomes of this system is that judges are fearful of ruling on politically sensitive cases. This form of judicial timidity was evident in the CUD case brought against the Prime Minister after the 2005 elections discussed above. The court's timidity perhaps led it to decide that the case involved a question of constitutional interpretation so that it could escape having to rule on the validity of the Prime Minister's actions in a politically sensitive case. However, even if the court had decided to rule on the validity of the Prime Minister's actions by applying the Constitution and finding that the Prime Minister had in fact overstepped his authority, the HoF could have easily overturned such a decision by declaring that there was in fact an issue of constitutional interpretation and therefore it was not within the courts' power to

[295] See Ctr. for Strategic and Int'l Studies, Ethiopia in 2005: The Beginning of a Transition 3 (2006), http:// www.csis.org/media/csis/pubs/anotes_0601.pdf [hereinafter beginning of a Transition].
[296] Ibid.
[297] Procl. No. 251/2001, Supra note 8, Art. 2 § 2; Procl. No.798/2013, Supra note 172, Art. 3(1).

decide the case.[298] In other words, by invoking the issue of constitutional interpretation whether such an issue does or does not exist, the HoF can always deprive the judiciary of the power to adjudicate sensitive cases dealing with the limits of executive power.

4.3.2. The Process of Constitutional Interpretation in Ethiopia

From the very beginning, Constitutional interpretation in Ethiopia involves some sort of inherent procedure. The procedure has emanated from the very fact that it passes numerous steps which becomes a traffic way for the individuals whose Constitutional rights is inevitably infringed by such procedure in question. It begins from the very initiation of constitutional complaints by the courts or by any interested party to final decision is rendered by the HoF. It emphatically creates inevitable procedural complication which has its own effect or consequence on the constitutionally guaranteed rights of the citizen. Thus, the procedure of Constitutional interpretation seems rightly to satisfy saying of 'justice delayed is justice denied.'

The key points which demand proper consideration in this regard is the trend of referral of constitutional issue from and by the regular courts to the HoF via the CCI. The judiciary refers all cases to the CCI/HoF which it deems need interpretation. The trend of swift and at times unquestioning judicial referral of Constitutional disputes to the CCI/HoF has seemingly bordered on judicial surrender of its proper province of refereeing the possible unconstitutional trespasses by the legislative and executive branches.

Thus, there is confusion surrounding the procedure of judicial referral of Constitutional issues to the CCI/HoF. The most cause for this jurisdictional confusion is the legal argument arising from the provisions of article 83(1) of the Constitution, which stipulates that 'all constitutional disputes' shall be decided by the HoF. This provision has given rise to the view, in judicial circles and beyond, that courts are relieved of or, more appropriately, stripped of the duty to interpret and apply constitutional provisions. Thus, it is believed that the constitutional interpretation power is taken away from the courts, and that for the regular courts to directly interpret and apply the constitution is impossible. This has been met by the practices of the

[298] Procl. 798/2013, Supra note 172, Art. 1; see Haile, Comparing Human Rights in Two Ethiopian Constitutions, P. 55.

CCI/HoF that have consistently sought to stretch their roles and powers to the limit in matters involving Constitutional interpretation. So, does the practice of HoF/CCI conform to the laws? If the practice is an accurate reflection of the law, it could well mean that the courts have been relieved of or stripped of the right and indeed the duty to refer all matters to CCI/HoF for Constitutional interpretation. However, as discussed in chapter three, we can infer from Art. 84(2), 78, 79, 37, 9, and 13 of FDRE Constitution that the spirit of the Constitution does not seem to totally exclude the judiciary from checking the un/constitutionality of subordinate laws (Regulation, Directive, Decisions, and customary practice) and interpretation of the text of the Constitution. Therefore, regular courts should only refer the cases entail un/constitutionality of legislative acts.

As provided under Article 84 of the FDRE Constitution, the Procedure of judicial referral in Ethiopia implies that when courts have confronted cases that have constitutional issues, they have referred the cases to Council of Constitutional Inquiry. Then, after investigation the Council shall: (a) Remand the case to the concerned court if it finds there is no need for constitutional interpretation; the interested party, if dissatisfied with the decision of the Council, may appeal to the House of the Federation. (b) Submit its recommendations to the House of the Federation for a final decision if it believes there is a need for constitutional interpretation. Then the House shall make the final decision upon draft proposal of constitutional interpretation submitted to it by the Council of Constitutional Inquiry. Really, this by itself is complex circulation of cases from one organ to the other and has its own practical implication to delay justice which amount to deny justice. The consequence of judicial referral has thus its own impact on human rights particularly on procedural rights such as the right to speedy trial, appeal, rights to public hearing, the right to be tried before independent and impartial body. Now before extensive analysis is made on the consequence of constitutional interpretation particularly the procedural irregularity on the rights of individuals, in the subsequent sections the writer tried to justify how constitutional interpretation especially procedural irregularities are created in the constitution, proclamation No. 798/2013 and proclamation No. 251/2001

4.3.2.1.The Procedure at the Initiation of Constitutional Complaints

One among the various prescription of the Constitution is to rightly pin point those persons (either physical or legal) who would be entitled to initiate Constitutional complaints. The FDRE Constitution has tried to expressly provide those persons who would initiate Constitutional complaints as 'any court or any interested party'.[299] Here what makes the study too burdensome is to specifically spell out the real connotation of any court and any interested party. However, as per to the authors' opinion any court is used to connote the court of any level be it federal or state which initiates Constitutional complaints either by its own initiative or by the request of any party if it convinced that there is a need for Constitutional interpretation in deciding the case. Generally, in Ethiopia whenever Constitutional interpretation on issues before courts of law arises, courts of any level refer the case to CCI.[300] But the courts do such task if they are convinced that law is repugnant to the Constitutional right of the concerned party. For instance, in the case between Melaku Fanta V. Anti Corruption Prosecutor Team, the Federal High Court referred a case to the CCI/HoF seeking for Constitutional interpretation on the issue of jurisdiction.[301] In this case the Federal High Court's jurisdiction to try Melaku was challenged by the defense team who argued that the defendant, as a government official with a ministerial portfolio and a member of the Council of Ministers, shall be tried by the Federal Supreme Court. On the other hand, prosecution team had argued that Melaku's ministerial portfolio is only to accord benefits for the former director general of the Ethiopian Revenues and Customs Authority (ERCA) and therefore, he should be tried by the Federal High Court.

The court, presided over by three judges, regarded Melaku as a full-fledged minister however, questioned the Constitutionality of referring the case to the Federal Supreme Court. Under Article 8(1) of the Federal Courts Establishment Proclamation offences for which officials of the Federal Government are held liable in connection with their official responsibility, the Federal Supreme Court will have first instance jurisdiction. Further, Article 7(1) of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation said Federal High Court will have first instance jurisdiction other than those cases for which the Federal Supreme Court has first instance jurisdiction.

[299] FDRE Constitution, Supra note 1, Art. 84(2).
[300] Procl. No. 798/2013, Supra note 172, Art.4(1).
[301] The Federal High Court referred Melaku Fenta's case to the House of Federation seeking for constitutional interpretation. See www.ertagov.com/.../1987-court-seeks-constitutional-interpretation-in-mela..., Court seeks constitutional interpretation in Melaku Fenta's case ... assessed on November 20/2013.

The court, in its unanimous ruling, questioned the Constitutionality of these articles because, the defendant will be deprived of his Constitutional right to appeal if his case is to be tried by the Federal Supreme Court. This is contrary to Article 20 (6) of the Constitution which declares defendant's right to appeal." Therefore the court argued that the ruling sought for Constitutional interpretation on the matter as well as which court should have jurisdiction to preside over the case from the CCI/HoF. Thus, the court refers the case based on its own initiatives to the CCI as per Art.4 of proclamation No. 798/2013, for Constitutional interpretation.[302] Thus, these practices precisely justify as the court of any level can raise Constitutional complaints by its own initiative and directly refer it to the CCI to be interpreted. What type of Constitutional issues the regular courts could refer to HoF via CCI? To begin with, there is a big problem in the protection of fundamental rights and freedoms guaranteed under the Constitution in case any regular court refer all Constitutional matters to the HoF that mean all First Instance Court of nine regional states, High Courts of the nine regional state, Supreme Court of nine regional states and all First, High and Supreme Courts of federal and Dire Dawa city administration. Surprisingly, imagine how many courts can single regional state has; then multiply it by nine of regional states in federal states of Ethiopia plus the number of courts in Addis Ababa and Dire Dawa. From this fact it is inevitable that huge number of constitutional cases could be referred to CCI/HoF which results a great load to this organ. Therefore, how could CCI which is the part timer organ effectively accommodate human rights issues which need day to day activity that will be referred from all level of regular courts of the corner of country on the matter of all constitutional issues? From this angle, it is very difficult to think of having the proper protection of the fundamental rights and freedoms guaranteed under the Constitution. On the other hand, from the very purpose of the constitutional interpretation, the practice of referring all constitutional issues to HoF is not intended by the drafter of the Constitution. Furthermore, the drafter of the Constitution did not intend as all level of regular courts refer all cases which entail constitutional issues to HoF. So that it is not necessary for courts to refer all cases which entail constitutional issues rather as per Art.84 (2) of the Constitution they should refer cases entailing only un/constitutionality of legislative acts to the HoF.

[302] Ibid.

The other point is the FDRE Constitution fails to define the term interested party and it becomes a matter of controversy to understand its meaning constitutionally. Nonetheless the controversy among the scholars, the term interested party is used to denote those whose interest is at stake directly or in directly as a result of the operation of the law or the legislation enacted either by the federal or state legislature. Other writers also 'state that where an issue of constitutional interpretation or disputes arises in the course of litigation in court, an interested party may mean a plaintiff or a defendant.'[303] Because a plaintiff or a defendant whose interest is inevitably affected by the outcome of the case.

Constitutionally the term interested party could mean the defendant or the plaintiff or any party or any organ or any individual whose Constitutional rights is affected by the operation of the law, by the decision of public officials as well as by any other customary practice of the state. If the term interested party is understood and interpreted just like what has been discussed before through what procedures could these parties initiate constitutional complaint? Initially the interested party should apply to the court as the application of a certain provision of the Constitution requires interpretation. In doing so he/she should show the transgression or the violation of his constitutionally guaranteed right by the operation of certain federal or state legislation or by the decision of any organ of the government. In such cases his rights is violated or infringed in two ways. That is either in the court litigation or out of the court proceeding.

4.3.2.2. In Court Proceeding

When the issue of constitutional interpretation arises in the court proceeding, the interested party can not directly lodge his complaint before the CCI/HoF. He should rather present his request or complaint before the court handling the case before submitting it to the CCI.[304] In such instances once complaint is posed before the court it cannot immediately declare a decision on the case. Rather it has two options, either to reject the complaint on the ground that it is not a legal issue to call for constitutional interpretation or to submit that complaint to the CCI if the court is convinced that the complaint really demands interpretation in deciding the case.[305] In this regard the proclamation seems to obligate the courts to refer all complaints of constitutional issues if it

[303] Ibrahim Indris, Supra note 155, p. 82.
[304] Procl. No. 798/2013, Supra note 172, Art. 4(2).
[305] Id., Art. 4(3).

calls for constitutional interpretation which do not seem to the spirit of the Constitution. Also this fact obligates us to assert that depending on the circumstances of the case, the court has absolute discretion either to submit the case to the CCI if it believe that the complaint call for constitutional interpretation or to reject the complaints if the court believe that the complaint do not need interpretation.

