



ADDIS ABABA UNIVERSITY
SCHOOL OF GRADUATE STUDIES
FACULTY OF LAW
CONSTITUTIONAL AND PUBLIC LAW STREAM

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

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REGIONAL STATE CONSTITUTION OF 2001 WITH THE FDRE
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ADDIS ABABA.

DECLARATION

I hereby declare that **“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”** 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.

Solomon Emiru Gutema

Signed _____

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LAW FACULTY, CONSTITUTIONAL AND PUBLIC LAW STREAM

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Abstract

The objective of this study is to determine the incompatibility between the FDRE Constitution and the Oromia national regional state constitution on the matter of adjudicating constitutionality issues and to identify the possible effects of this incompatibility. Hence the study tries to answer: what are the possible effects of these incompatibilities between the FDRE and Oromia state constitutions on the matter of constitutional adjudication? To what extent the organs established under the Oromia state constitution for the purpose of adjudicating and resolving regional constitutional disputes are competent? What are the impacts of excluding judiciary from determining the constitutionality of laws under the regional state constitution of Oromia? Is there any clear mechanism provided under the FDRE Constitution to reconcile the inconsistencies between the federal and regional laws? To answer these questions, the study analyzes related provisions of the FDRE Constitution and the state constitution of Oromia with constitutional adjudication; appropriately reviews the existing literature and critically analyzes practical cases. The findings of this study include: While federal and state laws must, at least, be consistent on basic democratic principles, like ensuring separation of powers, check and balances, independence of judiciary and rule of law in a federation, the state constitution of Oromia prohibits ordinary courts from reviewing the constitutionality of both laws of the parliament and subordinate enactments of the executive organs like regulations and directives contrary to the FDRE Constitution. The exclusion of courts from reviewing the constitutionality of subordinate legislations of the executive highly erodes the principle of constitutionalism, at regional state level of Oromia.

ACRONYMS

CCI.....	Council of Constitutional Inquiry
E.C.....	Ethiopian Calendar
FDRE.....	Federal Democratic Republic of Ethiopia
HoF.....	House of Federation
HPR.....	House of Peoples Representatives
Proc. No.	Proclamation Number

CHAPTER ONE

1.1 Introduction

Background of the Study

Ethiopia introduced federal system of government in the 1995 FDRE Constitution after being troubled by civil war for tens of decades. The single strategy that the past regimes had was assimilation into Amhara domination. This assimilation strategy has been replaced by multiculturalism following the fall of the Derg regime. From the aftermath of the downfall of the Derg, the new government embarked on ethnic-based federalism under the 1995 Constitution. This was considered as a paradigm shift in the history of Ethiopia, because it is a move from unification to one culture to recognizing multiculturalism and acknowledging diversity.

Under the 1995 FDRE Constitution, the right to self determination up to secession is guaranteed for the nations, nationalities and peoples of Ethiopia. Based on this, nine regional states were established in Ethiopia. These states have enacted their respective regional state constitution parallel with the federal Constitution of 1995. As known from federal system of governments; constitutions, laws and enabling legislations are enacted both at federal and regional level, since we have at least two governments in federations. These laws must be compatible for the purpose of uniformity and avoiding inconsistencies. In addition to this, the mechanisms employed to resolve the contradictions between the federal and regional laws must be clearly specified under the Constitutions and other relevant laws. So, by using clear laws and independent organ as arbiter, we can avert confusions and ambiguities arising out of constitutionality issues.

Judiciary is an organ of a government which interprets the law in any system of government. As we see from different countries' Constitutions, judiciaries have either the power to interpret and settle Constitutional disputes or not have such powers. Some countries like the U.S.A vest the power to interpret the Constitution in the hands of ordinary courts. In Europe like Germany independent Constitutional court is established for the same purpose. In Latin American countries like Brazil, mixed system approach is used. Under the mixed approach of adjudicating of constitutionality issues, the regular judiciary and separate constitutional interpreting body are working together. Yet, Ethiopia follows peculiar approach in solving constitutionality issues 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.

At regional level, the 2001 Revised Constitution of Oromia complicates the issue of constitutionality of laws more than the federal constitution. Under this regional Constitution, judicial organ does not have any role in interpreting and settling Constitutional disputes arising out of any matter. Because, pursuant to Article 67 of this Constitution, Regional Constitutional Interpretation Commission is established for the sake of interpreting and settling constitutional disputes at regional level. This commission entertains any constitutionality issue raised at regional level, whether from Proclamations (primary legislation by the regional parliament) or enabling legislations (subordinate enactments of the regional executive organ, like regulations and directives). This commission is also a political organization nominated from the representative of each district council as per Article 67(1) of this regional Constitution.

Internationally, interpreting and settling constitutional disputes is considered to be a difficult task. Some countries have effective and efficient laws and independent organs, like ordinary courts to deal with these issues. Other countries established independent Constitutional courts for the same purpose. Few countries like Ethiopia lack both clear laws and independent organs to settle constitutionality issues both at federal and state levels. The consequences of not having clear provisions of laws both at federal and regional level, particularly under the Oromia Regional state Revised Constitution have disruptive effects on the independency of judiciary

since the executive organ can enact a law and influence or interfere in the works of the courts and courts cannot check the constitutionality of this acts under this constitution.

Statement of the problem

As discussed above, Ethiopia follows a different pattern of interpreting the Constitution and settling constitutional disputes pursuant to the 1995 FDRE Constitution. The power to interpret and rendering final decisions to constitutional disputes vest in the hand of House of Federation (HoF) under the Constitution¹.

Pursuant to the regional states' constitutions under the Ethiopian federation, almost all the nine regional state Constitutions are similar with the federal Constitution of 1995. The method and structural arrangements established for interpreting and settling constitutional disputes is also similar with the methods employed by the federal government. Therefore, all the nine regional Constitutions vest the power to interpret and settling constitutional disputes in the hand of other separate organs rather than vesting in the hand of ordinary courts.² So, it is clear from the provisions of both federal and regional Constitutions that under the present Ethiopian legal system, courts have no power to determine upon the issue of constitutionality of laws though some scholars claimed that courts have inherent power to determine the constitutionality of laws and adjudicate constitutionality issues.

¹The constitution of Federal Democratic Republic of Ethiopia (Proclamation number,1/1995,Art. 62(1),84(1))

² In most states of Ethiopia, a constitutional interpretation commission, assisted by the state constitutional inquiry council, interprets the constitution. For instance, under the revised constitution of Oromia Region, Article 69, the power to investigate constitutional disputes and giving final decision on constitutional disputes(interpret the regional constitution) is given for regional council of constitutional inquiry and Constitutional interpretation commission respectively. Again in the SNNPR, the Council of Nationalities interprets the regional constitution.

But, this does not mean that Judiciary at federal level has no role in interpreting and settling constitutional disputes as we can understand from the provisions of FDRE Constitutions completely. It is clearly specified under Article 84(2) Amharic version of FDRE Constitution that only proclamations enacted by parliament, if being contested as unconstitutional is considered as an issue of constitutionality. The problem is that two Proclamations (Proclamation number 250/2001 and Proclamation number 251/2001) have brought inconsistency with this clear provision of the Constitution with regard to constitutional interpretation and settling constitutional disputes at federal level .These Proclamations were enacted to avoid ambiguities and ease the procedures employed in settling constitutional disputes and interpreting the Constitution. But they extend the term definition of law given under Article 84(2) of FDRE Constitution to subordinate legislations, like regulations and directives enacted by the executive organ. For instance, Article 2(2) of Proclamation number 251/2001(Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities Proclamation) the term law shall mean proclamation issued by federal or state legislative organs and regulations and directives issued by federal and state governmental institutions. Under Proclamation number 250/2001(Consolidation of the Council of Constitutional Inquiry and the Definition of its Powers and Responsibilities Proclamation) Article 2(5) the same definition is given for the term law. So we can observe inconsistencies between these Proclamations and FDRE Constitution. This fact shows that there are problems both legal and practical at federal level with regard to constitutionality issues and the competent organ to entertain it.

These problems become the worst under the Revised Constitution of Oromia Regional State Constitution of 2001. Where this Constitution claims, when there is a need for constitutional interpretation judiciary has no role in interpreting and settling regional constitutional disputes. Hence, under this Constitution of Oromia, if the Proclamation enacted by the ‘Caffee’ is being contested as unconstitutional by interested party, the issue of its constitutionality is entertained by Regional Constitutional Interpretation Commission as pursuant to Article 69(2) of Oromia Constitution. And enabling legislations enacted by regional executive organ, such as regulations and directives are also submitted to the same organ (Interpretation commission) to determine their constitutionality, if being contested as unconstitutional under the same provision. Here, any issue of constitutionality whether arising out of Proclamation or subordinate legislations must be entertained by Regional Constitutional Interpretation Commission rather than ordinary courts.

Because Article 69(2) of the Revised state Constitution of Oromia clearly provides that where any law, regulations or directives issued by Regional State Organs is contested as being unconstitutional and such dispute is submitted to Regional Council of Constitutional Inquiry for investigation, final decision is rendered on it by the Regional Constitutional Interpretation Commission.

Hence, pursuant to the Revised Constitution of Oromia, judiciary is pushed out from passing decision on the issue of constitutionality of laws and subordinate legislations like regulations and directives of the regional executive. True that in federal government systems, laws are enacted both at regional and federal levels. Most of the time, these laws must be compatible for the sake of uniformity and avoiding inconsistencies. The federal Constitution and Regional Constitution must be consistent on such important issues like constitutionality and the competent organ to settle constitutional disputes and to interpret the constitution. As one can understand from the above explanations, various inconsistencies are there between the laws (Proc. No. 251/2001 and Procl. No. 250/2001) at federal level and FDRE Constitution. Again incompatibility between the Oromia Revised Constitution and FDRE Constitution on the issue of constitutionality of laws and the organ that passes decision on these matters. Pursuant to Article 84(2) of the FDRE Constitution, one can infer the definition of the term law though it is not clearly defined. The Amharic version of this provision says, if laws enacted by the federal and regional legislative organ is being contested as unconstitutional they must be submitted to the Council of Constitutional Inquiry for investigation. So we can conclude that the term law under Article 84(2) of the FDRE Constitution can be defined as a Proclamation issued both at federal and regional parliaments in connection with constitutional adjudication. Hence, only the Proclamations are submitted to House of Federation for adjudication or interpretation if being contested as unconstitutional by an interested party. But this assumption of submitting only Proclamations to the CCI and HoF for determining their constitutionality and courts must determine the constitutionality of the enabling legislations like regulations, directives and decisions of the executive organ, is subjected to debate; therefore, not accepted as a general rule of constitutional adjudication under the FDRE Constitution or no consensus is reached among academics and even judges on this conclusion of subjecting the executive enactments and administrative decisions to the courts power to review their constitutionality. As a result of lack

of legal clarities, today practical and legal problems in relation to constitutional adjudication are prevailing under the Ethiopian federation.

Under this study special emphasis is given to the problem with the Revised Oromia Regional State Constitution of 2001. As per Article 69(2) of this Constitution, not only Proclamations, but also regulations and directives are submitted to the Regional Constitutional Interpretation Commission for final decision if being contested as unconstitutional. At federal level at least, there is an argument which claims courts have certain role in constitutional adjudication and in determining the constitutionality of the executive enactments like regulations and directs as per Article 84(2) of FDRE Constitution, pursuant to its Amharic version. But under the Revised Constitution of Oromia, there is no such argument to favor courts to adjudicate constitutionality issues and the Constitution is clear. Any issue related with the constitutional matter must be submitted to Regional CCI and Regional Interpretation Commission as explained in the above discussions. So, courts have no role in controlling or checking the constitutionality of the executive organ's enactments and decisions under the Oromia State Constitution. Therefore, Article 84(2) of the FDRE Constitution and Article 69(2) of the Revised State Constitution of Oromia are incompatible on the issue of constitutional adjudication. Pursuant to Article 84(2) of the FDRE Constitution, the term 'law' must be Proclamations enacted by legislature both at federal and regional level as per its Amharic version while pursuant to Article 69(2) of the Revised State Constitution of Oromia, the term 'law' means Proclamations enacted by the regional parliament and regulations and directives issued by the executive organ at regional level. The problem here is that Article 69(2) of the Revised State Constitution of Oromia violates the principle setout under Article 9(1) of the FDRE Constitution, which says, the Constitution is the supreme law of the land; any law, customary practice or a decision of an organ of a state or public official which contravenes this constitution shall be of no effect. In addition to this, Article 9(1) of the Revised State Constitution of Oromia says that without prejudice to the supremacy of the FDRE Constitution, this constitution is the supreme law of the land. One can understand from these explanations that at federal level there is strong argument and a legal clue that favors courts to adjudicate the constitutionality of regulations, directives, decisions and other acts of the executive organ based on Article 84(2) of the FDRE Constitution. But the Revised Constitution of Oromia restricts the power of courts to review the constitutionality of subordinate

legislation granted under the FDRE Constitution contrary to Article 9(1) of the FDRE Constitution and its own Article 9(1).