Whenever the court announces its rejection of the complaint and at the same time if the suspect is aggrieved by such rejection of the court, he can submit his grievance by way of appeal to the CCI within the three months time from the receipt of the decision of the court.[306] In such a case, the CCI may order the court to suspend until it decides on the inquiry for constitutional interpretation of the case.[307] Thus, needless to mention this situation clearly shows the undue procedural delay. Similarly, the writer of this paper would like to inform the reader if not all, give much emphasis and understand the whole concept of this paper by having in mind that the issue of constitutional interpretation is ensued in the court, the procedures followed by it and then the effects of those procedures on the rights of individuals that may arises from unnecessary delay of justice.

4.3.2.3. Out of Court Proceeding

When the issue of constitutional interpretation is initiated out of the court proceeding: constitutional complaint is said to be ensued out of the court proceeding when the fundamental rights and freedoms of any person is adversely affected or violated by the decision of any government organ or any public officials.[308] The individual is expected to first exhaust all available remedy from the government institution having the power with due hierarchy to consider it.[309] On the other hand, the Constitution firmly demands the protection of those fundamental rights and freedoms as they are regarded as basic rights. That is to mean since these rights are considered as the roots on which other rights base their existence any violation of such rights and liberties will be shocking and seem to contradict with the Constitution.

[306] Id., Art. 4(5).
[307] Id., Art. 6.
[308] Id., Art. 5 (1).
[309] Id., Art. 5(2).

Thus, in view of this fact individual has the rights to raise any form of constitutional complaint whenever he/she deems it calls for interpretation and then to question the validity, legitimacy of the decision of the public officials by posing it before the CCI. But as it has been clearly forwarded before what makes the complaint too difficult is the interested party cannot directly lodge it before the CCI. Interested party should rather exhaust other procedural remedies be it judicial or administrative.

For instance, in the case between Shambal Basha, Sisay Niguse and special public prosecutor,[310] the prosecutor brought a charge against Shambal for the suspicion of that he has committed a crime of homicide in December 20, 1970 E.C. However, the evidence of the prosecutor reveals that he had not committed a crime of murder on those persons but as he had committed crime of torture on those persons. Finally after the accused had detained for 10 years and four months without conviction, the Federal High Court has rendered a judgment of 8 years rigorous imprisonment and 5 years suspension of rights for the crime of torture. But the accused had seriously alleged that he had been punished or sentenced for the punishment of crime of torture which he was not accused and he persistently continues to allege until the cassation division that confirmed the decision of High Court, and the accused lodged his complain before the CCI on the ground that the decision of the judicial branch had violated his constitutional rights. But after a thorough investigation the CCI had rejected his complaint due to the fact that the issue does not require constitutional interpretation.

This shows that individual can lodge constitutional complaint after he had exhausted procedural remedies be it judicial or administrative. In this case if individual has been dissatisfied and believed that his right has been violated by the decision of the Federal Supreme Cassation Court, he could bring his constitutional complaint before CCI/HoF. This practice is within the spirit of the Constitution and what had been intended by the drafter of the Constitution.[311] However, this

[310]Shanbal Basha Niguse v. Special Public Prosecutor, CCI, File No. 1/24/97 (decision rendered on 19/06/1997 E.C).

[311] Minute of the Constitutional Assembly, supra note 218, See discussion on Art.62 (1) 83, discussion of the Assembly on Art.83, one member forwarded to the assembly his fear that "if courts are excluded from interpreting the constitution it is difficult to say that there are courts in Ethiopia" and the response given from the house was that courts are not totally excluded from their traditional interpretation power. the Assembly explained that the "fact that the power to interpret the constitution is given to the HoF does not mean that every cases appeared before a court that is claimed by a party as involving constitutional issue is to be referred to the CCI, rather the issue should pass

could make the power and function of the CCI not as organ to investigate on the constitutional issue but rather as organ of highest cassation division and elongate the procedure of case litigation which results delay of justice in the country.

4.3.2.4. The Procedure at Sub-Inquiry Committee and The Council's Recommendation on Complaint

In the forgoing discussion it has been discussed that the issue of constitutional interpretation arises either in court or out of court (after exhaustion of the available remedies). But, the issue on constitutional complaint could be submitted to the CCI in two ways. First by court itself whenever it is convinced that the case really calls for constitutional interpretation particularly when has faced with the un/constitutionality of the legislative acts. Second by the interested party itself whenever is dissatisfied by the decision or the ruling of court and decision of the administrative organ of the government. Afterwards the procedure to be followed is that the Council directs the complaint to sub-inquiry committee[312] which has the composition of at least three members including its chairperson who are assigned by the Council from among its permanent serving members.[313] The Sub-Inquiry Committee identifies cases that need or not need constitutional interpretation and submit the same to the Council along with the study based clarification.[314] From this fact the Sub-Inquiry Committee has the power to investigate whether constitutional complaint deems necessary to constitutional interpretation or not. Here the new Proclamation No.798/2013 adds one other organ which takes part in the constitutional interpretation. This could inevitably elongate constitutional interpretation procedure more than the previous Proclamation No. 250/2001. Let alone the elongation of procedure until the final procedure of constitutional interpretation, the establishment of Sub-Inquiry Committee within CCI elongates the procedure at the Council's recommendation on constitutional complaint.

Afterwards the procedure to be followed is the Council holds its own investigation and then the CCI will refer its opinion to the HoF. But, if it dismisses the case, it would refer the matter back to the concerned party, individuals or court. Here what makes the interested party be frustrated is

through the various level of courts up to cassation; and so long as it is not said that the decision of these bodies involves erroneous interpretation of the constitution, no case is to be lodged to the CCI.

[312] Procl. No. 798/2013, Supra note 172, Art.25(1).

[313] Id., Art.24(2).

[314] Id., Art.25(2).

that his/her complaint may have the possibility of being heard when the CCI holds regular meetings on monthly basis.[315] Even though Proclamation No. 798/2013 repealed the previous Proclamation No. 250/2005 and improved regular meeting of the CCI, three months to a monthly regular meeting, still it is not suitable to entertain human rights issues when we see from the angle of day to day violations of human rights.

At any rate it is mandatory for the Council to hear the complaint be it after one, two or three months whenever it makes a regular session. In such session again, a quorum is said to be held when two- third of members of the Council are present at the meeting.[316] But most of the time there are instances where such quorum will not be held in that session because the members of the Council are not permanent or regular but part time workers where their regular work made them extremely busy so as to attend in each meeting of the Council. Such fact reveals as investigation of the complaint may not be conducted even within a monthly time unless the quorum is constituted, thus it becomes obligatory for the party to wait another months until the quorum is held with two –third member of the Council. This elongation of time directly verifies as it is antagonistic to enjoy fair justice and expeditious decision with respect to such matter.

The other point is that meeting of the CCI shall be held in Addis Ababa; and as necessary it may be held in selected state.[317] This indicates that it is not mandatory to hold meeting outside the capital city of Ethiopia and still in practice CCI has no any branch out of the Addis Ababa city. This by itself has great impact on the protection of human rights when we see from the angle of geographical accessibility of the organ to bring the cases before it.

4.3.2.5. The Procedure Until Final Decision of HoF on the Complaint

Similar to how a constitutional complaint is brought before the CCI it may be posed before the HoF in two principal ways. First, by way of appeal when the CCI dismisses the complaint and the party who brought the complaint is dissatisfied by such dismissal of the Council. Second, directly by the CCI when it believes that complaints bear constitutional interpretation. At any

[315] Id., Art.23(1).
[316] Id., Art. 11(1).
[317] Id., Art. 23(3).

rate once the complaint is posed to the attention of the HoF, it is empowered to render a final and binding decision on the complaints.

As mentioned above 'the HoF is authorized to receive appeal from a party who is dissatisfied by the rejection of the case on the ground of no need for constitutional interpretation.'[318] Once if appeal is brought to the attention of the House, it should make thorough investigation whether the reason given by the Council on the complaint is justified or not. The pertinent problem ensued here is what the House found out the dismissal of the Council is unjustified and understands to the other around? This is difficult situation for the HoF to proceed and to render decision. Because neither the Constitution nor the Procl. 251/2001 states any solution so as to alleviate the problem the House encounters.

For such difficulty, one may envisage that the House may either remand the case back to the CCI for further and critical analysis over the case or may conduct a new investigation and reverse the decision and then renders its own new ruling over the matter at issue. On the account of this fact if the House reverse the decision or recommendation of the Council and provides its own new justification what is the very purpose of establishing the CCI? Could it not be amount to disregarding the very function of the CCI? Here the intention of the author is to point out and emphasize on how procedure of constitutional interpretation affects the rights of individuals. In case of Dr. Tesfaye v. Abebech Bejga: Dr. Tesfaye had submitted his complaint to the CCI demanding interpretation. But, the CCI had rejected the complaint on the ground that it was barred by period of limitation as per Article 22 of proclamation 251/2001. Dr. Tesfaye became dissatisfied with the decision of the CCI and appealed to the HoF. The House then accepts the appeal made a research on the matter and remands the complaint back to the Council to evaluate it not in the light of Art.22 but on the basis of Art.23 of proclamation 251/2001.[319] Similarly in the Benishangul Gumuz election case,[320] the HoF had reversed the decision of the CCI and confirms the previous decision of the election board or the minority opinion of the CCI. In short,

[318] Getahun Kassa, mechanisms of constitutional control: A preliminary observation of the Ethiopian system: An expert seminar in Brusseles on Ethiopian federalism and the protection of human right. July 12-13, 2006, p. 8.
[319] Dr. Tesfaye vs. w/r Abebech Bejga, House of Federation, File No. ፌ.ማ.-3/01/21/5/4 (Decision of Ginbot 17/1998 E.C.).
[320] Benishangul Gumuz Election Case: Journal of Constitutional Decisions of the House of the Federation of Federal Democratic Republic of Ethiopia, vol. I, 2000, p.15-34 (herein after Benishangul Gumuz Case).

these cases enumerate as the HoF can remand the case back to the CCI for further investigation and reverse the decision of CCI.

Therefore, from these two cases it is possible to conclude that the House may either remand the case back to the Council or reverse the decision of the Council and give its own new decision. If this is so, arguably the establishment of the Council seems for the mere elongation of the procedures. Here the intention of the author is to point out the constitutional and other related laws' defects, and to show how those defects create unnecessary procedures which become a typical cause for the delay of justice.

The second method forwarding constitutional complaint before the House is when the investigation of the CCI reveals as it demands constitutional interpretation.[321] The House has the obligation to pass a prompt decision within thirty days over the recommendation submitted to it by the Council.[322] Though the House is obliged to give decision within thirty days, cases are taking longer time in practice and that is thus far from being reality.[323] Because, how HoF provides a reliable decision within the prescribed time so far as it undertakes two sessions per a year? Even in those prescribed two sessions the House may have its own agenda on equally and more currently existed sensitive issues and it may have no extra time to make investigation on constitutional complaint. Besides, the decision of the House will be passed up on the approval of the majority vote when two third of the members which constitutes the quorum are present. Otherwise, if the members present are below two third of the total members then the quorum is not constituted. As a result, the House cannot render even evaluate any issue rather it postpones for the next session after six months. This again results in the procedural delay of justice.

The other issue that should be considered corollary to the aforementioned fact is though the House constitutes a quorum, it cannot again render a quick decision. Because it is required to follow another procedure before it gives a final and binding decision on the matter. For instance, it should collect additional information and order the pertinent bodies, institution, professional

[321] FDRE Constitution, Supra note 1, Art. 84(1).
[322] Procl. No. 251/2001, Supra note 8, Art. 13(2).
[323] Getahun kassa, Supra note 318.

and contending parties to produce their opinion which becomes the best source of evidence.[324] Take for instance in Benishangul election case in its appellate jurisdiction and in rendering its decision but before it gives its final decision, it called three legal professionals to state their opinion about the facts in issue. In view of which the HoF has decided and confirmed the decision of the minority vote in the CCI based on the opinion it obtained from those professionals.[325] In other way requiring these pertinent institutions and professionals to appear before the House from the various parts of the country takes more time. Taking the theory to the practice is not as such easy task. But, in whatever manner and how much time takes procedurally the HoF is constitutionally empowered to give a final and binding decision on those complains based on the approval of majority of members in the quorum.[326]

From the foregoing discussion, what the reader should remind is that from the time the constitutional complaint is initiated either in the court itself or by the interested party the case is pending in the court handling the case until such complaint has got a remedy by the final and non appellate decision of the House. In addition, it is possible to observe how all of those steps create or become the cause for the procedural delay of justice. That is its consequent prejudice is intolerable as a matter of fact and impermissible as a matter of law.[327] Thus, in lieu of which precisely with no need to say some of this procedural delay of justice has its own inevitable effect on the various human rights provisions enshrined under the constitution.

4.3.3. The Consequence of Constitutional Interpretation: Relevant Human Rights to the Study

The right to a fair hearing is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms. Human rights considerations are of increasing relevance to the law governing the conduct of proceedings and to legal conceptions of what amounts to a fair trial or a just decision, all of which are relevant constituents of effective access to justice.

[324] Procl. No. 251/2001, Supra note 8 Art. 8 , see also Art.10.
[325] Benishangul gumuz case, Supra note 320.
[326] FDRE Constitution, Supra note 1, Art.64.
[327] H. Richard Uviller, The process of criminal justice adjudication: American case book series (west publishing company, 1979), p. 930.

The right to a 'fair hearing' is recognized and enshrined in Art. 14(1) of the ICCPR: All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The right to a fair hearing is also echoed under Art. 6(1) of the European Convention on Human Rights (ECHR): In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public trial within a reasonable time by an independent and impartial tribunal established by law.

The above legal documents indicate that the concept of a fair hearing contains many elements and the standards against which a hearing is to be assessed in terms of fairness are interconnected. At the very least, the minimum basic elements of the right to a fair hearing can be said to consist of: the right to access to justice; costs of litigation; right to procedural fairness; right to an expeditious hearing/ speedy trial/; right to be tried before a competent, independent and impartial tribunal established by law; right to a public hearing; etc.

To relate the point with constitutional interpretation; the right to fair hearing should be respected before the organ which is empowered to interpret the Constitution. Thus, in this regard, state party to the international document has the duty to ensure the rights enshrined in the document. As far as Ethiopia is a party to the ICCPR, the right to fair hearing should be respected in the country particularly in regard to adjudication of constitutional issues. However, the system as a whole including trends of constitutional interpretation did not develop appropriate ways that could protect these rights recognized under the ICCPR and the FDRE Constitution especially the right to fair hearing in this context. Because, for one thing, the competence of the individual of HoF members to understand and interpret the Constitution in a manner sensitive to due process guarantees and substantive human rights is suspect. Some authors have shown that constitutional interpretation by the HoF has demonstrated misunderstandings of the constitutional guarantees involved (such as, the right to speedy trial, the right to public hearing, the right to appeal, the right to access to justice and so on) and set dangerous precedents.[328] The reluctance of regular

[328] G. Assefa, 'Federalism and Legal Pluralism in Ethiopia: Reflections on Their Impacts on the Protection of Human Rights', in G. Alemu and S. Alemahu (eds), The Constitutional Protection of Human Rights in Ethiopia:

courts in constitutional interpretation and the question of referral of constitutional issues by the regular courts to the CCI/HoF thus entail the need for a nuanced analysis of the ramifications of the hearing by the HoF.

Like in other jurisdiction the right to fair hearing in Ethiopia contains many elements and the standards against which a hearing is to be assessed in terms of fairness are interconnected. Now, let me discuss the constitutionally guaranteed rights that are at stake because of the system as well as the practices of constitutional interpretation developed in Ethiopia. With this in mind, I would like to discuss some elements of the right to a fair hearing and other rights that are at stake.

4.3.3.1.The Right to Speedy Trial

The appropriateness of constitutional interpretation and measures to reduce the length and complexity of constitutional litigation are specific terms of references in the study. According to UNHRC decision in Gonzalez Del RHO v. Peru[329] 'the right to fair trial is an absolute right that may suffer no exception. Additionally the right to fair trial assumes a fundamental foundation for the enforcement of all other rights recognized in the various international human rights instruments.'[330] Corresponding to the right to speedy trial an element of the right to fair trial is therefore an absolute right that may suffer no exception even when the trial is for genocide and crimes against humanity. According to General Comment 32, an important aspect of a fair hearing is its expeditiousness,[331] while jurisprudence indicates that the complexity of litigation will impact the level of expeditiousness required. The most litigation requirement in article 6 of the ECHR is the right to a fair hearing, followed by the obligation to ensure that proceedings do

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Challenges and Prospects, Vol. 2, Addis Ababa University Press (2008), p. 1; T. S. Bulto, 'The Interplay of the Equality Clause and Affirmative Action Measures under the Ethiopian Constitution: The Benishangul Gumuz Case and Beyond', in G. Alemu and S. Alemahu (eds), The Constitutional Protection of Human Rights in Ethiopia: Challenges and Prospects, Vol. 2, Addis Ababa University Press (2008), p. 59.

[329] Gonzales Del RHOv. Peru, communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/ 1987 (1992).

[330] Hailegabriel Debebe, Prosecution of Genocide at International and National Courts: A comparative Analysis of Approaches by ICTY/ ICTR and Ethiopia / Rwanda; a dissertation submitted in partial fulfillment of requirement of degree LLM (human rights and democratization in Africa) faculty of law, university of Pretoria, 2004.

[331] United Nations Human Rights Committee, General Comment No 32, CCPR/C/GC/32, 23 August 2007 [27] (herein after General Comment No. 32). A general common is an authoritative statement of the interpretation and application of a treaty provision by the body responsible for that treaty.

not exceed a reasonable time.[332] It also recognized under African charter on human and peoples' rights Art.7 (d).[333] While the issue of undue delays in trial proceedings is explicitly addressed in paragraph 3(c) of Art. 14 of the ICCPR delays in civil proceedings that cannot be justified by the complexity of the case or the behavior of the parties are not compatible with the right to a fair hearing.[334] Further, the HRC suggests that, 'where such delays are caused by a lack of resources and chronic underfunding, to the extent possible supplementary budgetary resources should be allocated for the administration of justice.'[335] It is clear from the jurisprudence that the level of expeditiousness required will depend very much on the circumstances of the case.

In the determination of any criminal charge against him/her everyone shall be entitled "To be tried without undue delay" Article 14(3) (c) of ICCPR. This provision has been interpreted to signify the right to a trial that produces a final judgement and it appropriate a sentence without undue delay. The time limit "begins to run when the suspect (accused, defendant) is informed that the authorities are taking specific steps to prosecute him."[336] The assessment of what may be considered undue delay will depend on the circumstances of a case, i.e. its complexity, the conduct of the parties, whether the accused is in detention, etc. The right is however not contingent on a request by the accused to be tried without undue delay. Note that a person who is in pre-trial detention may be entitled to release prior to the commencement of the trial even if there has not been undue delay.[337]

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[332] Council of Europe, Annual Report 2008 of the European Court of Human Rights (provisional edition), available at<http://www.echr.coe.int/NR/rdonlyres/B680E717-1A81-4408-BFBC-4F480BDD0628/0/ Annual_Report_2008_Provisional_Edition.pdf> at 5 September 2013, at 67. Accessed on 24 October 2013.

[333] African charte on human and poeples' rights adopted june 27, 1981, OAU Doc. Cab/ leg/ 67/3 Rev. 5, 21 I. L.M.58 (1982), entered into force Oct. 21, 1986.

[334] General Comment No 32, Supra note 331. See also Yves Morael v France UN Doc CCPR/C/36/D/207/1986 and Ruben Turibio Munoz Hermoza v Peru UN Doc CCPR/C/34/D/203/1986, which held that a fair hearing in civil proceedings required justice be rendered without undue delay.

[335] General Comment No 32, Supra note 331. See also, e.g. Concluding Observations, Democratic Republic of Congo, CCPR/C/COD/CO/3 (2006), [21], Central African Republic, CCPR//C/CAF/CO/2 (2006), [16].

[336] Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary (N.P. Engel, Arlington: 1993), at 257.

[337] See European Convention, Article 5(1); and Statute of the International Criminal Court [hereinafter ICC Statute], Article 55(1)(d). The ICC Statute establishes a permanent institution for the purposes of trying persons for the most serious international crimes (including genocide, crimes against humanity and war crimes) where a national legal system has failed to do so. The Statute was approved on July 17, 1998 but will not come into force until 60 nations have ratified. As of February 16, 2000, 94 countries had signed the Statute but only seven countries had ratified it.

The FDRE Constitution, being as the supreme law of the land provides fundamental rights and freedoms. Human rights including the rights to speedy trial are directly emanated from the nature of mankind and at the same time they are inviolable and inalienable[338]Which means the right to speedy trial of the suspect is one of those fundamental rights that man is granted for being a human.

The very difficult assertion here is not to believe as person has a speedy trial rights but spell out the specific time when the trial is said to be speedy or not speedy. In fact the precise boundaries of the speedy trial guarantee is far from clear,[339]and precise time for the infringement of the right to speedy trial remains a plausible issue and is not yet answered under any international instruments. But to believe of the author of this work one cannot rightly point out the exact time when the right is denied rather it may depend on the circumstance or the complexity of each case. Thus, we have no constitutional basis for holding that speedy trial right can be justified on a specific number of days, months or years rather it is up to the discretion of the law enforcing organ to take into account the very purpose of recognizing such a right and then to determine the time of the speedy trial. In similar manner, the FDRE Constitution on its part guarantees the suspect's right to speedy trial under Art.19(4) of the Constitution, it impose a duty on a court of law to avoid the unnecessary police investigation and then to enforce the individual's right to speedy trial. Moreover Art.20 (1) of the Constitution states that 'all persons have the right to public trial before an ordinary court of law within a reasonable time after having been charged. In short the above justification reveals as the right to speedy trial of the individual is clearly adopted and incorporated in the Constitution. That is once if this right is guaranteed by the supreme law, it should be protected safely by an organ of the government. Because the very reason for granting a speedy trial right is to avoid unnecessary or undue delay and to protect the interested party from unjustified punishment without conviction or from pre- trial incarceration.

Thus, if the right to speedy trial of the person has that much rational as discussed before, it is the duty of all government organs be it the judiciary, the legislature or the executive to prevent unnecessary delay and to ensure whether accused person is tried within the reasonable time or

[338] FDRE Constitution, Art. 10(1).
[339] Shatter walther V, Lafave Wayne R, American Bar Association project on minimum standards for criminal justice, standards relating speedy trial.

not. Taking this fact in to account, the right of the individuals should in no way be denied either by legislation of the law maker, by any judicial or administrative decision or by the customary practices of the state.