One key issue that demands proper consideration in case of Oromia Regional State Constitution is that the principle of separation of powers, the principle of check and balance and the independence of judiciary is being put in doubt by the Constitution itself. Since courts have no role to check the constitutionality of the executive enactments and decisions; it is too difficult for courts to enforce the principle of check and balance. In addition to this, the executive organ can enact a legislation which can negatively affect the independence of courts or they may influence or interfere in the day to day activities of the judiciary through legislating different regulations and directives which can paralyze the effective and efficient works of the judiciary. In this study the impacts of these inconsistencies between federal and regional constitution as well as its disruptive effects on the principle of federalism, particularly with independence of judiciary will be analyzed.

Research questions

Questions which the study investigates into include:

- Whether or not the Revised Oromia National Regional State Constitution is compatible with the FDRE Constitution with respect to the adjudication of constitutionality issues.
- ✓ How Constitutional Adjudication is taking place and what types of legal problems arise under the FDRE Constitution?
- ✓ How do courts deal with the issue of constitutional adjudication at federal level under the Ethiopian federation?
- ✓ How do courts deal with the issue of constitutional adjudication at Oromia Regional level?
- ✓ Whether or not the principle of independence of judiciary from the influence of the executive organ is ensured under the Oromia Regional State Revised Constitution.
- ✓ What are the possible effects of incompatibility of the FDRE Constitution and the Revised Oromia National Regional State Constitution on the matter of adjudicating constitutionality issues?

This short study tries to reveal the irregularities or inconsistencies of constitutions, laws and practices by the concerned organs both at federal and Regional level of Oromia with respect to constitutional adjudication in general and tries to answer these above questions directly in particular.

Literature review

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 adjudicate the constitutionality of laws and decisions of government bodies.³ 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 constitutionality issues. For instance, Ethiopia preferred a political organization (HoF) for constitutional adjudication under her 1995 FDRE Constitution as discussed previously. Therefore, whether the power to adjudicate constitutionality issue is vest 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 adjudication of that countries.

The new Ethiopian Constitution of 1995 has captured the attention of quite a good numbers of scholars, regarding to the mechanisms for reviewing the constitutionality of laws and decisions of government bodies. As pursuant to Article 62 and 83 of the FDRE Constitution, the authority to interpret the constitution is vested in the second chamber, the House of Federation. HoF is not only empowered to interpret the constitution but also empowered to decide the constitutional disputes under the FDRE Constitution. The act of vesting the power to adjudicate the constitutionality issues in the House of Federation, 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 the issue of constitutional adjudication as the following. But none of them compare and contrast the states' and federal Constitution on issues of constitutional adjudication. To show the

³ Mauro Cappelletti, *The Judicial Process in Comparative Prospective* (Oxford: Clarendon Press, 1989), pp. 312-313.

inconsistencies or compatibility among federal and regional laws and to know at which level the independence of judiciary is more respected, comparing the regional and federal constitutions would have paramount importance.

Assefa Fisseha strongly contested the act of vesting the power of interpreting the constitutionality of laws in the hands of the second chamber. He claims, the practice of constitutional interpretation in Ethiopia follows different pattern and this has created a serious impact on the role of the judiciary in the political process.⁴ Further, he argues that courts are clearly prohibited from reviewing the constitutionality of laws enacted by legislature.⁵

Takele Soboka claims that the boundary between the powers of the regular judiciary and HoF, which is an amorphous, hybrid of quasi-judicial, semi-executive body, has been a subject of rumbling debates.⁶ According to him, the regular court is a principal organ to adjudicate constitutional issues, while the CCI/HoF have been given the residual powers to interpret the Constitution without rendering a final decision on question of facts.⁷ He wrote that judicial powers both at federal and state level are vested in the courts only.⁸ Furthermore, he explained that 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.⁹ On the other hand, only those constitutional disputes considered by the court in need of constitutional adjudication are referred to the CCI for investigation and CCI submitted to HoF if it decides that there is a need for constitutional adjudication.¹⁰ Takele said that judiciary has the duty to deny applications to cases before them those laws which they deem are outright unconstitutional.¹¹ As to him, the dividing line between the power of regular courts and the powers of the CCI/HoF, the distinction between the direct and indirect avenues of testing constitutionality of the laws and the principle of avoidance is over looked or given a cursory

⁴ Assefa Fiseha, *Institutionalizing Constitutionalism and the Rule of Law: Towards a Constitutional Practice in Ethiopia* (Ethiopian Constitutional Law Series, Vol. III), p. 12.

⁵ *Ibid*, p. 13.

⁶ Takele Soboka, *Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory* (Ethiopian Constitutional Law Series, Vol. III), p. 60.

⁷ *Id*, p. 61.

⁸ *Ibid*.

⁹ *Ibid*.

¹⁰ *Ibid*.

¹¹ *Id*, p. 62.

view at best.¹² Consequently, conclusions are reached that the regular court is stripped of its birth right of judicial powers of testing constitutionality; this stance, as Takele claimed is both erroneous and exaggerated.¹³ He precisely concluded his argument that despite the dilemma created by the usage of the word ‘dispute’ under Article 83(1) of the Constitution, the power of HoF is limited to constitutional interpretation.¹⁴ So, according to him it is a regular court’s proper province to adjudicate concrete cases of mainly indirect but also direct constitutional issues.¹⁵

Professor Heneric Scholer shares Assefa’s position. He wrote that judiciary doesn’t have the power to interpret the constitution.¹⁶ He concluded that Ethiopia’s mechanism of resolving constitutionality issues seems the principle that says, the parliament is competent organ to interpret the Constitution.¹⁷ Tsegaye Regassa wrote that the primary task of states Constitutions is the creation of state governments and regulation of their day to day activities.¹⁸ They thus establish the primary organs of the state and circumscribe the ambit of their power, so that they can be put within proper limits.¹⁹ Tsegaye claimed that the manner of organization and rules of procedures for their operation must be clearly shown under the state Constitution.²⁰

Assefa Fisseha explained about the relationship between the federal laws and regional laws. He said that the federal Constitution is silent as far as the thorny issue of regulating the relationship between federal and state law is concerned.²¹ As he claimed, two views can be distinguished. If one adopts the federal supremacy clause by default, then the principle stated in other federations (that means federal law prevails over the state law in case of incompatibility between the two) will hold true in Ethiopia as well. But if one adheres to the supremacy of nations, nationalities and peoples literally, because of the principle stated on the preamble, the pretentious aggregate nature of the federation (Article 8 and 39 of the FDRE Constitution), then it may be difficult to state that federal law will preempt state law as Assefa explained. Perhaps the best compromise is

¹² Ibid.

¹³ Ibid.

¹⁴ Id, p. 68.

¹⁵ Ibid.

¹⁶ Professor Heneric Scholer, *Ethiopian Constitutional and Legal Development* (Volume 2), p. 255.

¹⁷ Ibid.

¹⁸ Tsegaye Regassa, *Sub-National Constitution: Towards Entrenching Constitutionalism at State level* (Mizan Law Review, Vol. 13, No. 1, 2009), p. 38.

¹⁹ Ibid.

²⁰ Id, p. 39.

²¹ Assefa Fisseha, *Federalism and Adjudication of Constitutional Issues: The Ethiopian Experience* (Netherlands International Law Review, LII: 1-30, 2005), p. 1.

to decide the issues on a case-by-case basis rather than subscribing to either principle on the abstract level.²²

Moreover state Constitutions are not known by many people and their relationship with the federal is not clear in Ethiopia now days. For instance, Tsegaye Regassa wrote as follows with respect to states' Constitutions in Ethiopia. The regional Constitutions enjoy supremacy in the hierarchy of laws in the states.²³ Their relation vis-à-vis ordinary federal law (laws issued by the federal parliament) is not clear yet because of the fact that the principle of the federal supremacy is not yet spelt out.²⁴ Nevertheless, because not many people were aware of their being in operation, it was not usual to see legal arguments framed on the basis of their text.²⁵ Furthermore, Tsegaye argued that features of state constitutional texts can be understood better when we compare and contrast them with the federal Constitution under the supreme authority of which they operate.

In order to have democratic and legitimate Constitution both at regional and federal level, the Constitution should clearly specify the powers of the three wings of the government. According to Justice R.R. Mzikamanda, Sub-Saharan Africa requires strong, stable, sustainable democracies to deal with the myriad of challenges facing the region.²⁶ 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.²⁷ Hence an independent judiciary is a guarantee to democracy.²⁸

The Constitution must clarify in unambiguous ways the power of the courts to determine the constitutionality issues. Aharon Barak claimed that the role of the judge in democracy is to protect the Constitution and democracy.²⁹ So if regional and federal Constitutions are

²² Id, p. 10.

²³ Tsegaye Regassa, *State Constitutions in Federal Ethiopia: A preliminary Observation (A Summary for the Bellagio Conference, March 22-27, 2004)*, p. 8.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Justice R.R. Mzikamanda, *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)*, p. 10.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Aharon Barak, *The Judge in Democracy (Published by Princeton University Press, 41 William Street, Princeton, New Jersey 08540, 2006)*, p. 31.

incompatible on the issue of power of courts; it is difficult for the judges to protect the constitution itself. Legal systems with formal Constitutions entrust this task on judges, but judges also play this role in legal systems with no formal Constitution like Israel.³⁰ Most of the time states Constitutions are interpreted by state courts in USA.³¹ But in a system where ordinary courts are not granted the power to interpret Constitution, such as in Ethiopia, specific body such as the Constitutional Interpretation Commission interpret the state Constitutions.

Other important factors which describe the issues of constitutionality of laws both at federal and state levels are the legal standards. House of Federation is empowered to interpret the Constitution and settle constitutional disputes pursuant to Article 62, 83 and 84 of the FDRE Constitution. CCI has the power to investigate constitutional disputes and submit it to the HoF for final decision pursuant to Article 84 of the same Constitution.

Proclamation number 250/2001(CCI Proclamation) and Proclamation number 251/2001 (HoF Proclamation) clearly state the powers and responsibilities of CCI and HoF in resolving constitutionality issues. In this study, the Oromia Regional State Revised Constitution is the principal legal document, since the writer's aim is to show the inconsistencies between the FDRE and the Oromia Regional State Constitution on the issue of constitutionality of laws. Therefore, relevant constitutional provisions related to constitutional interpretation both at federal and Oromia Regional State Constitution will be compared.

Objective of the Study

The main objective of this study is to determine the compatibility or incompatibility of the Revised Constitution of Oromia Regional State with the FDRE Constitution with respect to constitutional adjudication. This study is to explore the possible effects of incompatibility between these Constitutions on the principles of separation of powers, check and balances and independence of judiciary at Oromia Regional level. Furthermore, it tries to point out the problems arising out of this incompatibility between the two Constitutions on the issue of constitutional adjudication in entertaining the practical cases related with constitutionality issues both at federal and regional level of Oromia. It critically analysis the provisions of the Oromia

³⁰ Ibid.

³¹ W. Murphy, Constitutional Interpretation as Constitutional Creation (Eckstein Lecture Presented at the Center for the study of Democracy, UC, Irvine, 2008; Published Electronically at <http://repositories.cdlib.org/csd/00-05>).

state Constitution with connection to settling constitutional disputes and make a conclusion whether courts at regional level have certain role in adjudicating constitutional issues or do not have any role in such matter in light of the FDRE Constitution.

The study attempts to clarify how judiciaries' roles to check the executive organ is being put in confusion at federal level as a result of the legal ambiguities existing both under the Constitution and other relevant laws enacted to ease the process of constitutional adjudication under the FDRE Constitution. In addition to this, the study has the objective of showing that the Oromia State Constitution has great legal problem and such problem must be excavated and known to the concerned government organs of Oromia region especially the 'Caffee' Oromia or the regional parliament since it is the maker of this Constitution.

This study tries to explore all the problems existing in connection with settling constitutional disputes under the Oromia Regional States and its negative impact on the current Ethiopian federation, especially on the role of judiciary in enforcing the Constitution and ensuring the rule of law.

Significance of the Study

This research has great importance in showing the problems existing at regional level of Oromia on the area of reviewing constitutionality of laws. Since very few researches have been done on this Regional Constitution, this study will have great contribution in showing ways of avoiding the confusion raised with respect to constitutional adjudication at regional level of Oromia. It identifies the inconsistencies between the Oromia State Constitutions with FDRE Constitution and creates awareness among the federal and regional government and enable them to correct such incompatibilities in the future.

This study suggests the ways in which challenges and threats to the independence of the judiciary can be dealt with to ensure the protection of this principle at Regional level of Oromia.

In its findings, the study will try to show, how the power of courts both at federal and regional level are being put in doubt by different laws. So, this research will instigate the concerned organs, especially 'Caffee' Oromia to give attention to this paradoxical issue and come up with clear and consistent provisions of laws.

In particular this study has paramount importance for the regional parliament (Caffee Oromia) to modify their Regional Constitution, at least to ensure the principle of check and balance among governmental wings under the Constitution. In addition to this, it will be used by potential researchers as a literature source for further study.

Research Methodology

This study explore and try to identify the incompatibility of the federal and regional constitutions' provisions and other relevant laws and critically analysis practical cases on the issue of constitutional adjudication. Therefore, its research methodology is qualitative one. In the main, the study has attempted to make an appropriate review of the existing literature on constitutional adjudication to come up with the best mechanism of adjudicating constitutionality issues. In furthering this purpose, the study has set up the proper conceptual, legal and theoretical framework, which serves as springboard to determine the competent organ to resolve issues of constitutionality of laws at federal level under the FDRE Constitution and at regional level of Oromia state.

From among the documents used, the FDRE Constitution and the Oromia National Regional State Revised Constitutions are considered as the main legal documents up on which this study will be based. These two Constitutions will be analyzed and compared in detail in order to point out their incompatibility and its possible effects on the issue of constitutional adjudication. Furthermore, decided cases on the issue of constitutionality of laws will be analyzed as much as possible.

Limitation and Scope of the Study

The study emphasis on the constitutional provisions dealing with the issue of constitutional disputes under the 1995 FDRE Constitution and the Proclamations dealing with the powers and responsibilities of HoF and CCI (Proclamation Number 250/2001 and 251/2001).The practice of courts at federal level on determining constitutionality of laws will be seen. The relevant provisions of Revised Oromia State Constitution of 2001 with respect to constitutionality of laws are briefly analyzed and compared with the federal Constitution of Ethiopia particularly limited to the issue of constitutional adjudication. The relationship between the regional and federal Constitution under the Ethiopian federation is briefly explored under this thesis on the matters

and mechanisms of adjudicating constitutional disputes. Absence of decided cases at regional level of Oromia on the issue of constitutionality is considered as great limitation to explore the practices of constitutional adjudication at regional level of Oromia under this study.

Organization of the Study

In brief, the study has attempted to explore the mechanism in which the FDRE Constitution resolves constitutionality issues. In addition to this, it explores how the issue of constitutionality of laws addressed under the Revised Constitution of Oromia.

The study will be divided in to four chapters, each of which has its own sections and subsections. Particularly, Chapter one is the introduction; 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 constitution, interpretation, constitutional interpretation and constitutional disputes. It explores the conceptual and theoretical framework of constitutional adjudication like theories of constitutional adjudication, and overview of constitutional adjudication in some federal states.

Chapter three is explaining briefly about constitutional adjudication under the FDRE Constitution and the Revised National Regional State Constitution of Oromia. Particularly, it deals with the historical overview of constitutional adjudication in Ethiopia, Constitutional Adjudication under the FDRE Constitution of 1995, Legal ambiguities with regard to constitutional adjudication, constitutional adjudication at Sub-national level under the Ethiopian federation and power of courts in constitutional adjudication under the Ethiopian federation.

Chapter four compare and contrast the FDRE Constitution with the Revised Oromia National Regional State Constitution with connection to constitutional adjudication and determining the constitutionality of laws. It identifies the possible effects of incompatibility between these constitutions. The last part of this study by way of conclusion and recommendation, examines the best way of addressing constitutionality issues under the revised state constitution of Oromia.

CHAPTR TWO

2. Conceptual and Theoretical Framework

2.1 Definition

In every research, stating the definitions or meanings of words and phrases before jumping into using them in explanations has paramount importance, since understanding the meaning of words and phrases is a prerequisite to grasp the messages of that research in general. For this reason, some definitions are bestowed for relevant words and phrases that are going to be referred and used as key points throughout this writings.

Adjudication: adjudication means the legal process of resolving a dispute; the process of judicially deciding a case.³²In simple word, adjudication or power to adjudicate means to make an official decision on disagreements or conflicts between two or more parties in jurisprudence.

Constitution: constitution can be defined in many ways. The most common definition for constitution is that it is the supreme law of the land. “Constitution is the fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties.”³³ *Constitutional adjudication*: constitutional adjudication means the process of settling down the issues and disagreements involving constitutional matter.³⁴It is related to adjudicating constitutional issues rather than other issues. It is a matter of determining constitutionality of laws in general and the division of powers among governmental organs in

³²Black’s Law Dictionary, (Ninth Edition, West Publishing Co. Thomson business group, United States of America, 2004), p, 47.

³³Id, P. 353.

³⁴From the definition given for constitution and adjudication.

particular.³⁵Hence, which organ of the government can shoulder such enormous responsibility is subjected to a rumbling debate in many countries now days.

Interpretation: interpretation is the process of determining what something, especially the law or a legal document, means; the ascertainment of meaning to be given to word or other manifestations of intention.³⁶There has been some confusion in defining what constitutes constitutional disputes and constitutional interpretation means under the FDRE Constitution. The consensus has not yet reached on the differences of constitutional interpretation and constitutional dispute neither among the academicians nor among the judges. We have no definition of constitutional interpretation and constitutional dispute under the FDRE Constitution. But some scholars tried their best to point out their differences and similarities. Assefa Fisseha, for instance, clarified constitutional dispute as one having a narrow meaning; it refers to cases in which a matter is referred to CCI or HoF arising from a real case and controversy.³⁷However, in contrast constitutional interpretation could arise in many other cases apart from real cases and controversies like issues regard to separation of power and federalism that are referred to HoF in abstracts are best examples.³⁸ This issue will be explored in detail later. *Judicial review:* a courts power to review the action of other branches or levels of government; especially, the courts' power to invalidate legislative and executive acts as being unconstitutional.³⁹

2.2 The Conceptual and Theoretical Framework of Constitutional Adjudication

Democratic countries have several fundamental principles in common. Among these common principles, having a written supreme Constitution is known. A Constitution is a unique legal document; which shapes the appearance of the state and its aspiration throughout history. A Constitution shows the form of state, like federal or unitary system of government, how the structure of a certain country's government is framed, distribution of powers, the reason why various nations form a federation and exist as a single country though a number of distinct ethnic and religious groups live in that country. For instance, by reading the preamble of the FDRE Constitution, one can understand simply that the nations, nationalities and peoples of Ethiopia established the current Ethiopian federation for the purpose of creating a common economic entity. Therefore, a Constitution clarifies that what a certain people living in one country strongly desire to have or to do in the future and what they wanted to rectify or correct from their past political, economic and social practices. Hence Constitution reflects the events of the past; it lays

³⁵Assefa Fisseha, Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation, (Draft paper presented at African Network of Constitutional Law conference on Fostering constitutionalism in Africa Nairobi, April 2007), p. 5.

³⁶Id, P, 894.

³⁷Assefa Fisseha, Federalism and Accommodation of Diversity in Ethiopia: A comparative Study (Wolf Legal Publisher, Nijmegen, the Netherlands, 2006), p. 384.

³⁸ Ibid.

³⁹Black's Law Dictionary, Cited above at note 32, p. 911.

the foundation for the present and it determines how the future politics, economy and social life of a certain nation dwelling in certain country proceed in the future as one can infer from the preamble of the FDRE Constitution.

Basic features of democratic governments like, separation of powers, supremacy of Constitutions, independency of judiciary, rule of law, principle of check and balance and the concept of constitutionalism are all reflected in a certain state's Constitution. Especially in the federations, divisions of powers between the federal and state governments are recognized under the federal Constitution. This federal Constitution is considered as the supreme law of the land in federal states although the supremacy of the federal law is not without limit. For instance, the federal legislature should enact its laws and policies within the limits set by the federal Constitution; once this condition is met, federal law prevails over the contrary state laws.⁴⁰ In a federation, the federal Constitution attempts to define the scopes and powers of the two levels of governments; but there is bound to exist natural imprecision in the language of the Constitution; it is also in the very nature of Constitutions that they are often stated vaguely, so that they will serve generations.⁴¹ In addition to this, in federation whatever their formation may be, the diversified interests between the central and the constituent units must be harmonized in order to succeed in the common interest and now days this issue is being handled through the application of federal system.⁴²

In federation, though power is divided between the federal and state governments; disputes and overlaps of powers cannot be avoided completely. For instance, a parliament enacts a law inconsistent with the supreme federal Constitution. Government may violate constitutionally guaranteed rights through its acts or decisions. Any private individual may bring a claim that his/her/its right is violated by the government act and decision or by the conduct of any other non governmental organs. Furthermore, a state Constitution may become incompatible with the federal Constitution on vital principles of democratic government like principles of check and balances among the three branches of government, independence of judiciary, separation of powers and others. Herein this thesis, the concept of constitutional adjudication is explored to critically analysis all the inconsistencies between the FDRE Constitution and the Revised National Regional State Constitution of Oromia and related constitutional issues.

In history, the issue of constitutional adjudication gained a considerable attention 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

⁴⁰ Assefa Fisseha, Federalism and Accommodation of Diversity in Ethiopia, cited above at note 37.

⁴¹ James Brudney, Recalibrating Federal Judicial Independence (Ohio State Law Journal 64:1, 2003), p. 171 and see also Assefa Fisseha cited above at note 32.

⁴² Ibid.

unconstitutional.⁴³ Since then, it is common to observe that ordinary courts are empowered to check the compatibility of legislation and executive acts with the term of Constitution. In most legal system, Constitution is declared as the supreme law. It is claimed, all legislations, whether primary or secondary should be compatible with the spirit of the Constitution and any acts and decisions of the government must be consistent with the covenant of the nation.

But the compatibility of laws, acts and decisions of the government institutions with the Constitution ensured under the text does not hold water, unless it is practically enforced. Hence in order to ensure constitutionalism, having constitutional text with its democratic elements does not suffice, unless it is backed by impartial and independent tribunal which is empowered to adjudicate constitutional issues and umpire the federation. Therefore, through tribunal that interprets and adjudicates constitutional issues, federal systems have been able to promote legal integration.⁴⁴ The key points raised with regard to constitutional adjudication include: Which organ of the government shall safeguard constitutional principles from violation? Which organ of the government is empowered to determine the boundaries where in the government may act constitutionally? And which organ of the government is authorized to adjudicate matters arising out in connection to the constitutionality issues? Constitutional adjudication is therefore, the process through which all these questions and other related problems are resolved by the selected organs like judiciary or Constitutional Court or HoF as specified under the FDRE Constitution. It is a tough work, so that, countries are attempted to settle their constitutional disputes or conflicts by using different mechanisms and governmental institutions as treated in the next topic.

2.3 Theories of Constitutional Adjudication

Given the unavailability 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 interpretation of the exact scope of power assigned to each order of government by the 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.⁴⁵ In order to resolve such constitutional disputes, a strong, autonomous and impartial tribunal necessitates, especially the federal states. But the competent organ of government to adjudicate constitutional related issues differs from country to country. Hence there is different answer in legal theory for the question which body or which judge is competent and authorized by the Constitution to adjudicate the Constitution. With regard to this question of constitutional adjudication, as one

⁴³ Marbury v Madison (Supreme Court of U.S 1803 5U S. (1(Granch) 137, 2, L. ED. 60 quoted in Yonatan Tesfaye, Whose Power is it Anyway: The Court and Constitutional Interpretation in Ethiopia (Journal of Ethiopian Law, Vol. III No. 1, 2008), p. 129.

⁴⁴ Mauro Cappelletti, The Judicial Process in Comparative Perspective, cited above at note 3, p. 115.