However, no matter how a speedy trial right is expressly guaranteed by the FDRE Constitution and other ratified international instruments, the Ethiopian system of constitutional interpretation including the practices results difficulty in such basic right. While regular courts have confronted cases that have constitutional disputes, it has referred to CCI then after investigation if this organ was satisfied it directs the case to HoF for final decision on the issue of law and even it could be remanded again to the CCI from HoF if it deems necessary for more investigation. This implies that there is complex circulation of case from one organ to the other. Let alone all procedures that has been followed by these organs up to final decision rendered by the HoF, the procedure that single organ has followed by itself is complex and has its own implication to delay justice which amount to deny justice. Therefore, a system of constitutional interpretation as well as trend satisfies the proverb 'justice delayed is justice denied' for it has come up with numerous procedures which become the cause for the delay of justice. This unjustified delay of justice infringes the interested parties' speedy trial right. For the purpose of this work, unlike other causes of delay, both the police and the public prosecutor are not blamed on the ground that there is no functional relationship between constitutional interpretation and these institutions. The delay is rather attributable to those institutions and organs which entrust the power to constitutional interpretation with various procedures should be blamed. Since, the system in question affects the interest of justice as well as denies the constitutionally guaranteed rights of the individuals.

As it is also briefly enumerated in chapter three a system of constitutional interpretation has developed final decision power on constitutional matters not to the court but to the HoF. On account of this fact it has its own negative consequence, typically on the speedy trial right of the accused person due to those inherent procedures it involves. It is the one that rooted in hard reality on need to have charges promptly disposed.[340] This is also due to the fact that the right to speedy trial is generically special from any other rights enshrined in the Constitution for the

[340] LIoyed Weinedrb, Criminal process: prosecution (West Burg, New York Foundation Press, INC. 1993), p.941.

protection of the suspect.[341] In this regard a legal expert called sir Edward coke concluded that prolonged detention without trial is contrary to the law and customs of the state and also in addition to that it will be an improper denial of justice.[342]

Furthermore, the Ethiopian system of constitutional interpretation has denied the speedy trial right of the suspect/accused person/ regardless of the bail ability or non bail ability of the case. In other word for the right of the suspect to be denied by the Ethiopian system of constitutional interpretation, the bail ability or non bail ability of the charge instituted by the public prosecutor is immaterial. In either case the right is violated in so far as the constitutional issue is submitted to the CCI and then to the HoF for the final decision. Which mean even if the charge or the case is bail able and the suspect is released on bail he is awaiting the time that he will be tried. Hence so long as he is not tried within a reasonable period of time depending on the circumstances of the case, still his right to speedy trial is denied irrespective of the bail ability or otherwise of the case.

However, the denial of the right to speedy trial, by the system of constitutional interpretation which Ethiopia has developed, became so series and grave when the case or the offence that the suspect charged is non bail able. Because in such instance the denial of the right to speedy trial has its own due impact or consequence on the other rights of the suspect. Chief among which is the right to presumption of innocence and the accused could faces for inevitable economical loss.

In the previous section of this chapter, the author has attempted to show the procedural delay of justice denied the speedy trial of the suspect that is resulted from a system of constitutional interpretation in Ethiopia. This denial of speedy trial is also directly attributable to violation of the right to presumption of innocence especially when the charge brought against the suspect with non bail able offence. Let me discuss how this right could be affected in this regard.

4.3.3.2. The Rights to Presumption of Innocence

[341] Id., p. 946.
[342] H. Richard, Supra note 327.

The presumption of innocence is one of the most important and ancient rights embodied in criminal justice systems around the world. The right to be presumed innocent until proved guilty is one of those principles that influences the treatment to which an accused person is subjected from the criminal investigations through the trial proceedings, up to and including the end of the final appeal.[343] This principle is fundamental for the protection of human rights and must guide the prosecution as well as the defense lawyers. However, when is the Presumption of Innocence Triggered? During the investigation phase, the authorities need only establish a sufficient cause to arrest, and sustain a charge. They do not need to establish the arrestee's guilt beyond a reasonable doubt. It is during this time that the arrested person is most likely subjected to a violation of his rights and therefore his right to be considered innocent until a final decision is reached.

According to Article 14(2) of the ICCPR "Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law."[344] As a basic component of the right to a fair trial, the presumption of innocence, inter alia, means that the burden of proof in a criminal trial lies on the prosecution and that the accused has the benefit of the doubt. [345] Despite the fact that Article 14(2) does not specify the standard of proof required, it is generally accepted that guilt must be proved to the intimate conviction of the tier of fact or beyond a reasonable doubt, whichever standard of proof provides the greatest protection for the presumption of innocence under national law. The presumption of innocence must, in addition,

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[343] Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, United Nations, 2003, at 219, available at http://www.ohchr.org/Documents/Publications/training9chapter6en.pdf.

[344] The web site of the UN High Commissioner for Human Rights has a list of those nations that have ratified the ICCPR at http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_4.html. Accessed on 20/6/2013 Depending on the regional human rights instrument(s) that a state is bound by, the corresponding provisions of such treaties should be taken into account as well. For European states the most important instrument would be the European Convention for the Protection of Human Rights and Fundamental Freedoms, November 5, 1950 [hereinafter European Convention] (http://www.coe.fr/eng/legaltxt/5e.htm). For Latin and North American states it would be the American Convention on Human Rights, November 22, 1969 (http://www.cidh.oas.org/Básicos/Basic%20Documents/enbas3.htm), while for the African states it would be the African Charter on Human and People's Rights, adopted June 27, 1981, entered into force October 21, 1986 (http://www.oau-oua.org/oau_info/rights.htm). Art. 6(2).

[345] ICC Statute, supra note 337, Article 66. The ICC Statute establishes a permanent institution for the purposes of trying persons for the most serious international crimes (including genocide, crimes against humanity and war crimes) where a national legal system has failed to do so. The Statute was approved on July 17, 1998 but will not come into force until 60 nations have ratified. As of February 16, 2000, 94 countries had signed the Statute but only seven countries had ratified it.

be maintained not only during a criminal trial vis á vis the defendant, but also in relation to a suspect or accused throughout the pre-trial phase. It is the duty of both the officials involved in a case as well as all public authorities to maintain the presumption of innocence by "refrain[ing] from prejudging the outcome of a trial."[346] It may also be necessary to pay attention to the appearance of an accused during a trial in order to maintain the presumption of innocence, for instance, it may be prejudicial to require the accused to wear handcuffs, shackles or a prison uniform in the courtroom.

But, here what reader should bear in mind is the denial of the right to presumption of innocence and other important benefits of the suspect as a consequence of the denial of the right to speedy trial is not simply because of the fact that the organ empowered to interpret the constitution is the HoF. However, the issue of constitutional interpretation may ensue just at the beginning or at the middle of the proceeding of the trial. Here, since there is a perception that the court is not authorized to interpret the Constitution it refers the case to the CCI and order the suspect to return back and to stay in the custody or jail until the case finds a remedy from the final decision of the HoF. The suspect may or may not be released from the custody or jail. But at any rate the fruit of the grain is his detention in the custody not because he is found to be guilty but by those inherent procedures until the final decision of the HoF. This situation persuades reasonable person that in addition to violating the speedy trial right, as it amounts to punishing the accused person while he is at the stage of innocent. In line of which this punishment of innocent person justifies the clear denial of the right to presumption of innocence as a consequence of denial of the speedy trial right which is emanated from the procedural delay of justice in a system of constitutional interpretation which Ethiopia adopts. Taking into account the right to presumption of innocence is violated for the accused person who is charged with the non bail able offence and considering as constitutional interpretation may be ensue at the beginning of trial or at the middle of the criminal proceeding. A case of *Pre Ethiopian Bank Worker v. Special Public Prosecutor*[347] ensures this material fact. That is beginning from May 21, 1993 E.C the 29 Pre-

[346] Human Rights Committee General Comment No. 13/21 of April 12, 1984 [hereinafter General Comment 13], para 7.

[347] The 29 pre- Ethiopian Bank Worker and 12 Traders Vs. Special Public Prosecutor, Council of Constitutional Inquiry (the decision of 1/04/1996). In this particular case public prosecutor detained the defendants as they are suspected for the offence of corruption which is non bail able.

Ethiopian Bank Worker and 12 Traders detained as they are suspected for the offence of corruption which is non bail able as per Art. 51(2) of Procl. No. 239 (2000). But on August 30, 1993, the defense council of those suspects brought complain to the CCI by alleging that the Proclamation is unconstitutional in so far as it prohibits bail which is guaranteed under Art.19(6) of the Constitution. But, the CCI by its own reason cannot render a speedy decision over the matter. The councils of the suspects again petition to the CCI on January 29, 1995 E.C, claiming immediate relief on the same issue. After one year on December 25, 1996 E.C, the CCI considers, investigate and make a thorough study over the matter and give its decision as the proclamation is no more unconstitutional.

This case justifies that those suspects are detained from may 1993 to December 1996 only due to the CCI delay in giving its decision over the matter at least before it submit to the HoF. Imagine that if it submits complain to the HoF, it may also likely to take another two or more years. Thus, this fact clearly reveals how the right to speedy trial and in consequence to it how the right to presumption of innocence is violated. Because, since the offence of corruption is non bailable, those suspects are detained before their guilty is proved by the trial court. This emanates from those procedures resulted from constitutional interpretation. In conclusion the Ethiopian approach of constitutional interpretation has a tantamount or an adverse effect both on the speedy trial and the right to presumption of innocence of the suspect.

4.3.3.3.The Right to Be Tried Before Competent, Independent and Impartial Organ.

The basic institutional framework enabling the enjoyment of the right to a fair trial is that proceedings in a suit at law are to be conducted by a competent, independent and impartial tribunal established by law [Article 14(1)].[348] The rationale of this provision is to avoid the arbitrariness and/or bias that would potentially arise if suits at law were to be decided on by a political body or an administrative agency. The general aim of this provision is to assure that complaints are heard by a tribunal set up in advance and independently of a particular case and not prior to and specifically for the issue involved. In order to be independent, a tribunal must have been established by law to perform adjudicative functions, i.e. to determine matters within

[348] See also European Convention, supra note 344, Article 6(1); American Convention, supra note 444, Articles 8(1) and 27(2); and African Charter, supra note 344, Articles 7(1) and 26.

its competence on the basis of rules of law (substantive) and in accordance with proceedings conducted in a prescribed manner (procedural).[349]

Independence presupposes defining the powers in which the tribunal is institutionally protected from undue influence by, or interference from, other organ such as the executive branch and, to a lesser degree, from the legislative branch. The Basic Principles on the tribunal set out in some detail the need for and mechanisms necessary to achieve that independence. Some of the practical safeguards of independence include the specification of qualifications necessary for judicial appointment, the terms of appointment,[350] the need for guaranteed tenure,[351] the requirement of efficient, fair and independent disciplinary proceedings regarding judges,[352] and the duty of every State to provide adequate resources to enable the judiciary to properly perform its functions[353] (for example adequate salaries[354] and training[355]). Depending on the circumstances of a case, a tribunal's independence may also be assessed on the basis of its relationship with prominent social groups such as political parties, the media and various lobbies.

While independence primarily rests on mechanisms aimed at ensuring a tribunal's position externally, impartiality refers to its conduct of and bearing on the final outcome of a specific case. Bias (or a lack thereof) is the overriding criterion for ascertaining a tribunal's impartiality. It can, thus, be prima facie called into question when a judge has taken part in the proceedings in some prior capacity, or when s/he is related to the parties, or when s/he has a personal stake in the proceedings. It is also open to suspicion when the judge has an evidently preformed opinion that could weigh in on the decision-making or when there are other reasons giving rise to concern about his/her impartiality.

[349] Final Report, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Session, E/CN.4/Sub.2/1994/24, June 3, 1994 [hereinafter The Final Report], at 67. (http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/d8925328e178f8748025673d00599b81?Opendocument).
[350] Basic Principles on the Independence of the Judiciary, UN General Assembly resolution 40/32, November 29, 1985 and resolution 40/146, December 13, 1985, [hereinafter Basic Principles on the Judiciary], principle 10.
[351] Id., Principle 12.
[352] Id., Principles 17-20.
[353] Id., Principle 7.
[354] Id., Principle 11.
[355] Id., Principle 10.