⁴⁵ Ronald L .Watts, Comparing Federal Systems (3rd Edition, Institute of Intergovernmental Relations, Queen's University Press, London, 2007), p.158.

can grasp from various literatures and practices of the world countries, three answers are given in legal history as briefly explained below.

I) The Diffuse System

This solution goes back to the early American jurisprudence of the Supreme Court. Naturally, in a federal system, where federal laws and state laws may conflict; and where both of them might conflict with the Constitution of the federal system, there is a high importance and a need for an authorized body to solve this problem.⁴⁶In American system every judge can raise the problem and decide a dispute whether a federal or state law is violating the Constitution or not.⁴⁷But his decision is only for the two parties involved, however, when the case finally gets up to the Federal Supreme Court, then this decision of the judge by virtue of the doctrine *Stare decises* is binding for everybody.⁴⁸Hence in the decentralized (diffuse or American) model of judicial adjudication in order to control the constitutionality of the legislative acts and executive conduct is exercised by all regular courts of all tiers.⁴⁹In other words, the supremacy of the Constitution controlled solely by the regular courts in the decentralized American model of constitutional adjudication.⁵⁰

II) The Centralized System

Sometimes the concentrated system of constitutional adjudication is called the central European or German solutions for constitutional disputes and interpretation. In the more centralized European system of constitutional adjudication, the power to pass judgments on the constitutionality of a law or conduct is vested exclusively in a separate organ whose sole duty is to act as a constitutional judge.⁵¹Such an organ could be a constitutional court, a supreme court or a separate special body such as the French *Conseil Constitutionnel*.⁵² “The purpose of such special institutions is invariably to judge the validity of a legislation or act with simple and rational logic, completely separate from the need to settle disputes in specific cases and acting as a negative legislator”⁵³Unlike the decentralized model where judicial review takes place in the context of resolving a concrete case that give rise to it, the primary function of constitutional courts of the concentrated system is confined to abstract review.⁵⁴This mode of judicial adjudication, 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

⁴⁶ Henric Scholer, Ethiopian Constitutional and Legal Development, cited above at note 16, p. 295.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Herbert Hausmaninger, Judicial Referral of Constitutional Question in Austria, Germany and Russia (Tulane European and Civil Law Forum), P. 25.

⁵⁰ Ibid.

⁵¹ Allan Randolph Brewer-Carias, Judicial Review in Comparative Law (1989), p. 185.

⁵² Andre Alen, The Relations between the Constitutional Court and other National Courts, Including the Interference in this area of the action of European Courts (Human Rights Law Journal, 2002), p. 304.

⁵³ Brewer-Carias, cited above at note 51.

⁵⁴ Takele Soboka, Judicial Referral of Constitutional Disputes in Ethiopia cited above at note 6, p. 58.

of how the interpretational issues arises.⁵⁵ So under this system, constitutional disputes necessitating constitutional adjudication for testing the validity of legislations or executive conducts can be channeled to the special constitutional body either by virtue of a direct action by interested parties or through specified state organs or a referral by the court.⁵⁶ The constitutional adjudication or review can be initiated by the government bodies, private parties or a judicial referral requesting the constitutional body to test constitutionality of the contested legislations, decisions or conduct. But the Constitutional Courts of Europe are entirely separated institution from the traditional judicial branch of the state. We cannot categorize it as executive or legislative either. So that as Crisaffuli observed, the constitutional court remains outside the traditional categories of state powers; it is an independent power whose function consists in ensuring that the constitution is respected in all areas.⁵⁷

III) The Mixed System

The mixed system of constitutional adjudication apportions constitutional adjudicating powers between the regular courts and a separate constitutional adjudicating organ. The mixed model of constitutional judicial review has been principally practiced in Latin American states, such as Columbia, Venezuela, Peru and Brazil as well as in few European countries, namely Portugal and in its limited form in Switzerland.⁵⁸ Like the American system of diffuse judicial adjudication, any interested party to a civil or criminal proceedings or the court which is a forum there to can raise the issue of constitutionality of legislative or executive acts and courts of all levels are empowered to rule on the constitutionality of the challenged law, decisions, or acts.⁵⁹ Hence, like in the diffuse system of constitutional adjudication, the regular courts can rule on the constitutionality or unconstitutionality of laws, but with the *inter-partes* effects.⁶⁰ Therefore, such cases are review *incidentere* and involve a concrete review.⁶¹

Here 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 constitutionality or unconstitutionality of a law the content of which potentially affects the outcome of the concrete litigation.⁶² Under this system only the decision of the constitutional court has *erga omnes* effects.⁶³ That means, the decision rendered by the constitutional court binding on everybody. As in the concentrated system, the proceedings before the constitutional court would be limited to abstract review of constitutionality of a law, pending which the related proceedings (concrete

⁵⁵ Herman Schwartz, *The New East European Constitutional Courts* (13 Michigan Journal of International Law, 1992), p. 741.

⁵⁶ Takele Soboka Cited above at note 6, pp. 58-59.

⁵⁷ Quoted in Takele Soboka, cited above at note 6, p. 59.

⁵⁸ Brewer Carias, cited above at note 51.

⁵⁹ Id, p. 266.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Takele Soboka cited above at note 6, p. 59.

⁶³ Ibid.

dispute) would be stayed until the outcome of review of constitutionality is handed down.⁶⁴ For this matter, 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 proceedings.⁶⁵ Under this model of constitutional adjudication, the jurisdiction to hear and entertain final appeal on the concrete aspect of the case would be reserved for the highest regular court, obviously the Supreme Court or its cassation division.⁶⁶

It seems that the current Ethiopian constitution of 1995 followed the mixed system of constitutional adjudication rather than the diffuse or the concentrated system; since it apportioned the duties of constitutional adjudication between the two bodies; the judiciary and the Council of Constitutional Inquiry/ House of Federation as it is explained in detail under next chapter of this thesis.

2.4 Overview of Constitutional Adjudication in Some Federal States

Despite many differences, a few common characteristics distinguish federal system from other type of government system. In federation, at least two orders of government, one for the whole country and the other for the constituent units, a written supreme Constitution which cannot be amended or altered unilaterally neither by the federal nor by state government. All laws, acts and decisions of any government organ must be compatible with this supreme Constitution. For this reason, effective and efficient federal system of government must be based on a written Constitution that ensures rule of law and incorporate the idea of constitutionalism or limited government, since the Constitution sets the basic framework and principles of the federation. In addition to this, the Constitution can be symbolically important in fostering unity and ensuring uniformity, especially on the democratic principles within the federations as we observe from the preamble of FDRE Constitution, particularly its paragraph two, three, four and five.

But, however carefully the Constitution is crafted, most of the time disputes and conflicts are the brand of the federation. As a result of this fact, federal and state governments in federations need a constitutional arbiter to resolve disputes and conflicts over their respective constitutional competencies.⁶⁷ A federal Constitution must provide a method for resolving possible conflicts over the legal powers of the two orders of government.⁶⁸ Such disputes or conflicts can arise in various ways in federal states. Firstly, when both order of governments have concurrent legal authority over a subject, the laws of one order of governments must prevails in case of conflicts.⁶⁹ Thus Constitution must clarify which has paramount importance in case of conflicts.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Brewer Carias cited above at note 51, p.267.

⁶⁷ George Anderson, *Federalism: An Introduction* (Forum of Federations, Oxford University Press, 2008), p. 56.

⁶⁸ Ibid.

⁶⁹ Ibid.

In most federations the federal law prevails over the state laws in case a conflict exist between the two laws. Secondly, both order of the government (federal and states) may pass laws that conflict each others and defend their respective laws as deriving from their distinct powers.⁷⁰For instance, the federal government might have power over internal trade while the constituent unit governments have the power over property, and they pass conflicting laws relating to these two areas; in such case, resolving the conflict requires determining which power(internal trade or property) is the more relevant.⁷¹Thirdly, sometimes there is no actual conflict between two laws, but a government or private interest objects to a law passed by another government on the ground that the law exceeds its legal jurisdiction.⁷² For instance, the objection may be on the ground that the law contravenes a constitutionally established right. ``Federations deal with conflicts over the distribution of powers and legal incompatibility by using courts, emergency powers, constitutional amendments, political compromise and elections.’’⁷³Below some federal states are consulted to look their mechanisms of adjudicating constitutional issues and resolving disputes between the federal and regional laws.

A) The United States of America

The United States of America, the first modern federation adopted federalism as the organizing principle for its structure of government in 1789, following Philadelphia convention of 1787.⁷⁴It survived a devastating civil war during the first century of its existence, but as the most enduring federation in the world, it is an important reference point in any comparative study of federation.⁷⁵In the U.S.A, variation in political culture and considerable attention up on the value of the states and local government is known though the whites are majority in every state.⁷⁶

The major features of distribution of powers is the arrangement where by the Constitution lists subject matters under federal authority, most of which are concurrent and some of which are made exclusively federal by prohibiting the states from legislating on them and leaves the unspecified residual matters to the states.⁷⁷Hence in the U.S.A, the federal institutions are established based on the principle of separation of powers between the executive and legislative and having independent judiciary involving a system of check and balances. In United States of America, there is one federal Constitution and all states adopted their own Constitution. Since two levels of government established under the U.S.A federation the issue of constitutional adjudication has paramount importance as a result of possible inconsistencies between the federal and state laws. As discussed above, any disputes whether constitutional or others are

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Craig R. Ducat, Constitutional Interpretation (6th Edition, West Publishing Co., Northern Illinois University, 1996), p. 26.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

subjected to ordinary court jurisdiction under the U.S.A federation for their settlement. In the first place, while each of this Constitution may be independent, the federal Constitution and the Constitutions of the states must share certain common principles and premises, a common spirit in order to fit into a common mosaic.⁷⁸ In U.S.A as Walter F. Murphy stated, adjudication of the Constitution or “acts of interpretation is the highest and most difficult responsibility to which the American judges called on to perform.”⁷⁹ Americans practiced this difficult legal issue since 1803 or starting from *Marbury v Madison* case. But U.S.A carefully handed the matter related to constitutional adjudication through establishing well framed legal system and an independent judiciary.

The supremacy clause in Article VI of the U.S.A Constitution holds that “the federal Constitution and all laws and treaties based on it are the supreme law of the land.”⁸⁰ In the U.S.A federation a state law is unenforceable to the extent of its conflict with any valid exercise of any of its powers by the national government.⁸¹ Therefore, the enforceability of state laws depend on the extent it would not conflict with the realization of the objectives intended to be protected by the grant of a power to the national government.⁸² Hence in U.S.A, if conflict arises between actions of the two levels of governments both in cases of exclusive and concurrent powers, it calls the issue of constitutional adjudication which is conducted by the ordinary court of law. So in case conflict exists between the two Constitutions and other laws of the two levels of governments, the laws of the national government prevails.

B) The Federal Republic of Germany

The Federal Republic of Germany has sixteen Landers (states). Unlike other federal systems, Landers have very little matters up on which they can legislate, for the reason that the Basic Law has subordinated most state legislative powers to the federal government. However the states formulate some educational and cultural policies and maintain police. The administration of all laws including federal laws is almost exclusively in the hands of the Landers. However, the Lander in Germany is not merely administrative districts as in a unitary state. Landers have their own territories, Constitutions and governmental power (Parliaments, governments, administrative authorities and courts) as clarified under the various provisions of the Basic Law of Germany.

All policies not assigned to federal jurisdiction are within the legislative purview of the Landers. The Lander governments also exercise power at national level through the *Bundesrat* (the upper house of the parliament in Germany). The *Bundesrat* is one of the key institutions in Federal Republic of Germany; its members are state ministers or civil servants and are not elected. It has

⁷⁸ Walter F. Murphy, *Constitutionalism and Democracy, Transition in Contemporary World* (1993), p. 4.

⁷⁹ Walter F. Murphy and C. Herman Pritchett, *Courts, Judges and Politics: An Introduction to the Judicial Process* (Random House, New York, 1961), p. 463.

⁸⁰ The U.S Constitution of 1879, Article VI.

⁸¹ Henry Rottschaefer, *Handbook of American Constitutional Law* (West Publishing Co.1939), p. 88.

⁸² *Ibid.*

a final say in disputes between the states and the federal government. The Landers shall participate through the Bundesrat in the legislative process and administration of the federation as well as in matters concerning European Union.⁸³ Each Lander shall have three votes; Lander with more than two million inhabitants shall have four votes and Lander with more than seven million inhabitants has six votes.⁸⁴Hence by using the Bundesrat as an instrument, Landers in German federation affects the federal legislative process.