Ethiopia's system of constitutional interpretation has many practical implications for the protection of human rights. A body which interprets the fundamental law of the land should be independent and free from any kind of political influence. The HoF's representatives are accountable to the NN&P of Ethiopia whom they represent. The HoF is also a political organ operating within the context of a federal government dominated by a ruling party, the EPRDF which has an excess of power in all branches of government.[356] The HoF lacks complete independence from the EPRDF and the executive branch of government.[357] Thus, the HoF is not likely to rule against the government when adjudicating constitutional issues.[358] As a political organ under the influence of the executive, the HoF should not be called upon to decide sensitive political issues because it cannot be expected to decide such matters in a fair, unbiased manner.[359] Fundamental rights and freedoms may lose out to political considerations favoring the ruling party and the executive.[360] The HoF is also not capable of ruling against itself.[361] HoF members are typically also State Council members and sometimes Regional Chief Executives.[362]Therefore, the HoF may be called upon to determine the constitutional validity of either its own state legislation or its own exertions of power as Chief Executives at the regional level.[363] In such cases, it is unlikely that the HoF would declare its own exertions of authority to have exceeded constitutional bounds and impinged upon the fundamental rights and freedoms of state citizens.

As a result, decision by the HoF on a constitutional interpretation could jeopardise the right to be heard by an impartial and competent tribunal. It goes without saying that the HoF is not a judicial body, nor does its impartiality depict a semblance of the impartiality that is the defining characteristic of the regular courts. According to the current practice, elected as they are on their

[356] Minasse Haile, Supra note 2.
[357] Id., p. 52-53.
[358] Ibid.
[359] Id., p. 59.
[360] Id., p. 54-59.
[361] Id., p. 54.
[362] Stephanie Kodish, Balancing Representation: Special Representation Mechanisms Addressing the Imbalance of Marginalized Voices in African Legislatures, 30 Suffolk Transnat'l L. Rev. 1, 81-83;(cited in Chi Mgbako**,** silencing the ethiopian courts: non-judicial constitutional review and its) impact on human rights.
[363] T.S. Twibell, Ethiopian Constitutional Law: The Structure of the Ethiopian Government and the New Constitution's Ability to Overcome Ethiopia's Problems, 21 Loy. L.A. Int'l & Comp. L. Rev. 399, 409, 418-21, 424 31, 438-46, 448-49 (1999). At 447.

party or political allegiances,[364] the members are more executive-minded than those of any constitutional interpreting body in the centralized or mixed systems of judicial review elsewhere.

In addition, members of the HoF are politicians, most of them representing the executive branches of the regional states and their role as a constitutional arbiter would be clouded by reasonable suspicions of partiality. Their loyalty may well be divided between their own parties' interests and the interests of their constituencies on the one hand and the dictates of the constitution on the other. If strictly followed, the constitutional meaning may in some cases lead to unpleasant results against their parties or constituencies.[365] Besides, many of the members of the HoF have significant executive roles in their respective regional states, and would have interests in the outcome of the case.

For instance case brought by the leading opposition political party, the CUD, against the Prime Minister in 2005, is the perfect example of how the HoF/CCI is unwilling to rule against another organ of the federal government. The CUD case involved the exertions of power by the Prime Minister following the May 2005 parliamentary elections. The CUD questioned the Prime Minister's constitutional authority to issue a decree banning public demonstrations thereby curbing the constitutional right of assembly for a month following the disputed elections.[366] The Federal First Instance Court received the case, ruled that the dispute required constitutional interpretation and referred the matter to the CCI.[367] The CUD lawyers appealed the case to the Federal High Court, arguing that mere application of the Constitution would prove that the Prime Minister had overstepped his constitutional bounds.[368] The CCI remanded the case to the Federal First Instance Court, ruling that no constitutional interpretation was required because the Prime

[364] Members of the House of the Federation shall be elected by the State Councils. The State Councils may themselves elect representatives to the House of the Federation. See also FDRE constitution, supra note 1, Art. 61(3).
[365] Yonatan Tesfaye, Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review, 14 African Journal of International and Comparative Law (2006), p. 77-78.
[366] Dagnachew Teklu, Court Sends Meles Zenawi's Case to Inquiry Council, The Africa Monitor, June 7, 2005, at B1, available at http:// www.theafricamonitor.com/resources/55%20English%CC20issue%CC20June%CC207,%202005.pdf.
[367] Ibid.
[368] Interview with Anonymous, High Court Judge, in Addis Ababa, Ethiopia (August. 26, 2013).

Minister had not exceeded his constitutional authority.[369] The Federal High Court had no choice but to reject the appeal on these same grounds.

Subsequently, the Federal First Instance Court came down with a ruling in line with the CCI's decision. [370] This indicates an inability on the part of the CCI/HoF to adjudicate sensitive political issues, because they are not independent from the ruling party.[371] This case also indicates the courts' reluctance to engage in constitutional interpretation involving sensitive political issues.[372]A Federal High Court Judge noted that since the HoF is not independent from the ruling party, it would never rule against the government or Prime Minister.[373] Therefore, because of the above mentioned reasons the adopted system of constitutional interpretation has denied the right to be tried before an independent and impartial body of the party to the case in the country. As a result there is the violation of the said right in this regard

4.3.3.4. The Rights to Public Hearing

The principle of open justice has long been recognized. As a general rule the administration of justice has required that it be done in public. Publicity in the administration of justice was one of the surest guarantees of our liberties and publicity is the very soul of justice.[374] The needs for public justice which has now been statutorily recognized, is that it removes the possibility of arbitrariness in the administration of justice, so that in effect the public would have the opportunity of "judging the judges": by sitting in public, the judges are themselves accountable and on trial.

Article 6(1) of the European Convention on Human Rights provides that: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This human rights document gives direction as public authorities have been

[369] Ibid.
[370] Ibid.
[371] Minase Haile, Supra note 2, p. 54-59.
[372] T.S. Twibell, Ethiopian Constitutional Law: The Structure of the Ethiopian Government and the New Constitution's Ability to Overcome Ethiopia's Problems, 21 Loy. L.A. Int'l & Comp. L. Rev. at 399-449
[373] Interview with Anonymous, Supra note 368.

[374]kenneth hamer, public V. Private Hearing And Publicity, …www.hendersonchambers.co.uk (assessed on 6/5/2013) (herein after kenneth hamer).

compelled to offer individuals the right to public hearings of every proceeding. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

As to what are the exceptional situations where the general principle will not apply, it is useful to start with the guidance that "the exceptions are themselves the outcome of a yet more fundamental principle that the chief objective of organ of justice must be to secure that justice is done. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end must accordingly yield. But the burden lies on those seeking to displace this application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. To justify an order for a hearing in camera it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made.[375]

To relate the points with the constitutional interpretation in Ethiopia, decision-making by the HoF does not have an in-built mechanism for ensuring the right to be heard for a party contesting the law's or decision's constitutionality. Because, the procedure before the HoF does not involve a mandatory duty on the CCI/HoF to hear the complainant parties,[376] a case could be decided without directly hearing the parties thereto. Proclamation No. 251/2001, provided that the HoF 'may' call upon the parties involved to give their opinion, and is permitted to do so when it deems fit to hear the parties. But this falls short of imposing on the HoF any duty to hear the parties involved. This wipes out the parties' right to be heard in public which would otherwise be guaranteed in the proceedings of the regular judiciary.

4.3.3.5. The Right to Appeal

[375] Ibid.

[376] The HoF 'may' call upon the parties involved to give their opinion, and is permitted to do so when it deems fit to hear the parties. But this falls short of imposing on the HoF any duty to hear the parties involved. See Proclamation 251/2001; Supra note 8, Article 10.

An appeal is a process for requesting a formal change to an official decision. In appeal the decision of the prior decision maker is challenged by arguing that he or she misapplied the law, came to an incorrect factual finding, acted in excess of his jurisdiction, abused his powers, was biased, considered evidence which he should not have considered, or failed to consider evidence that he should have considered.

The result of an appeal can be either affirmed: Where the reviewing organ agrees with the result, of the lower organ's ruling(s), reversed: Where the reviewing organ disagrees with the result of the lower organ's ruling(s) and overturns their decision, or remanded: Where the reviewing organ sends the case back to the lower organ.

There can be multiple outcomes, so that the reviewing organ can affirm some rulings, reverse others and remand the case all at the same time. Remand is not required where there is nothing left to do in the case. Generally speaking, an appellate court's judgment provides 'the final directive of the appeals courts as to the matter appealed, setting out with specificity the court's determination that the action appealed from should be affirmed, reversed, remanded or modified.'[377]

"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law" [Article 14(5)].[378] This provision clearly provides the right to appeal to everyone who wants to review the previous decision by the higher tribunal. The right to appeal is aimed at ensuring at least two levels of judicial scrutiny of a case, the second of which must take place before a higher tribunal. The review undertaken by such a tribunal must be genuine. This, among other things, means that appeal proceedings confined only to a scrutiny of issues of law raised by a first instance judgement might not always meet that criterion.[379] Appeal proceedings must also be timely. The immediate effect of the exercise of the right to appeal is that a court has to stay the execution of any decision passed in the first instance

[377] In law, an appeal is a process for requesting a formal change to an official decision. Very broadly speaking there are appeals on the record and de novo appeals. en.wikipedia.org/wiki/Appeal Cached (accessed on 12/6/2013).
[378] See European Convention, supra note 344, Article 2 of Protocol 7; American Convention, supra note 344, Article 8(2)(h); and 1992 Resolution on the Right to Recourse Procedure and Fair Trial of the African Commission on Human and Peoples' Rights [hereinafter African Commission Resolution], (B) (http: //www1.umn.edu/humanrts/africa/achpr11resrecourse.html), para 3.
[379] See for example the concerns of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions in his 1993 Report (7 December 1993, UN Doc E/CN.4/1994/7 at paras 113 and 404).

until appellate review has been concluded. This principle applies unless the appellant voluntarily accepts that the decision be implemented earlier. The right to appeal belongs to all persons.[380] The guarantees of a fair trial must be observed in all appellate proceedings.

The decisions of the HoF have erga omnes effects, binding on any other similarly situated party, as they constitute precedents for similar cases.[381] As such, the decision binds the parties to the dispute, the courts of all tiers, as well as other state organs. This indicates that the HoF has the power to pass final decision on the constitutional interpretation. It has a supreme power on the constitutional issues. Therefore, rendering decision on constitutional issue by the HoF means that the losing party automatically loses the right to appeal against the decision because the losing party has been deprived of his constitutional right to appeal if his case would once has been tried and decided by the HoF. This is clearly the denial of the right granted under Article 20 (6) of the Constitution which declares the parties' right to appeal.

Thus, once a final decision is rendered by the HoF on a constitutional issue, the right to appeal against a final decision as guaranteed under article 20(6) of the constitution is no longer available to the parties involved in the case.

4.3.3.6.Access to Justice/ Right of Access to Justice/

Access to justice refers Access by people, to fair, effective and accountable mechanisms for the protection of rights control of abuse of power and resolution of conflicts. This includes the ability of people to seek and obtain a remedy through formal and informal justice systems, and the ability to seek and exercise influence on law-making and law-implementing processes and institutions.[382]

Access to justice has emphasized the need to make legal and quasi-legal justice institutions accessible to all. From this perspective, legal institutions are fundamental to the practice of justice. Thus, access to justice has often "concentrated on the citizen's use of institutions of law

[380] General Comment 13, Supra note 346, para. 17.
[381] Procl. 251/2001 Supra note 8, Article 11(1).
[382] Bedner, 'Towards Meaningful Rule of Law Research: An Elementary Approach', MS Unpublished, VVI, Leiden; and UNDP (n.d.), 'Access to Justice Practitioner Guide', 2004.

as deliberative fora in which private and public dominations can be contested and debated."[383] This institutional view of access to justice is premised on legal justice, which in turn, is "concerned with the way in which law distributes penalties for wrongdoing, or allocates compensation in the case of injury or damage."[384] Generally, this imply that access to justice is concentrated on individual's use of institutions of law for seek of available remedies in the country.

In addition, the right to access to justice also requires an appraisal of both claimholder and duty-bearer on three particular aspects, namely: capacity, accountability and empowerment. Capacity refers to the ability of both stakeholders to solve problems, perform functions and set and achieve objectives. Consequently, capacity development requires both the accountability and empowerment of both stakeholders. Claimholders need to strengthen their capacities to become accountable in the exercise of rights; duty-bearers often need to be empowered to be able to fulfill their obligations more effectively.

However, constitutional review in Ethiopia has created an overly bureaucratic[385], inefficient system of justice that has negatively impacted access to justice for the people. In its entire seventeen years history, the HoF has issued only five decisions.[386] There is very little public awareness of its existence or function.[387] Constitutional review has also stopped Ethiopian judges from developing a robust body of human rights jurisprudence. Part of the reason for the HoF's inefficiency in constitutional review rests in the part-time status of the institution. Constitutional review should be a full-time endeavor; yet, the only full-time employee of the CCI is its Registrar who is not involved in adjudicating constitutional cases.[388] The HoF is supposed to

[383] Parker Christine, Just lawyers: Regulation and access to justice, (Oxford: Oxford University Press, 1999) p. 47.

[384] Heywood Andrew, Political theory: An introduction (2nd Ed.), (New York: St. Martin's Press, 1999), p. 176.

[385] An interview with Tariku Takele a complainant, in Addis Ababa, Ethiopia, (on 05/02/2006 E. C.) He told me in a sense of irritation that on his first day for application to the CCI, the registrar opened his file and sends him to his home without any appointment and told him to follow his case by calling phone. He is a farmer and lives in the countryside. he is also illiterate and he hasn't phone to follow his case. On a day I had interviewed him, he had come Addis Ababa three times to follow his case. But the response of the CCI registrar is that the application is not decided today. Lastly, the registrar said "….. follow until the CCI will discuss on your case."

[386] Interview with the FDRE head of Registrar of the CCI, in Addis Ababa, Ethiopia, (on 05/02/2006 E. C) (herein after interview with CCI Registrar).

[387] Ibid.

[388] FDRE Constitution, Supra note 1, Art. 67.

meet twice a year, [389] and the CCI is mandated to meet twelve times per year,[390] but the CCI rarely fulfills its mandate and the HoF routinely does not meet often enough to address all the issues put before it.[391] Even when the CCI does convene, many times there is not a quorum, and therefore they cannot conduct any business related to constitutional review.[392] The HoF and CCI cannot fully consider cases and address them expeditiously as part-time institutions [393] and this has led to public inaccessibility.

Geographical location of the institution (physical access): As the World Development Report 2006 states, "People's legal rights remain theoretical if the institutions charged with enforcing them are inaccessible."[394] Once a normative system that protects human rights exists, and legal awareness is increased, appropriate institutions, both formal and informal, need to be accessible to all.[395] Accessibility encompasses the following dimensions: Physical Access: Physical access refers to ensuring that institutions are close to users and provide user-friendly services. This is a major challenge in Ethiopia since a vast part of the country in which the citizens live is so far from Addis Ababa which is the seat of HoF. This is from the fact that location of HoF is in Addis Ababa, the capital city of the country which is so far from the corner/periphery/ of country. In addition, most people live in countryside and they are illiterate in a case they hasn't any knowledge about the institution and location of the place of the House and they are poor that may result financial problem to take their constitutional complaint before the CCI/HoF when we compare with the regular courts which they could easily access as they want. Thus, in short there is problem of geographical proximity that hinders the people to take their complaint before these organs since HoF and CCI haven't any branch/agency/ outside Addis Ababa. Introducing branches of constitutional interpreter and mobile constitutional tribunal in the different part of the country can be an effective way to bridge the current gap.

[389] Interview with CCI Registrar, Supra note 386.
[390] Procl. No. 798/2013, Supra note 172, Art. 23(1).
[391] Interview with Registrar, Supra note 386.
[392] Ibid.
[393] Ibid.
[394] World Bank World Development Report: Equity and Development, (New York: OUP, 2006), at 156.
[395]Background Paper on Access to Justice Indicators in the Asia-Pacific Region, **(** La Salle Institute of Governance, With the support of the United Nations Development Programme, October 2003).

Besides, people fear to take their case to Addis Ababa in which the offices of the organs which are stock holder in the constitutional adjudication have office. Individuals may have been faced different problems on the journey to Addis Ababa. For instance, cost of transportation, bed, etc. This may be expressed in financial Access. i.e. the costs involved in accessing legal institutions be they direct (eg: filing fees), indirect (eg: transportation) or illegal (eg: payment of bribes) represent a major hindrance to access to justice for the poor.[396] In addition, for most of the people live in Ethiopia HoF is also linguistically in accessible. Because, the working language of HoF is Amharic language which is some 32 percent of the total population speak Amharic language.[397] From this fact around 70 percent of the total population encounter series language problem to communicate the HoF. Because of these reasons they become reluctant to take their cases before the CCI/HoF even though they aware as their rights have been violated. These all circumstances have led to public inaccessibility.

Surprisingly, without including the courts on other levels, U.S. Supreme Court only accepts one hundred cases out of the twelve to fifteen thousand applications each year and decides now and then on individual case with broad societal implications.[398] In the case of Ethiopia, until this study has in progress only one thousand and eighty cases regarding constitutional interpretation have been submitted to the CCI Registrar in seventeen years.[399] The CCI has only accepted four of these cases, rejecting the vast majority on procedural and substantive grounds.[400] This mean in average, CCI has accepted 0.23 which is less than one case out of sixty three applications each year and decide on an individual case. This indicates that very few cases have been brought before the constitutional adjudicating body. One cannot but wonder at such a low number of submitted cases from inhabitants of a country of eighty million people that has experienced substantial human rights issues. In fact, from the cases brought before the CCI, 97 percent were directly appealed by individual, organizations, and other government bodies on the decision of

[396] Ibid.
[397] The 1994 Population and Housing Census of Ethiopia, vol. 1, Addis Ababa, June 1998, cited in Teshome G. Wagaw, Conflict of Ethnic Identity and the Language of Education Policy in Contemporary Ethiopia, Northeast African Studies, Volume 6, Number 3, (New Series, Published by Michigan State University Press, 1999) at. 75-88.
[398] C. Willis, Supra note 168.
[399] See Interview with Registrar, Supra note 386.
[400] Ibid.

the Federal Supreme Court/Cassation Court.[401] The remaining 3 percent of cases were appealed on the decision of other governmental bodies.[402] Deciding only few cases within 17 years could properly proof the inaccessibility of the HoF to entertain constitutional cases. Consequently, the system of constitutional interpretation has adverse impact on the protection of human rights typically it clearly shows the denial of the right to access justice provided under the FDRE constitution.

4.3.3.7. The Protection of Right to Ethnic Identity

The right to identity as a single-whole forms a bundle of rights including cultural, ethnic and linguistic identity.[403] In its broader sense, the right to identity refers to the right of persons belonging to group to enjoy their own culture, to profess and enjoy their own religion, or to use their own language. On the whole, the right to identity enables persons belonging to certain groups to have a legal defense against coercive methods that aim at the elimination of their distinctive characteristics. Certainly, this does not in any way mean that a State is completely barred from taking any step that aims at integrating members of different groups into the majority provided that the means used is non-coercive.[404]

Be it as a group or as an individual one has to exist to exercise any of his rights as a human being. That is why the right to existence is considered as a supreme right in the hierarchy of rights of human beings. Individual persons belonging to a group should be allowed to uphold their distinct ethnic, linguistic, cultural or religious characteristics. The right to physical existence and the right to preserve a separate identity are the two collective rights accorded to every minority covered under international law.[405] The right to existence of individual is not

[401] Ibid.
[402] Ibid.
[403] Abera Degefa, The Scope of Rights of National Minorities Under the Constitution of The Federal Democratic Republic of Ethiopia, a thesis submitted to the school of graduate studies Addis Ababa University in partial fulfillment of the requirements for the degree of masters of laws (Addis Ababa University School of Graduate studies faculty of law, 2005).
[404] Ibid.
[405] Kristin Henrard, Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination, Martinus Nijhoff Publishers, the Hague, 2000,at p. 32. Cited in Abera Degefa, The Scope of Rights of National Minorities Under the Constitution of the Federal Democratic Republic of Ethiopia, a thesis submitted to the school of graduate studies Addis Ababa University in partial fulfillment of the requirements for the degree of masters of laws (Addis Ababa University School of Graduate studies faculty of law, 2005).

restricted to continued existence in a physical sense, but extends to the right to sustain the distinguishing characteristics of their identity. Accordingly, the Genocide Convention gives protection to the right to existence of members of an ethnic, religious or linguistic group.[406] Therefore, States are expected to protect the existence and the national or ethnic, cultural, religious and linguistic identity of individual or group within their respective territories and they must encourage conditions for the promotion of that identity.[407]

When we see the case of Ethiopia in this regard, the National Identity Claim Case in the southern region illustrates the HoF's reluctance to rule against a government body, even though, in this instance, the government body was a state and not a federal body.[408] The Silte people of southern Ethiopia no longer wished to be considered part of the Gurage Nation, but rather, a Nation in their own right.[409] The HoF justified the rights of the Silte people in their claim for national identity; however, the extreme deference paid to the state government, including the HoF's reluctance to even state that the HoF was directing the state government as to how to respond, demonstrates the HoF's discomfort in confronting another government body.[410] Additionally, the HoF waited years before accepting the case, hoping that the Southern Region would resolve the matter themselves.[411] The Southern Region, however, did not wish to do so without the constitutional guidance of the HoF. It was suggested by one research conducted that the National Identity Claim case, if submitted now, would never be accepted by the CCI, nor adjudicated in the same manner by the HoF, due to current political circumstances.[412] Because, 'at the present time, there are currently fifteen other ethnic groups in the Southern region and in other regional states making claims for national identity.'[413] For example, ethnic identity claim of kimant, Mareko, Tembaro, Dorze, Gura Ferda group live in southern regional state, speaker of Tigrigna

[406] Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, G.A.Res.260 A (III) (1948).
[407] United Nations' Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA, Res.47/135, 18 December 1992.
[408] See generally House of the Federation, Decision of the House of the Federation Regarding Resolution of Claim for Identity (2001), http:// www.hofethiopia.org/pdf/CI%20Dessiontion_2.pdf [hereinafter HoF, Silte].
[409] See Kemal Bedri & Elena Baylis, Constructing Credibility, 6 Green Bag 2d 399, 399 (2003).
[410] HoF, Silte, Supra note 407.
[411] Ibid.
[412] Chi Mgbako and others**,** Silencing The Ethiopian Courts: Non-Judicial Constitutional Review And Its Impact On Human Rights, (Fordham International Law Journal 259), 2008, p. 12, available at: http://ssrn.com/abstract=1719135 accessed on 02/09/2013.
[413] Ibid.

language live in Afar regional state, Dube ethnic group live in Somali regional state zone two, etc. are cases filed for identity claim.[414] This is a sensitive political issue because the Southern region already has forty-eight NN&P represented in the HoF.[415] The ruling party has the fear of administrative costs and the disintegration of the country because of the volatile ethnic question. Even though the ruling party fears to recognize the current ethnic identity claim, having identity is natural phenomenon and recognizing this phenomenon is the duty of the state. However, the current political situation in Ethiopia couldn't accommodate the claim of ethnic identity positively. This is an example of how HoF which is dominated by single ruling party is not the best entity and free from bias to resolve sensitive political issues that entail constitutional questions.[416] Therefore, recognizing the right to ethnic identity at least for those could fulfill the requirements of identity right is at stake in Ethiopia today.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

5.1. Conclusion

From the very beginning, there is an emphatical and corresponding relation between constitutional interpretation and the right of the individuals. Such relation is of course the central point of the research and abridged by the effect of constitutional interpretation on the protection of human rights. It is accentuated from the Ethiopian system of constitutional interpretation which empowers HoF to render final decision on constitutional issues and CCI for its assistance.