There is an independent Constitutional Court which has the power to adjudicate constitutional disputes or conflicts in German federation. The court has to be approached by federal or regional governments or by parliament or by a judge which had to solve a problem of conflicts or disputes between federal and Landers constitutions or laws.⁸⁵In case of conflicts between the two laws, federal law shall override the Landers law in Germany.⁸⁶Each Lander has their own Constitution and Constitutional court in German federation. For instance, Article 52 of the state Constitution of Mecklenburg- Western Pomerania of 1993 announces the establishment of independent institution, which is the Lander's Constitutional court to adjudicate the Constitution with binding force. The scopes of the jurisdiction of the court are enumerated under Article 53 of the same constitution. For these reasons, under the German federation, Constitutional courts are established for the purpose of adjudicating constitutional disputes and other related matters both at federal and sub-national level.

C) The Swiss Federation

The Swiss federation consists of 26 Cantons (states). It has a long republican tradition, and its modern democratic Constitution dates back to 1848. This Constitution is totally revised in 1874 and amended organically from time to time. The current version of the Swiss Constitution is adopted by referendum on February 2004.⁸⁷Like in U.S.A and Germany all the cantons of the Switzerland have their own Constitution.

Federal institutions assume only tasks which are explicitly enumerated in the Constitution. Similar with U.S.A constitutional system, all powers not delegated to the federal government by the Constitution are reserved for the cantons. Again similar with the U.S.A a second chamber within the national parliament is created in which each canton is represented with two seats and every half canton has one seat.⁸⁸ Unlike the situation in U.S.A the Swiss federal Court was prevented by the Constitution from becoming the guardian and arbiter of last resort for every aspect of federal-state relations. This is because, a review of constitutionality of federal laws and international treaties by the ordinary courts are excluded under the Swiss Constitutional law.

⁸³ The Basic Law of Federal Republic of Germany (1990), Article 50.

⁸⁴ Id, Article 51.

⁸⁵ Id, Article 100 (1).

⁸⁶ Id, Article 30.

⁸⁷ M. v. Pyee, Selected Constitution of the World (2nd Edition, New Delhi, Universal Law Publishing Co. Pvt. Ltd, 2006), p. 704.

⁸⁸ Swiss Constitution of 2004, Article 3.

Disputes between canton or cantons and the confederation shall to the extent possible, be resolved through negotiation or mediation.⁸⁹ Apart from this the federal tribunal is the highest court of appeal in Switzerland. It has a final jurisdiction in suits between the cantonal and federal governments, corporations, individuals between cantons. It has original jurisdiction only in cases involving offences against the confederations and unlike the U.S.A Supreme Court; it may not review the constitutionality of federal laws. So, in Switzerland there is unique arrangement that the Federal Tribunal may rule on the validity of the cantonal laws but not the federal laws. The validity of federal law is determined instead through the instrument of legislative referendum. Therefore, in Switzerland in addition to elections at each level of government, the electorate plays a major adjudicating role through the operation of legislative referendum. In this case, any federal legislation that is challenged by 50,000 citizens or eight cantons must be submitted to a direct popular vote. As a result, this referendum process becomes the adjudicative process for ruling on the validity of federal legislation in Swiss federation.

2.5 Pros and Cons of vesting the Power of Constitutional Adjudication in the Courts

Generally as explained in the above discussions, there is no consensus on the matter of vesting the power of constitutional adjudication in the hand of judicial organ of the government. There is strong argument that claims courts must be avoided from constitutional adjudication and determining the constitutionality of statutes, since judges are not directly accountable to the public at large.⁹⁰ Therefore, the power to adjudicate the Constitution in general and determining the constitutionality of laws enacted by the legislative organ of the government in particular must only be given to the representatives of the people, who are directly accountable to them.⁹¹ This line of argument claims that, it is not sound to empower judges to review the constitutionality of legislations enacted by the legislative organ of the government; since empowering the judiciary to check the constitutionality of statutes, can be considered as replacing the supremacy of the parliament, which is recognized under the Constitution by judicial supremacy.⁹² Hence according to this line of thinking judges lack direct accountability to the people, so that, it is not logical to empower an organ, which is not directly accountable to the public at large to review the acts of a parliament which is directly accountable to the people.⁹³ Therefore, the supporters of this argument claimed that an organ which represents and directly accountable to the public at large must only empowered to determine the issues of constitutionality under a certain Constitution.⁹⁴ Furthermore, courts are often criticized for being anti-majoritarian, at odds with the democratic principles; judicial activism is also considered at odds with the principles of separation of powers for it takes away the role of the other branches of governments and many consider the judiciary

⁸⁹ Id, Article 44(3).

⁹⁰ Aharon Barak cited above at note 29, p. 91.

⁹¹ Ibid.

⁹² Id, p. 94.

⁹³ Ibid.

⁹⁴ Ibid.

lacks the competence to adjudicate the constitutionality issues.⁹⁵ Hence ordinary courts are excluded from adjudicating constitutionality issues as explained previously, as a result of these above reasons under various Constitutions.⁹⁶

On the other hand, there is strong and sound arguments that claims, empowering the judicial organ to review the constitutionality of legislations enacted by the parliament are used as stepping stone to ensure the principles of constitutionalism.⁹⁷ 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.⁹⁸ 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.⁹⁹ 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.¹⁰⁰ This group argued that democracy is more than a mere populism; it is a lawful exercise of powers conferred by the Constitutions.¹⁰¹ 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.¹⁰² 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.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ Hence judge is not a politician, so his or her

⁹⁵ Assefa Fisseha cited above at note 37, p.389.

⁹⁶ Some states prefer a middle position; the established the Independent Constitutional Courts fearing that empowering their ordinary courts to adjudicate the constitutionality issues, like Germany, Nigeria and South Africa while other states even afraid to empower an independent Courts, even they afraid to establish Constitutional Courts and prefer to vest the power to adjudicate constitutionality issues in the hand of not independent organ like the House of Federation under the 1995 FDRE Constitution.

⁹⁷ Aharon Barak cited above at not 29, p. 95.

⁹⁸ *Id.*, p. 93.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ Beverley McLachlin, 'Charter Myths'(33 U.B.C, Rev., 23,31,1999) as cited in Aharon Barak, cited above at note 29, p. 94.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ Aharon Barak cited above at note 29, pp. 94-95.

¹⁰⁵ *Ibid.*

accountability is differs from the accountability of a politician.¹⁰⁶Therefore, 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.¹⁰⁷It 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.¹⁰⁸

“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.”¹⁰⁹ 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.¹¹⁰With 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.*¹¹¹

From the above two arguments, one can understand that two competing interests exist. The first interest is that preventing the regular courts to adjudicate the Constitution in general and review the constitutionality of the legislations enacted by the parliament, since courts are not elected by the people or not accountable to the public as well as they are based on their on subjective belief and furthermore, 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 system that specific state accepted for centuries may not favor judicial review. If 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; we 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 courts are prohibited to adjudicate constitutionality issues in general. Since other organ must be established under such Constitution in order to interpret the Constitution as a whole and determine the constitutionality issues

¹⁰⁶ Id, p. 96.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Id, p. 95.

¹¹¹ *Vriend v Alberta* (I.S. C. R. 493, 566-67, 1998) as quoted in Aharon Barak cited above at note 29, p. 95-96.

particularly. The relationship between this organ that must be established for the purpose of constitutional adjudication 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.

As explained briefly in the previous discussions, 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 constitutionality 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.¹¹²Hence 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.

The great problem comes with those states preferred neither of the above two methods of constitutional adjudication. Some countries like Ethiopia are introduced unique methods of adjudicating the constitutionality 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 organization like HoF is empowered to adjudicate the Constitution in general, it is too difficult to talk about the independence, impartiality and effectiveness of such institutions. 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 adjudication remains a paradox. Of course, there is one truth for the case of Ethiopia that empowering the ordinary court is not a sound decision as the writer of this thesis thinks, since the legal tradition Ethiopia practiced is a continental legal system which does not favor the constitutional adjudication by ordinary courts. But it is preferable to establish an

¹¹²As Crisaffuli observes: 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. Quoted in Takele Soboka, cited above at note 6, p.6.

independent Constitutional Court rather than empowering politically not independent organ for the purpose of constitutional adjudication.

In such systems which empower other organs for the purpose of constitutional adjudication, 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 adjudication 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 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 adjudication 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 government ever seen on the earth likes the United States of America preferred their ordinary courts for the task of constitutional adjudication rather than recognizing other organ under their Constitution for this purpose. Hence as the writer thinks vesting the power of constitutional adjudication 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.

CHAPTER THREE

3. Constitutional Adjudication under the FDRE Constitution and the Revised Oromia National Regional State Constitution of 2001

3.1 Constitutional Adjudication in Ethiopia: Historical Overview

In Ethiopian history, the concept of constitutional adjudication was not as such relevant legal issue, since the idea of constitutionalism or limited government system was not the political culture of the Ethiopian rulers. The emperors were sovereign not the peoples. The Ethiopian emperors had absolute power and their powers were free of any legal restriction, so that, they were above the law. Subjects are granted benefits and privileges at the will of the emperors; so the concept of claiming constitutional rights by the citizens of Ethiopia was unthinkable during the monarchical eras. Except limitations imposed on the power of the emperors by the church and tradition, the power of Ethiopian emperors were untouchable by positive law, even by the Constitution as one can inferred from the 1931 and 1955 Ethiopian Constitutions.

With regard this, Assefa Fisseha said, “constitutional adjudication does not have a gratifying history in Ethiopia”¹¹³The first written Constitution of 1931 did not explain about constitutional adjudication. It was enacted to strengthen the absolute monarchy, so that, talking about constitutional adjudication was pointless at that time. Under this Constitution; powers, acts and decisions of the emperor was not subjected to any strict kind of review and his authority could

¹¹³ Assefa Fisseha, Constitutional Interpretation: The Respective Role of Courts and the House of Federations (Faculty of Law/Civil Service College, Proceedings of the Symposium on the Role of the Courts in the Enforcement of the Constitution, 2000), p. 18.

not be contested.¹¹⁴The 1955 Ethiopian Constitution had a supremacy clause under its Article 122. Pursuant to this Article, the constitution together with those international treaties, conventions and obligations to which Ethiopia is a party shall be the supreme law of the empire. And all future legislations, decrees, orders, judgments, decisions and acts inconsistent therewith shall be null and void. Despite the mere declaration of the supremacy of the Constitution, the practice of constitutional adjudication never existed under the 1955 Constitution. No organ of the government was specifically empowered to adjudicate constitutional issues and declare legislation, decrees, orders, judgements, decisions and acts which were considered as unconstitutional null and void.¹¹⁵This Constitution was drafted by three American legal scholars, so that it seems that because of their influences on its draft process, Ethiopia adopted the U.S.A system of constitutional adjudication under the 1955 Constitution. In U.S.A the history of constitutional adjudication demonstrates, a court may exercise constitutional adjudication without explicit authorization by the Constitution.¹¹⁶Hence under the 1955 Ethiopian Constitution there is no specifically specified organ to conduct constitutional adjudication, but it is sound to claim that this Constitution empowered the judicial organ of the government for the purpose of constitutional adjudication, since it reflects the American form of constitutional adjudication theoretically.¹¹⁷Similar to the 1931 Constitution, the 1955 Constitution conferred the indisputable power on the emperor. The emperor acted as a legislator or law giver, fountain of justice and chief executive. In relation to this point George Krzeczunowicz has rightly pointed out that the power of the emperor to quash any decision rendered by the courts would make the exercise of the constitutional adjudication pointless.¹¹⁸One can simply conclude from this explanation that though the supremacy of the Constitution was inserted under the 1955 Constitution, the whole concept of constitutionalism in general and constitutional adjudication in particular was never practiced during the monarchical system in Ethiopian legal history.

The People's Democratic Republic (PDRE) Constitution of 1987 has adopted the concept of constitutional adjudication. An institution empowered to adjudicate constitutional issues was

¹¹⁴ C.N, Paul and C. Claphm, *Ethiopian Constitutional Development* (1967), p.287.

¹¹⁵ Yonatan Tesfaye, *Whose Power Is It Anyway: The Courts and Constitutional Interpretation in Ethiopia* (Journal of Ethiopian Law, Vol. XXII, No. 1), p. 131.

¹¹⁶ *Ibid.*

¹¹⁷ Ibrahim Idris, *Constitutional Adjudication under the 1994 FDRE Constitution* (Ethiopian Law Review, Vol. 1 (1), 2002), p. 63.

¹¹⁸ George Krzeczunowicz, *Hierarch of Laws* (Journal of Ethiopian Law, Vol. 1(1), 1984), p. 111.

established. This Constitution contained express clause on the interpretation of the Constitution and determination of constitutionality of legislative acts. It was the Council of State, a political body which was entrusted to adjudicate the Constitution. Since Derg government was a dictator, it was reported that no significant case related to constitutionality issue was brought and adjudicated before the State Council during the Derg regime.¹¹⁹ The present FDRE Constitution of 1995 provides detailed provisions on the concept of constitutional adjudication as explored in detail in the next sub-topic.

3.2 Constitutional Adjudication under the FDRE Constitution of 1995

Up on the adoption of the 1995 FDRE Constitution, the federal system of government was introduced in Ethiopia with some 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, the principle of sanctity of human rights, secularism and accountability of the government officials for their conducts.¹²⁰ 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, separation of politics from justice, division of powers between 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.

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 both the government institutions and officials are the servants of the nations, nationalities and peoples while Constitution is their manual or guidance. In federation, including Ethiopia, every law including the state Constitution, must be compatible with the federal supreme 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. In federation we have federal and state Constitution, excluding those federations without having state Constitution. Since conflicts or disputes are inevitable in federation, both

¹¹⁹ Assefa Fisseha, Constitutional Interpretation, cited above at note 113, P. 19.

¹²⁰ See Article 8-12 of the FDRE Constitution.

federal and state governments must provide effective mechanisms of resolving constitutional disputes and other conflicts in their respective Constitution.

Unlike other federal states, the Ethiopian Constitution empowered the House of Federation, a political organ, for the matter of entertaining constitutional disputes rather than vesting this power in the hand of ordinary courts or establishing independent Constitutional Courts. The HoF is composed of representatives of nations, nationalities and peoples of the federation.¹²¹ Two reasons are given for vesting the power of constitutional adjudication in the HoF under the current Ethiopian federation. Firstly, the framers of this Constitution think that the new Ethiopian federation is the coming together of the outcome of the nations, nationalities and peoples. In deed it is clearly stipulated in the preambles and Article eight that this nationalities are the sovereign. Therefore, this Constitution is considered as covenant made based on the consent and free will of the peoples living in the federation. It is in the words of the framers that “this Constitution is a political contract and therefore, only the authors that are the nations, nationalities and peoples should be the ones to be vested with the power of interpreting the Constitution.”¹²² As a result of this since it is difficult to adjudicate the Constitution by the nations, nationalities and peoples; the FDRE Constitution empowered the HoF to do so on behalf of them pursuant to Article 62 of the same Constitution. Secondly, the framers were well aware of the fact that empowering the judiciary or a constitutional court brings unnecessary judicial adventurism or what some scholars prefer to call it as judicial activism in which the judges would in the process of adjudicating the vague clauses of the Constitution put their own preference and policy choices in the first place.¹²³ Thus the framers argued that this might result in hijacking the very document that contains the compact between the nationalities to fit the judges own personal philosophies.¹²⁴ Based on these two reasons, the framers and some scholars believe that it is sound to vest the power to adjudicate constitutional disputes in the second chamber of the parliament under the Ethiopian federation.

But the writer of this thesis neither supports the first reason nor the second one. It is better to establish the independent constitutional courts for the purpose of adjudicating constitutional and

¹²¹Id, Article 62.

¹²²See Ye Ethiopian Hige Mengist Gubae Kale Gubae V.4 Hidar 14-20, 1987 E.C. (Minute of the Constitutional Assembly, November 1994, Discussion on Article 59, 61 and 62).

¹²³ Assefa Fisseha, Federalism and the Accommodation of Diversity cited above at note 37, p. 389.

¹²⁴Ibid.

other related issues as discussed under chapter two of this thesis, although vesting such great responsibility in the hand of ordinary court is too difficult in Ethiopia because of judicial activism in which the judges would in the process of adjudicating the constitutionality issues put their own preferences and policy choices in the first place. It is difficult to think that HoF is an independent and impartial organ though it is claimed that its members are the representatives of the nations, nationalities and peoples because they are elected from the ruling political party. So it is better to create a certain institution for the purpose of adjudicating constitutional issues independent from politics in Ethiopia.

On the other hand, the framers of the Constitution recognized the fact that constitutional adjudication involves legal technicalities, so that HoF is assisted by the Council of Constitutional Inquiry. The CCI consists of eleven members including, the federal chief justice and his deputy of the federal Supreme Court; who also serve respectively as a chairman and vice chairman of a CCI.; Six other legal experts appointed by the president of the republic with the recommendation by the House of Peoples Representatives, who shall have proven professional competence and high moral standing and three persons designated by the HF from among its members. The CCI shall establish organizational structure which can ensure expeditious execution of its responsibilities.¹²⁵

3.2.1 Legal Ambiguities With Respect to Constitutional Adjudication under the Ethiopian Federation

A) Legal Ambiguities under the FDRE Constitution

The FDRE Constitution empowered two constitutional organs; the HoF and CCI to adjudicate constitutional matters and resolve conflicts in the federation.¹²⁶ Though these two organs are established for the purpose of resolving constitutional disputes and other conflicts, still various legal and terminological confusions and ambiguities are common under the FDRE Constitution concerning the constitutional adjudication process. The Constitution said that the HoF is empowered to decide all constitutional disputes and interpret the Constitution.¹²⁷ But the definition or difference of the term constitutional dispute and constitutional interpretation are not

¹²⁵ FDRE Constitution, Article 83.

¹²⁶ Id, Article 62, 83 and 84.

¹²⁷ Ibid.

given under this Constitution. Hence, questions like, what is the difference between constitutional disputes and constitutional interpretation? Are they one and the same? If so what is the need of using two terms? And other related questions are debatable under the FDRE Constitution in relation with constitutional adjudication.

For this reason the writer of this thesis prefer to use the term constitutional adjudication in general, to cover all points raised with connection to constitutional interpretation, constitutional disputes and mechanisms of resolving constitutional disputes under this thesis. Literature shows that constitutional interpretation occurred when the specific constitutional provisions or texts are suffered from lack of clarity, conflict in legal documents, omissions/gaps, unforeseen developments and other related problems are encountered. Different from other ordinary legal interpretation, constitutional interpretation needs high standard of interpretation ethics and a great care, since it is a matter of expounding nation's covenant especially in federations.

But under the FDRE Constitution, there has been confusion in defining what constitutional interpretation and constitutional disputes really mean. As per Article 62(1), the HoF has the power to interpret the Constitution and it has the power to decide constitutional disputes as per Article 84(1) of the FDRE Constitution. Among the academics, the definition given to the term constitutional interpretation and constitutional disputes differs. One group claimed that the two terms are not one and the same and the other group argued that both terms are one and the same so that we can use them interchangeably. Among authors, Assefa Fisseha claimed that constitutional disputes have very narrow meaning; it refers to cases in which a matter is referred to CCI or HoF arising from real case and controversy.¹²⁸ He further explained that constitutional interpretation could arise in many other cases apart from real cases and controversies.¹²⁹ As pointed out issues regarding separation of power and federalism that are referred to the HoF in abstract are good examples of constitutional interpretation.¹³⁰

Yonatan Tesfaye, explored that constitutional dispute in the context of the FDRE Constitution has two aspects; “one is the general task of interpreting the Constitution with a view to ascertain the meaning, content and scope of a constitutional provisions based on Article 84(1) while the

¹²⁸ Assefa Fisseha cited above at note 37, p. 390.

¹²⁹ Ibid.

¹³⁰ Ibid.

other is the more specific task of determining the constitutionality of the state and federal laws as clarified under Article 84(2).”¹³¹Yonatan argued that what makes a certain dispute, a constitutional dispute is the mere fact that the dispute involves constitutionally recognized rights.¹³²According to him, the determining factor is that the claim is based on the provisions of the constitution or that provisions of the Constitution in one way or another implicated in a case brought before the court.¹³³Generally Yonatan argued that constitutional dispute means both expounding a certain provision of a Constitution and determining the constitutionality of a law so that he incorporated the term constitutional interpretation in the term constitutional disputes or takes constitutional interpretation as one components of constitutional disputes.

In contrast with the above arguments, Takele Soboka claimed that constitutional dispute has the same meaning with the term constitutional interpretation.¹³⁴ Takele supports his argument of the sameness based on Article 83(1) of the FDRE Constitution. He claimed that the interpretation of constitutional dispute as a constitutional interpretation is in line with the powers and responsibilities of the HoF 62(1) of the Constitution.¹³⁵He further explained that the HoF has the power to interpret the Constitution. But it does not correct to assume that the power to adjudicate the concrete constitutional disputes is in the hands of the HoF, since HoF is a final constitutional arbiter in terms of testing constitutionality of laws; but it is not a trier of fact or concrete constitutional disputes as Takele maintains.¹³⁶ Hence he conclude that, “there is no reason to suggest that Article 83(1) of the FDRE Constitution sought to expand the power of adjudicating factual constitutional disputes beyond the requirements of abstract interpretation of the constitutional provisions.”¹³⁷All the above arguments of the different authors show that there is no consensus among the academics with regard to the definition of constitutional interpretation and disputes as a result of legal unclarity in connection with constitutional adjudication under the FDRE Constitution.

In addition to the above terminological problem, there is a legal ambiguity in relation to resolving constitutional disputes and interpreting the Constitution under the Ethiopian federation.

¹³¹ Yonatan Tesfaye cited above at note 115, p. 134.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Takele Soboka, *Judicial Referral of Constitutional Disputes in Ethiopia*, cited above at not 6, p. 68.

¹³⁵ Id, p. 67.

¹³⁶ Ibid.

¹³⁷ Ibid.

When we see the term ‘law’ employed under the FDRE Constitution it lacks clarity. Article 84(2) of the FDRE Constitution says, “Where any federal or state law contested as being unconstitutional and such disputes is submitted to it by any court or interested party, the Council shall submit it to the House of Federation for final decision.”¹³⁸ Under this provision the Constitution vaguely said ‘any law’ hence it is a general term subjected to interpretation. But the Amharic version of the same provision is clearer than this English version. The Amharic version clearly said if the law enacted by the federal and state legislative organ is being contested it must be submitted to the CCI for investigation and HoF for final decision.¹³⁹ It is known that Amharic is a version with final legal authority under the FDRE Constitution.¹⁴⁰ For this reason, one can conclude that only if Proclamation enacted by the federal and state legislative organ is contested, it is submitted to the CCI for investigation and HoF for final decision by giving priority to the Amharic version through interpretation. But as it stands, version difference between the Amharic and English creates confusion both among the courts and academics. Since ‘any law’ may be interpreted or defined as all laws including the primary legislations of the parliament and subordinate enactments of the executive organ of the government. In order to ease these ambiguities under the FDRE Constitution and broadly explain the powers and responsibilities of both the HoF and CCI with connection to constitutional adjudication and other matters of resolving conflicts, the HPR enacted two Proclamations in 2001. But still the problems are not avoided under these Proclamations as explored in detail under the following sub-topic.

B) Legal Ambiguities under the Two Proclamations¹⁴¹

In order to successfully resolve constitutional disputes and other conflicts these two proclamations named as Proclamation number 251/2001 and 250/2001 were enacted. First of all House of Federation is another chamber of the parliament with no law making power. These Proclamations are enacted by the House of People Representatives. The most astonishing point is that how the HPR can enact a law which clarifies the powers and responsibilities of the HoF

¹³⁸ FDRE Constitution, Article 8(2).

¹³⁹ Id, Amharic Version.

¹⁴⁰ See Article 106 of the FDRE Constitution.

¹⁴¹ Proclamation Number 251/2001, Consolidation of the House of Federation of the Federal Democratic Republic of Ethiopia and to Define its Powers and Responsibilities (Federal Negarit Gazeta, 7th Year No. 41, Addis Ababa, 6 July 2001) and Proclamation Number 250/2001, Council of Constitutional Inquiry Proclamation (Federal Negarit Gazeta, 7th Year No. 40, Addis Ababa, 6 July 2001).

while the law enacted by the HPR itself is subjected to the review of HoF for its constitutionality remains a paradox under the FDRE Constitution.