The FDRE Constitution is supreme law and embodies the rights of nation, nationalities and people vis –a-vis those fundamental rights and freedom which are justiciable by their very nature. According to the Constitution, the ultimate power of constitutional interpretation is vested in the HoF. Thus, the power of the regular courts to interpret the human and democratic rights parts /chapter three of the Constitution/ is not exclusive because of the fact that after exhaustion of all remedies in the channel of courts any person can take his case to the HoF to seek a final say. Whether the matters involving the executive action, customary practice relates

[414] Information gathered from the file of office of CCI registrar. The information from the registrar of the CCI indicates that claim for the recognition of identity is increasing in Ethiopia.
[415] The Federal Democratic Republic of Ethiopia, House of Federation, History: The House of Federation, http://www.hofethiopia.org/HOF/HOF_ History.html.
[416] See Twibell, Supra note 372.

to human rights violations or other matters in which allegation is made that there is an issue of constitutionality of the executive action involved, the judiciary has jurisdiction which is not exclusive power. Most appropriately, the HoF has first instance and exclusive jurisdiction on the issue of constitutionality of legislative acts and is being appellate loci for other cases that has begun somewhere and exhausts all remedies (up to Cassation Courts) in relation to human and democratic rights. Therefore, the Ethiopian Constitution has apportioned the duties of constitutional interpretation between two bodies: the Judiciary and the CCI/HoF.

However, the practices in Ethiopia deviate from the spirit of the Constitution because HoF dominates the power of regular courts in constitutional interpretation. What is more problematic about the practices in constitutional interpretation is that it does not have characteristics that make it a good part of a well designed constitutional adjudication especially on protection of human and democratic rights parts of the Constitution. This emanates from the fact that HoF does not have the capacity to engage in the often complex and technical arguments that any examination of the constitutionality of a law or any interpretation of the Constitution, for that matter, entails.

At any rate the current system has developed the domination of HoF in constitutional interpretation. It excludes courts from the business of constitutional interpretation. Domination of HoF in constitutional interpretation has emanated from the existing practice and the enactment of two Proclamations (Proclamation number 798/2013 and Proclamation number 251/2001) that have extended the term definition of law given under Article 84(2) of FDRE Constitution to any law including subordinate legislations, like regulations and directives enacted by the executive organ.[417] However, it is not a commendable system of constitutional interpretation especially from the angle of human rights protection. This is because it is not institutionally suited to discharge the task of constitutional interpretation vis-a-vis protection of human rights enshrined under the Constitution. This institutional inefficiency has made it impossible for the institution to contribute towards effective constitutional governance especially in the protection of human rights. Because, HoF is supposed to meet twice a year; HoF routinely does not meet often enough to address all the issues put before it. As a result it rarely fulfills its mandate.

[417] Procl. No. 798/2013 Supra note 172, Art. 2(5); and Procl. No. 251/2001, Supra note 8, Art. 3(1).

Consequently, there was a failure to consider the multitude of daily cases related to infringements of human right that are brought before the court that require interpretation of the Constitution. The system of constitutional adjudication failed to appreciate not only Constitution does deal with sensitive due process of guarantees but also with many provisions on many ordinary matters. Furthermore, the system currently has been developed create problem on the protection of human rights particularly to carry out the proper protection of rights enshrined under the Constitution on the ground that the House is inaccessible, not independent, competent and impartial body from the executive organ of government. Consequently, the right of speedy trial, right to presumption innocent, right of identity, the rights of access to justice, the right to be tried before independent, competent and impartial body etc. are affected.

In addition, the procedure before the CCI/HoF does not involve a mandatory duty on the CCI/HoF to hear the complainant parties,[418] a case could be decided without directly hearing the parties thereto. But, this falls short of imposing on the HoF any duty to be hear the parties involved. In this regard the right to public hearing could be affected. The other point is that the decisions of the HoF have *erga omnes* effects, binding on any other similarly situated party, as they constitute precedents for similar cases.[419] As such, the decision binds the parties to the dispute, the courts of all tiers, as well as other state organs. In this regard the decision on a constitutional issue by the HoF could affects the right to appeal of losing party against the decision or affects the rights of non parties to take justiciable matter to judicial organ in the future.

The other point that create problem on the protection of human rights also emanates from the procedures which appear as the result of empowerment of HoF to render final decision on constitutional matters. In clear term constitutional interpretation procedure system leads circulation of constitutional cases from the court of law to the CCI and possibly to the HoF. Any matter that requires the constitutional interpretation now has to be referred to the HoF through the CCI. Such process involves inherent procedures which indispensably creates complex

[418] The HoF 'may' call upon the parties involved to give their opinion, and is permitted to do so when it deems fit to hear the parties. But this falls short of imposing on the HoF any duty to hear the parties involved. See Procl. No. 251/2001, Supra note 8.

[419] Id., Art. 11(1).

procedure on complain of constitutional interpretation. Not only does this pose a problem to the effective functioning of the courts, but it also elongates the process for claimants who require an immediate redress to their problem. Consequently, the efficacious observance of the complicated procedures, however, best ensures how the system of constitutional interpretation induces a problem on the protection of the rights to fair hearing such as the right to speedy trial, presumption of innocence and other related rights.

5.2. Recommendation

An organ embarked up on interpreting the Constitution should be accessible, independent, impartial and suitable for the protection of human rights. The HoF, the organ which dominates constitutional interpretation is geographically, financially and linguistically inaccessible. In addition, HoF is not suitable in constitutional interpretation because it is supposed to meet twice a year and normally does not meet often enough to address all the issues put before it. As a result it rarely fulfills its mandate. The system also creates inherent complicate procedures on the matter of constitutional interpretation that results the denial of procedural rights as well substantive rights recognized under the Constitution. Thus, the current system of constitutional interpretation creates problems on the protection of fundamental rights and freedoms enshrined under the Constitution and international treaties which Ethiopia is a party.

To alleviate the problems**,** first, Proclamation No. 215/2001 that enacted for Consolidation of the House of the Federation and the definition of its Powers and Responsibilities and the Proclamation No. 798/2013 enacted to re-enact for the strengthening and specifying the powers and duties of constitutional inquiry of the federal democratic republic of Ethiopia totally take and paralyzes the power of regular courts on the matter of constitutional interpretation and result negative impact on the protection of procedural and substantive rights in Ethiopia. These proclamations have created a complex circulation of cases from one organ to the others. i.e constitutional cases referred from the regular courts to CC that has other sub organ called sub-inquiry committee which assist it, then to HoF that also has legal standing committee. The circulation of cases to these entire organs inevitably elongate the procedure of constitutional interpretation that result delay of justice and this also results violation of rights recognized under the Constitution. Therefore, both proclamations (Procl. No. 251/2001 and Procl. No. 798/2013) should be repealed and avoided.

Second, the current Constitution should be amended in such a way that it should apportion constitutional adjudicating powers between the regular judiciary and a special, separate and distinct Constitutional Court. This system has been principally practiced in Latin American countries such as Colombia, Venezuela, Peru and Brazil, and in a few European states, namely Portugal and in a limited form in Switzerland[420] and it also has my modification. Accordingly:

1. Regular courts of all levels should empower to rule on the constitutionality of the challenged law, decision or Act and the meaning of the Constitution except political issues but with inters parties effects. Because, regular courts have the structure that make it capable of reaching all people. This is in a sense of working language: regional state courts use their own mother tongue within their region and people could easily lodge their constitutional complaint to the regular court. Second, physically, regular court is accessible to every individual since regular courts are available everywhere in Ethiopia unlike that of HoF which is only single organ and its office is only in Addis Ababa i.e at least there is one First Instance Court at wereda level.
2. A party could make an appeal to the Constitutional Court at any point during the adjudication of a case.
3. Once the Supreme Court has issued a final ruling on the case, there should no recourse to the Constitutional Court to overrule the Supreme Court's decision. Because it inherently create complex procedure on the matter of constitutional interpretation which has negative impact on the protection of human rights like current system in Ethiopia. Particularly, it elongates the procedure of constitutional interpretation that results the denial of the right to speedy trial, the right to presumption of innocence, etc.
4. The regular court could request an opinion from the Constitutional Court.
5. The proceedings before Constitutional Court would be limited to abstract review of law.
6. The decision of the Constitutional Court should have erga omnes effects. i.e All regular courts would be bound by the decision of Constitutional Court.

[420] Id., p. 263.

BIBLIOGRAPHY

1. BOOKS AND JOURNALS

A. Fiseha , 'Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience' Netherlands International Law Review 1,(2005) 21.

Abera Degefa, The Scope of Rights of National Minorities Under The Constitution of The Federal Democratic Republic of Ethiopia, a thesis submitted to the school of graduate studies addis ababa university in partial fulfilment of the requirements for the degree of masters of laws, Addis Ababa University School of Graduate studies faculty of law, 2005.

Aharon Barak, The Judge in Democracy, Princeton University Press 41 William Street, Princeton, New Jersey 08540, (2006).

Alemante G. Selassie, Ethnic Federalism: Its Promise and Pitfalls for Africa, 28 Yale J. Int'l L. , 51 (2003).

Alen A. et al., The Relations Between the Constitutional Court and the Other National Courts, Including the Interference in this Area of the Action of the European Courts, 23(8–12) Human Rights Law Journ , 2002.

Allen Brewer- Carias, Judicial Review in Comparative Law, Cambridge: Cambride University Press, 1989.

Assefa Fiseha, Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation 1(1) Mizan Law Review 10, 2007.

Assefa fiseha, Federlism and The Accommodation of Diversity in Ethiopia, Wolf legal Publisher, 2007.

Bickel A., The Least Dangerous Branch: The Supreme Court at the Bar of Politics as cited in J. Perry, The Constitution in the Courts: Law or Politics? , 1994.

Burnham W. and A. Trochev A., 'Russia's War between the Courts: The Struggle over Jurisdictional Boundary between the Constitutional Court and Regular Courts', 55 American Journal of Comparative Law, (2007).

Chemerinsky E., The Vanishing Constitution, Harvard Law Review , 76-77 (1998).

Currie I. and De Waal J., 'Application of the Bill of Rights', in I. Currie and J. de Waal (eds), The Bill of Rights Handbook, 5th ed., Juta (2005).

Dworkin R.; Freedom's Law: The Moral Reading of the American Constitution ,(1996).

Farber A. and Sherry S., Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations , 2002.

Fasil Nahum, Constitution for a Nation of Nations: The Ethiopian Prospect, The Red Sea Press, Inc., Asmara, 1997.

G. Assefa, 'Federalism and Legal Pluralism in Ethiopia: Reflections on Their Impacts on the Protection of Human Rights', Vol. 2, Addis Ababa University Press, 2008.

Geck W. K., 'Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices', 51 Cornell Law Quarterly , (1996).