Under the 251/2001 Proclamation, the HoF shall interpret the Constitution, organize the CCI, decide in accordance to the Constitution issues relating to the right to self determination, promote the equality of the peoples, strive to find solutions for disputes or misunderstandings that may arise between states.¹⁴² The HoF shall make final decision up on draft proposal of constitutional interpretation submitted it to by the CCI.¹⁴³The HoF shall identify and implement principles of constitutional interpretation which it believes help to examine and decide constitutional cases submitted to it.¹⁴⁴In the process of adjudication, unless otherwise proved to the contrary, the enacted law is presumed to be constitutional while the house starts to review its constitutionality.¹⁴⁵The final decision of the house on constitutionality issue shall have general effect; therefore, it shall have applicability on similar constitutional matters that may arise in the future.¹⁴⁶

For the purpose of giving professional support to the HoF which has been given the power to interpret the Constitution and resolving constitutional disputes, the CCI is established by the FDRE Constitution.¹⁴⁷Furthermore, it has been deemed necessary to specify the powers and responsibilities of CCI under a certain Proclamation in a wider manner than what is explained under the Constitution. Based on this, the HPR enacted Proclamation number 250/2001, which can be cited as the CCI Proclamation of the Federal Democratic Republic of Ethiopia.¹⁴⁸According to this Proclamation the CCI has the power to investigate constitutional disputes and submitted it to the HoF with its recommendation.¹⁴⁹Where any federal or state law is contested as unconstitutional and such a dispute is submitted by any court or interested party the CCI, consider the matter and submitted it to the HoF for final decision.¹⁵⁰When the case is submitted to the CCI, it has two outcomes. First, the CCI may remand the case to the concerned court if it thinks that there is no need for constitutional interpretation and the second option is

¹⁴² Id, Proclamation No. 251/2001, Article 3.

¹⁴³ Id, Article 5 (1).

¹⁴⁴ Id, Article 7(1).

¹⁴⁵ Id, Article 9(1).

¹⁴⁶ Id, Article 11(1).

¹⁴⁷ FDRE Constitution, Article 82.

¹⁴⁸ Proclamation No.250/2001, Article 1.

¹⁴⁹ Id, Article 6(1).

¹⁵⁰ Id, Article 6(2).

that it submits its recommendations to the HoF if it believes that there is a need for constitutional interpretation.¹⁵¹ Any party who is dissatisfied with the decision of the CCI can appeal to the HoF within sixty days from the decision of the council on constitutionality issues.¹⁵²

As clearly explained above the aim of having these two Proclamations is for the sake of avoiding ambiguities and reduce the vague provisions of the Constitution on the issue of constitutional adjudication. But what was expected has never been attained by the enactments of these laws in 2001.¹⁵³ The problem comes, if one asks which type of law is submitted to the CCI and HoF if being contested as unconstitutional. Whether the primary law (Proclamations) or the secondary law (like regulation and directives) or both of them are submitted to the CCI/HoF for checking their constitutionality? The two Proclamations define the term 'law' as both the primary and secondary laws with relation to settling constitutional disputes. For instance, under Proclamation number 251/2001, "the term 'law' shall mean Proclamations issued by federal and state legislative organs and regulations and directives issued by state governmental institutions."¹⁵⁴ Again under Proclamation number 250/2001, "the term 'law' shall mean Proclamations issued by the federal or state legislative organs and regulations issued by the federal and state governmental institutions."¹⁵⁵

One fact can be deduced from reading and critically analyzing the provisions of these two Proclamations in connection with constitutional adjudication. These Proclamations, in the process of reducing the problems existing under the FDRE Constitution, come up with the more confused law, which complicates the mechanisms of resolving constitutional disputes even far beyond the constitutional provisions by expanding the definition of the term law to the enabling legislation of the executive organ of the government contrary to the sprits of the definition given to the term law under Article 84(2) of the FDRE Constitution under the Amharic version. Hence under these Proclamations, if all laws including proclamations, regulations and directives are contested as unconstitutional, they must be channeled to the CCI for investigation and HoF for final decision.

¹⁵¹ Id, Article 6(3).

¹⁵² Id, Article 18(2).

¹⁵³ Cited above at note 141.

¹⁵⁴ Proclamation No. 251/2001, Article 2(2).

¹⁵⁵ Proclamation No. 250/2001, Article 2(5).

3.3 Constitutional Adjudication at Sub-national Level under the Ethiopian Federation

The FDRE Constitution clarifies the structure of the organ of the state as comprising federal government and state members.¹⁵⁶ This Constitution specified that both the federal and states have three wings of government, namely, legislative, executive and judiciary.¹⁵⁷ Their respective powers are given and recognized under the FDRE Constitution. The federal government power is listed exclusively in the constitution; enumerated powers are given for the federal and state governments while residual power is reserved for the states.¹⁵⁸ Even though, the FDRE Constitution does not clearly stipulate the existence of the principle of federal supremacy under the Ethiopian federation, it explicitly said that the states shall respect the power of the federal government and the federal government shall likewise respect the power of the states.¹⁵⁹ This provision shows us that the Ethiopian federation is dual type of federalism in theory though the practice is different. If we consider this mutual respect between the federal and state governments in collaboration with the extreme form of right to self-determination bestowed for the Nations, Nationalities and Peoples of Ethiopia under the Constitution; the Ethiopian federation gives due attention to the state sovereignty at least in the text of the Constitution.

However it is too difficult to delineate the power between the federal and state governments to the extent of preventing any type of conflicts or disputes between these levels of governments, since avoiding disputes or conflicts totally by crafting competent laws is humanly impossible. As known from daily practices, disputes may arise both at federal and state level. The causes of these disputes and conflicts may be enactment of laws, regulations, directives, and decisions of an organ of the state and public official and any other acts inconsistent to the Constitution as explained above. Even disputes and conflicts may be caused between state laws, a group of persons or ethnic group claiming a certain constitutional rights, like the right to self-determination, election and other constitutionally guaranteed rights.¹⁶⁰

¹⁵⁶ Article 50(1) of the FDRE Constitution.

¹⁵⁷ Id. Article 50(2).

¹⁵⁸ See Article 50, 51 and 52 of the FDRE Constitution.

¹⁵⁹ Id, Article 50(8).

¹⁶⁰ See the case of Silte Peoples v Southern Nations, Nationalities and Peoples Regional State (Fileno.0/5/41, 1992 E.C) and Benishangul Gumuz Regional State v The Highlanders Living in this Region (Be. GU. Fileno.02/95, Ethiopia).

Therefore, disputes and conflicts exist with federations all the time. For the interpretation and settling constitutional disputes, state Constitutions often depend on the state courts. This is the case, for instance, in the states of USA.¹⁶¹ But in systems where ordinary courts are not granted the power to interpret Constitutions, such as in Ethiopia, a specific body such as the constitutional interpretation commission, or as in the time preceding 2001 in Ethiopia, state legislatures interpret and settle Constitutional disputes under state Constitutions. Most of the regional states of Ethiopia starting from 2001 established a Constitutional Interpretation Commission and State Constitutional Inquiry Council for the purpose of interpreting and settling constitutional issues. In Southern Nations, Nationalities and Peoples Region, the Council of nationalities interprets and settles constitutional disputes¹⁶² in place of the constitutional interpretation commission in other states like Oromia, Tigray and others.¹⁶³ We have the Nationality Administration Council of the Amhara state for settling constitutional disputes and interpret the regional state Constitution of the Amhara.¹⁶⁴

Whatever the organ to be empowered under the states' Constitutions to interpret and entertain constitutional disputes under the current Ethiopian federation does not have any earthly effect since all the nine states are the replica of the federal Constitution of Ethiopia on the issue of settling constitutional disputes and interpretation. The nine states preferred the non-judicial constitutional adjudication system whether the power to adjudicate the constitutional disputes may be in the hands of constitutional interpretation commission or Council of Nationalities or Nationality Administration Council, since all of these organs are neither courts nor independent organs.

At federal level Ethiopia empowered the House of Federation and Council of Constitutional Inquiry to tackle with this constitutional conflicts and disputes.¹⁶⁵ As one can understand through reading the states' Constitution of Ethiopian federation, the major material sources of the norms of the state Constitutions is apparently the federal Constitution. As a result of this fact, the mechanism employed by regional states under their respective regional Constitution to settle

¹⁶¹James A. Gardner, *Interpreting state constitutions: A Jurisprudence of Functions in a Federal System* (Chicago, University of Chicago Press, 2005), p. 5.

¹⁶² See Article 58, 59 and 78 of the Southern Nations, Nationalities and Peoples regional state constitution.

¹⁶³ See Article 67-69 of the Oromia state constitution and Article 67-78 of the Tigray regional state constitution.

¹⁶⁴ See Article 70 and 71 of the Amhara regional state constitution.

¹⁶⁵ See Article 62, 82, 83 and 84 of the FDRE Constitution.

constitutional disputes and conflicts is similar with that of the federal Constitution of Ethiopia. The states under the Ethiopian federation vest the power to interpret Constitution and settling constitutional disputes in the hand of other organ rather than the ordinary courts like the federal Constitution as explained above.

These organs (Regional Constitutional Interpretation Commission and Regional Council of Constitutional Inquiry) established for the adjudication of constitutional cases are either not yet established practically or where established it has not become operational. For instance, they are established in Oromia and Southern Nations, Nationalities and Peoples Region. But they have not yet started operation, no case has yet been submitted to them or we have no cases decided by these organs at regional level until today. The reason is not clearly and officially published why these regional constitutional adjudicative organs were not yet been established or if established even not yet operational. As the writer thinks it may be because of the ineffectiveness of regional states to develop and promote the concept of constitutional adjudication among their nations though the right to do so is recognized by the federal as well as state Constitutions. Most peoples are not know even the concept of constitutional adjudication at regional level of Ethiopia or fear to contest the constitutionality of the acts and decisions of the executive organs in front of the constitutional adjudicatory organs as one can observe from the practices prevailing at regional level. Shortage of skilled manpower and financial problems make the states unable to effectively and efficiently exercise their right under the Constitution.

3.4 Constitutional Adjudication under the Revised Oromia National Regional State Constitution

Oromia is one of the nine members of states of the Federal Democratic Republic of Ethiopia recognized by the Constitution.¹⁶⁶ Based on current border delineation, the land of Oromia is estimated at 363,136Km² and it occupies about 34.3 percent of the country's total physical area.¹⁶⁷ Furthermore, Oromia shares common borders with Kenya and Sudan in the South and West respectively. It is the largest state of Ethiopia with total border length of about 5,700Km

¹⁶⁶ See Article 47(1) of the FDRE Constitution.

¹⁶⁷Nasise Challi, *Oromia Today: A pocket Guide* (2nd Edition, Addis Ababa, Oromia President Office, 2008), p. 1.

with all regions except Tigray.¹⁶⁸ Oromia is also the most populous state of Ethiopia with 36.7 percent of the total population of the country.¹⁶⁹

The Regional State of Oromia had its own State Constitution since 1993. Based on the power granted under Article 50(5) of the FDRE Constitution for the states, to draft, adopt and amend the state Constitution, Oromia replaced its 1993 Constitution by the 1995 Constitution. The 1993 Oromia state Constitution was replaced by the 1995 completely without any reference to the 1993 Constitution.¹⁷⁰ The 1995 State Constitution of Oromia was revised in 2001. The 2001 Revised Constitution of Oromia is still in force with little amendments.¹⁷¹ Pursuant to Article 52(2) the FDRE Constitution, the state legislature has the power to enact the regional state Constitution. The same is true for the regional state of Oromia. All the state Constitutions of Oromia were enacted, replaced, revised and amended by the regional parliament (Caffee).

Apart from the state legislature as the formal sources of the states' Constitutions, their formal sources are unclear under the Ethiopian federation including the Oromia State Constitution.¹⁷² Question like who drafted, based on what procedures and who deliberated up on the states' Constitutions before they were presented for adoption to the regional parliament is unclear under the Ethiopia federation.¹⁷³ But what is clear is that the states' Constitutions were not enacted through public participation at large, rather they were enacted under the guise of the regional ruling parties in respective states and adopted by the parliaments of the regions. In Oromia, legislative power is vested in 'Caffee' Oromia; executive power of the regional state is vested in the Administrative Council of the region and judicial power is vested only in the courts of the region.¹⁷⁴

With regard to constitutional adjudication two organs of regional government established under the National Regional State Constitution of Oromia; namely, the Regional Council of Constitutional Inquiry and Constitutional Interpretation Commission. According to this

¹⁶⁸ Ibid.

¹⁶⁹ The Federal Democratic Republic, Population Census Commission (Summary and Statistical Report of the Population and Housing Census, 2008).