Gedion Timothewos , Freedom of Expression in Ethiopia: The Jurisprudential Dearth, 4(2) Mizan Law Review, 2010.

Getachew Assefa, All About Words: Discovering the intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation 24 (2) Journal of Ethiopian Laws , 2010.

Getahun Kassa, mechanisms of constitutional control: A preliminary observation of the Ethiopian system: An expert seminar in Brusseles on Ethiopian federalism and the protection of human right. July 12-13, 2006.

Hausmaninger H., 'Judicial Referral of Constitutional Questions in Austria, Germany, and Russia', 12 Tulane European and Civil Law Forum, 1997.

Heinrich Scholler; Notes on Constitutional Interpretation in Ethiopia, Friedrich Ebert Stiftung Press, 2003.

Henry C. Black, Blacks Law Dictionary , 1991.

Human Rights Committee, General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN DocCCPR/C/21/Rev.1/Add13 (2004), [4].

Ibrahim Indris, constitutional adjudication under the 1994 FDRE constitution in Ethiopia law review , vol. I, No. 1 (2000).

Interview with Anonymous, High Court Judge, in Addis Ababa, Eth. (August. 26, 2013).

James O'Reilly, Human Rights and Constitutional Law , 1st ed., Round Hall Press, Kill Lane Ireland, 1992.

Justice Mzikamanda R.R., The Place of the Independence of the Judiciary and the Rule of Law in Democratic Sub-Saharan Africa (A paper Presented on November 14, 2007).

Krzeczunowicz G., Hierarchy of laws, 1(1) Journal of Ethiopian Law, 11 (1984).

Lars Mammen, A Short note on the German Federal Constitutional court and its Power to review legislation, European Human Rights Law Review, 6:4 (2001).

Leonard Besselink F.M., 'The Protection of Human Rights in Federal Systems – the case of Ethiopia' in proceedings of the 14th international conference of Ethiopian studies, in Getachew, All About Words: Discovering the intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation 24 (2) Journal of Ethiopian Laws , 2011.

Liebenberg S., The Protection of Economic and Social Rights in Domestic Legal Systems, in A. Eide et al (eds), Economic, Social and Cultural Rights (2001).

Lipkin R.J., Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism (2000).

LucTremblay B., General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law, 23 (4) Oxford Journal of Legal Studies, 2003.

Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary, N.P. Engel, Arlington, 1993.

Marbury v. Madison 5 US 1 Cranch 137 (1803), cited in Asseffa Fiseha, Federalism and Accommodation of diversity in Ethiopia, Wolf legal Publisher, 2007.

Mauro Cappelletti, The Judicial Process in Comparative Prospective, Oxford: Clarendon Press, 1989.

McWhinney E. (ed.), Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review, 5th edn, Martinus Nijhoff, 1986.

Meaza Ashenafi , Ethiopia: process of democratization and development in A- An-narim (ed) human reports under African constitutions, (Philadelphia: University of Pennsy, Vania Press, 2003).

Minasse Haile, Comparing Human Rights in Two Ethiopian Constitutions: The Emperor's and the "Republic's"--Cucullus Non Facit Monachum, 13 Cardozo J. Int'l & Comp. L. 1, 30-32 (2005).

Minasse Haile, The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development, 20 Suffolk Transnat'l L. Rev. 1, 46 (1996).

Minute of the Constitutional Assembly of the Transitional Government of Ethiopia, V.5, December 01-04, 1994.

Minutes of the Discussion on the Draft Constitution at the Council of Representatives, May 1994 (Amharic).

Mohammed Benti Sirag, The Power of House of Federation to Interpret the FDRE Constitution, (1997).

Paul J. C. N. and C. Calapham, Ethiopian Constitutional Development, Addis Ababa University, 1956.

Peter Arenella, Rethinking the Function of Crimininal Procedure: The Warren And Burger Court's Competing Idiologies, 72 Geo. L. J. 185 (1983).

Ronald L .Watts, Comparing Federal Systems (3rd Edition, Institute of Intergovernmental Relations, Queen's University Press, London, 2007.

Rotman, Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights, 17 Harvard Human Rights Journal (2004).

Ruger T.W., A Question which Convulses a Nation the Early Republic's Greatest Debate about the Judicial Review Power, Harvard Law Review 857 (2004).

Schwartz H., The New East European Constitutional Courts, 13 Michigan Journal of International Law, 1992.

Sean Mulryne, A Tripartite Battle Royal: Hamdan v. Rumsfeld and the Assertion of Separation of- Powers Principles, Seton Hall L. Rev. 279-297 (2008).

Sharon Krause, The Sprit of Separate Powers in Montesquieu: The Review Of Politics, vol. 62, No. 2 (2000).

Stephanie Kodish, Balancing Representation: Special Representation Mechanisms Addressing the Imbalance of Marginalized Voices in African Legislatures, 30 Suffolk Transnat'l L. Rev. 1, 81-83.

Sudha Setty, The President's Question Time: Power, Information, and the Executive Credibility Gap, 17 Cornell J.L. & Pub. Pol'y, 248, 248 (2008).

Susan J. Barsion and Walter Sinoh- Armstrong, Contemporary Perspectives on Constitutional Interpretation, west view press, 1993.

Takele Saboka Bulto, 'The Interplay of the Equality Clause and Affirmatuive ActionMeasures under the Ethiopian Constitution: The Benishangul Gumuz Case and Beyond', in G. Alemu and S. Alemahu (eds), The Constitutional Protection of Human Rights in Ethiopia: Challenges and Prospects, Vol. 2, Addis Ababa University Press (2008).

Takele Soboka, Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory, in Assefa Fiseha and Getachew Assefa (eds.), Institutionalizing Constitutionalism and the Rule of Law: Towards a Constitutional practice in Ethiopia, 3 Ethiopian Constitutional Law Series. 67 (2010).

Tsegaye Regassa, Courts And The Human Rights Norm In Ethiopia: An Overview, In Proceedings of the Symposium on The Role of Courts In The Enforcement of the Constitution 112 , Addis Ababa: Birhanina Selam, 2001.

Twibell S.T., Ethiopian Constitutional Law: The Structure of the Ethiopian Government and the New Constitution's Ability to Overcome Ethiopia's Problems, 21 Loy. L.A. Int'l & Comp. L. Rev. (1999).

Vincent M. Barnett, Constitutional Interpretation and Judicial Self-restraint, 39 Michigan Law Review, (1940).

Willis C., Essays on Modern Ethiopian Constitutionalism: Lectures to Young Lawyers (unpublished, on file with the author, Addis Ababa University, 1997).

Sisay alemahuYeshanew , 'The justiciability of human rights in the Federal Democratic Republic of Ethiopia 8/2 African Human Rights Law Journal (2008).

Yonatan Tesfaye, Whose Power Is It Anyway: The courts and Constitutional Interpretation In Ethiopia 22 Journal of Ethiopian law , No.1, (2008).

Yonatan Tesfaye, Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review', 14 African Journal of International and Comparative Law , (2006).

Zylberberg , Problem of Majoritarianism In Constitutional Law: A Symbolic Perspective, 37 McGill L. J. 27, 1992.

2. INTERNET MATERIALS

Chi Mgbako and others, Silencing The Ethiopian Courts: Non-Judicial Constitutional Review And Its Impact On Human Rights, Fordham International Law Journal, 259, 2008, available at: http://ssrn.com/abstract=1719135.

Dagnachew teklu, court sends Meles Zenawi's case to inquiry, the Africa Monitor, june 7, 2005, at B1, available at http://www.theafricamonitor.com.

Ethiopia's total population is approximately 82 million. Central Intelligence Agency, The World Factbook, Ethiopia (2008), https:// www.cia.gov/library/publications/the-world-factbook/geos/et.html. The Oromos make up 32.1% of the population while the Amharas make up another 30.1%.

Federal Democratic Republic of Ethiopia, House of Federation, History: The House of Federation, http://www.hofethiopia.org/HOF/HOF_ History.html.

Federal High Court referred Melaku Fenta's case to the House of Federation seeking for constitutional interpretation. Available at www.ertagov.com/.../1987-court-seeks-constitutional-interpretation-in-mela..., Court seeks constitutional interpretation in Melaku Fenta's case ...

House of the Federation, Decision of the House of the Federation Regarding Resolution of Claim for Identity (2001), http:// www.hofethiopia.org/pdf/CI%20Dessiontion_2.pdf.

Jack Donnelly, "The Universal Declaration Model of Human Rights: A Liberal Defense"(Human Rights Working Papers) available at http://www.du.edu/humanrights/workingpapers/index.html.

kenneth hamer, *public* V. Private *Hearing* And Publicity,www.hendersonchambers.co.uk.

Trucy Hughes, Extradition Reform: The role of the judiciary in protecting the rights of a requested individual, 9 B.C.int'l and comp.L.Rev.293 (1986), available at http://lawdigitalcommons.bc.edu/iclr/vol9/.

Tsegaye Regassa, State Constitutions in Federal Ethiopia: A Preliminary Observation 2-3 (2004), available at http:// camlaw.rutgers.edu/statecon/subpapers/regassa.pdf.

Yonatan Tesfaye Fessha , Judicial Review And Democracy: A Normative Discourse On The (Novel) Ethiopian Approach To Constitutional Review, Hein Online 14 Afr. J. Int'l & Comp. L. 53, 2006 available at http://heinonline.org/HOL/.

3. LAWS

American Convention on Human Rights, November 22, 1969 African Charter on Human and People's Rights adopted June 27, 1981, entered into force October 21, 1986.

Constitution of Federal Democratic Republic of Ethiopia (Proclamation No.1/1995).

Convention on the Prevention and Punishment of the Crime of Genocide, G.A.Res.260 A (III) (1948).

European Convention for the Protection of Human Rights and Fundamental Freedoms, November 5, 1950.

Proclamation to Consolidate the House of Federation of the Federal Democratic Republic of Ethiopia and to Define Its Powers and Responsibilities, Proclamation No. 251/2001.

Proclamation to Re-Enact for the Strengthening and Specifying the Power of Constitutional Inquiry of the Federal Democratic Republic of Ethiopia, Proclamation No. 798/2013.

Revised Constitution of the Empire of Ethiopia, Proclamation No. 149/ 1955.

Revised Constitution of the Empire of Ethiopia, Proclamation No. 149/ 1955.

United Nations Human Rights Committee, General Comment No 32, CCPR/C/GC/32, 23, August 2007.

UN Human Rights manuals such as Human Rights and Law Enforcement: A Trainer's Guide on Human Rights for the Police. New York/Geneva: UN, 2005.

United Nations' Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA, Res.47/135, 18 December 1992.

Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

4. CASES

Coalition for Unity and Democracy v. Prime Minister Meles Zenawi Asres, Fed. First Instance Court, Lideta Div., File No. 54024 (Decision of 3 June 2005) (26 Ginbot 1997 E.C).

Dr. Tesfaye vs. w/r Abebech Bejga, House of federation, File No. ፌ.ማ.ም-3/01/21/5/4 (Decision of Ginbot 17/1998 E.C).

Ethiopian Blind Association v. Oromia Education Beuro and Jimma Teacher Training College, CCI, File No. 16-03-96 (decided on 1/04/1996 E.C).

Shanbal Basha Niguse v. Special Public Prosecutor, the decision of CCI rendered on 19/06/1997 E.C.

Shanbal Basha Niguse v. Special Public Prosecutor: Council of Constitutional Inquiry, File No.1/24/97, (Decision of 19/o6/1997 E.C).

The 29 pre- Ethiopian Bank Worker and 12 Traders Vs. Special Public Prosecutor, Council of Constitutional Inquiry, (the decision of 1/04/1996 E.C).