¹⁷⁰ Tsegaye Regassa, Sub-National Constitution, cited above at note 18.

¹⁷¹ Some amendments to the 2001 is taken place, for instance, the Nomenclature of the Regional State of Oromia amended as "The Oromia National Regional State" under the proclamation No. 94/2005.

¹⁷² Tsegaye Regassa cited above at not 18, p. 52.

¹⁷³ Ibid.

¹⁷⁴ See Oromia State Constitution, Article 46.

Constitution, any constitutional dispute shall be decided by Constitutional Interpretation Commission which comprises a representative nominated from each District Council.¹⁷⁵The Constitutional Interpretation Commission shall elect its own chairman and secretary from among its own members and gets the necessary secretarial and financial support from ‘Caffee’.¹⁷⁶The regional CCI is empowered to investigate constitutional disputes.¹⁷⁷The council submits its recommendation after it investigated the constitutional disputes, if it thinks that there is a need for constitutional adjudication.¹⁷⁸The members of this Regional Council of Constitutional Inquiry shall have eleven members consisting of the president of the regional Supreme Court as its chair person and its vice president who shall act as its vice-chair person; six lawyers appointed by ‘Caffee’ on the recommendation submitted by the president of the regional government on the basis of their professional excellence and moral standing and three persons designated by the ‘Caffee’ whom the speaker shall submit for approval.¹⁷⁹

Hence under the Oromia National Regional State Constitution, “Where any law, regulation or directives issued by regional state organs is contested as being unconstitutional and such is submitted to it by any court or interested party, the Council shall consider the matter and submit it to the Constitutional Interpretation Commission for final decision.”¹⁸⁰When the issue of constitutional adjudication arise in court, the regional CCI shall either remand the case to the concerned court if it finds there is no need for constitutional adjudication or submits its recommendation to the Commission for final decision if it believes that there is a need for constitutional adjudication; and the decision rendered for the submitted recommendation by the Commission is final.¹⁸¹

3.5 Role of Judiciary in Constitutional Adjudication under the FDRE Constitution

As discussed in previous explanation, judiciary may have or not have the power to adjudicate constitutional issues in certain states. It has been long known that the pressure is exerted by the executive and legislative branches on their judicial counterparts in the battle for more operative

¹⁷⁵ Id, Article 67 (1).

¹⁷⁶ Id, Article 67(4).

¹⁷⁷ Id, Article 69(1).

¹⁷⁸ Ibid.

¹⁷⁹ Id, Article 68 (2).

¹⁸⁰ Id, Article 69 (2).

¹⁸¹ Id, Article 69 (3).

legal space or alternatively, to constrain judicial oversight over the respective activities of the other two branches in all legal system.¹⁸²In the same manner, sometimes jurisdictional competitions for adjudications of constitutional issues have reached a point of non consensus among the academics of certain country due to the fact that some states vested the power to adjudicate constitutional disputes in other tribunals or independent constitutional courts rather than in the ordinary courts.¹⁸³Likewise in Ethiopia, it seems that regular courts have excluded from adjudicating constitutional disputes and resolving conflicts under the FDRE Constitution. As explained above, in place of courts House of Federation is empowered to adjudicate and pass final decision on all constitutional disputes and other conflicts arising in the Ethiopian federation.¹⁸⁴Though it is explained under the FDRE Constitution that the HoF has ultimate power to adjudicate all constitutional disputes and rules on the constitutionality of legislations; there is no consensus among the academics and judges on the extent to which the court can participate in resolving constitutional disputes under the same constitution. With regard to this issue, there are three rambling debates related with the role of courts in constitutional adjudication under the FDRE Constitution as explored below.

D) Courts Have Inherent Powers to Adjudicate Constitutional Issues

This group argued that declaring a law as invalid is the inherent judicial task of the courts. They claimed that it is a normal business of the courts to interpret and declare the law in their daily undertakings. They further argued that when a court nullifies legislation on the ground that it is unconstitutional, it is applying the existing as opposed to a non-existing or repealed law.¹⁸⁵They support their argument by referring Article 79 (1) of the FDRE Constitution which says, “judicial power both at federal and state levels are vested in the courts.” According to them, judicial powers include: the power to interpret, apply, and ensure the observance of the constitution; so that, short of this the grant of judicial powers would add up little substantive effect.¹⁸⁶In addition to this, they argued that the FDRE Constitution itself makes all inconsistent

¹⁸² Clyde Willis, *Essays on Modern Ethiopian Constitutionalism* (Lecture to Young Lawyers, Unpublished, 1997) as cited in Takele Soboka cited above at note 6, p. 53.

¹⁸³ Lech Garlick, *Constitutional Courts Versus Supreme Courts* (International Journal of Constitutional Law 5(1), 2007), p. 44.

¹⁸⁴ See Article 62, 83 and 84 of the FDRE Constitution.

¹⁸⁵ Tsegaye Regassa, *Courts and the Human Rights Norms in Ethiopia* (Proceedings of the Symposium on the Role of the Courts in the Enforcement of the Constitution, Civil Service College, 2000), p. 116.

¹⁸⁶ Takele Soboka cited above at note 6, p. 61.

laws, practices and decisions null and void as its per Article 9 (1). Therefore, a court's role is a mere declaration of repeal, through adjudication when it refused to apply the inconsistent laws with the Constitution.¹⁸⁷ It seems that this group bases their claim on arguments advanced by the Chief Justice Marshal of USA in the most celebrated case of Marbury v Madison. In that case the court despite the absence of explicit constitutional authorization to do so, refused to apply an act of a coordinate branch of government. In Marshal's opinion, "a written Constitution is a law and it is the province and duty of the judicial department to say what the law is and therefore, judicial power according to him includes reviewing acts of the legislature."¹⁸⁸

II) The Duty to Enforce the Constitution by the Courts under the FDRE Constitution

This group also claimed that courts have the power to adjudicate constitutional disputes under the FDRE Constitution. But they substantiate their argument based on Article 13 of the FDRE Constitution which says. "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 chapter three of the FDRE Constitution or fundamental rights and freedoms"¹⁸⁹ Hence this group argued that enforcement of the Constitution without having the power of adjudication is impossible for courts. So they insisted on the idea that courts have the power to adjudicate constitutional issues in order to enforce the provision of chapter three of the FDRE Constitution as per Article 13 (1). This group differs from the above one, because they do not accept the argument that claims courts can invalidate an act of the legislature as the first argument.¹⁹⁰ This group rather limits the power of courts to espousing the provisions of the Constitution.¹⁹¹ Therefore, they believe that courts have certain role in adjudicating constitutional issues, short of reviewing the constitutionality of laws enacted by the parliament. They said that courts can invalidate executive acts, regulations, directives and decisions for the reason of their inconsistencies with the Constitution, but they cannot adjudicate the constitutionality of the acts of parliament.

III) The Court Lacks the Power to Adjudicate the Constitution under the FDRE Constitution

¹⁸⁷ Tsegaye Regassa cited above at note 185.

¹⁸⁸ Marbury v Madison Case, quoted in Yonatan Tesfaye cited above at note 115, p. 136.

¹⁸⁹ Assefa Fisseha, Some Reflections on the Role of the Judiciary in Ethiopia (Ethiopian Bar Review, Vol. 3, No. 2, 2009), pp. 122-123.

¹⁹⁰ Yonatan Tesfaye cited above at note 115, pp. 135- 136.

¹⁹¹ Ibid.

This is the extreme position that claims courts have no role in adjudicating constitutional issues under the FDRE Constitution. This group of academics criticized the above two arguments that claims courts have certain role under the FDRE Constitution in constitutional adjudication. They criticized the first line of arguments that claims courts have inherent judicial power to adjudicate the Constitution. According to this group, courts lack inherent judicial power to adjudicate constitutional issues as one can understand from the Ethiopian legal tradition. They claimed courts have no power to review the acts of legislatures in civil law legal system. For example, Bell said that giving judiciary a controlling power has always been considered as something that conflicts too much with the traditions of French public life; French therefore, established the *Conseil Constitutionnel* in 1958 for the purpose of constitutional adjudication.¹⁹² The same is true in England where the supremacy of the parliament is recognized; judging statutes to be invalid for violating either moral or legal principles of any kind is not the normal business of the courts.¹⁹³

Therefore, this group argues that the Ethiopian legal tradition follows the England and the French model though it is not one and the same. So in all these three countries and others, courts have no inherent power to adjudicate the constitutional issues. Further this group concludes that courts in Ethiopia do not have the power to declare the legislature's enactments as null and void for their repugnancy to the Constitution under the FDRE Constitution.¹⁹⁴ They argued that the power to adjudicate the constitutional issues and resolve constitutional disputes is granted for the CCI and HoF under the FDRE Constitution; so that ordinary courts have no role in adjudicating constitutional issues under the Ethiopian federation.

On the other hand, the idea that claims it is a constitution itself which makes inconsistent laws null and void; therefore, the role of court is only a mere declaration of repeal is also not accepted by this group. Because they claimed that adjudication and declaration cannot be divorced from one another.¹⁹⁵ They accepted the fact that inconsistent laws with the Constitution is null and void, but they argued that even for declaring a law as null and void includes a sort of adjudication or interpretation of a Constitution in itself by the courts.¹⁹⁶ So, since even declaring

¹⁹² J. Bell, *French Constitutional Law* (2001), p. 24.

¹⁹³ Yonatan Tesfaye cited above at note 115, p. 137.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

an inconsistent law with the Constitution as null and void involves acts of adjudication, this idea is not accepted according to this group.

Furthermore, this group attacks the second argument which claims courts have no mechanism to enforce and respect the provisions of the Constitution unless they have the power to adjudicate constitutional issues. This group argued that it is not clear whether all provisions under Chapter three of the FDRE Constitution need constitutional interpretation or adjudication to respect and enforce them by the courts.¹⁹⁷ Continuously they said in civil law legal system countries, like Ethiopia, detailed rules are enacted and judges are expected to strictly apply them without engaging in interpretation; and many of the provisions under chapter three of the FDRE Constitution, especially those that the courts are expected to invoke in their daily functioning are stated in an explicit and clear manner.¹⁹⁸ Hence they argued that there is no need of involving in adjudication or interpretation to apply Chapter three of this Constitution, rather courts can apply the provisions directly to the existing fact of case.¹⁹⁹ According to this group, the courts are expected to enforce the provisions of Chapter three of the FDRE Constitution which deals with fundamental rights and freedoms, only to the extent that it does not engage them in constitutional adjudication or interpretation; so that if the needs for constitutional adjudication arises, the court should refer the matter to the CCI for investigation.²⁰⁰

3.5.2 Power of the Judiciary under the Revised Oromia National Regional State Constitution in Constitutional Adjudication

The Revised Constitution of the Oromia National Regional State, under its Chapter seven explains about the structure and power of the regional courts of Oromia state. According to this Constitution, judicial power of the Region shall vest only in the courts.²⁰¹ It claims that courts of all levels shall be free from interference or influence of any official organ of the government or any other source.²⁰² The judicial organs of the Oromia National Regional State shall be the state Supreme Court, Zonal high court and the District courts as explained under Article 64(1) of this Constitution.

¹⁹⁷ Id, p. 139.

¹⁹⁸ Id, p. 140.

¹⁹⁹ Ibid.

²⁰⁰ Id, p. 141.

²⁰¹ Oromia State Constitution, Article 63 (1).

²⁰² Id, Article 63 (2).

As it is explained in previous discussions, courts have no power to adjudicate constitutional issues, since Constitutional Interpretation Commission is established as per Article 67 of the Oromia State Constitution. Hence at the regional level of Oromia constitutional disputes shall be investigated by the regional CCI and final decision is rendered by the Constitutional Interpretation Commission.²⁰³

CHAPTER FOUR

4. Possible Effects of Incompatibility between the FDRE Constitution and the Revised National Regional State Constitution of Oromia

4.1 Purposes of Comparison

It is clear that in federation two independent states are established, namely, the federal state and regional states. The power is divided between both levels of these governments. Certain Powers may be given exclusively to each level of the government, other powers may be concurrently given for both and residual power may be left for the regional states most of the time in federations. Therefore, each level of the government must freely exercise their power within the specified boundary for them under the federal Constitution. In addition to this, recognition of Constitution over all orders of government and political culture emphasizing the fundamental importance of respect for constitutionality are therefore, a prerequisite for the effective operation of a federation.²⁰⁴ If these are lacking, a federation is likely to deteriorate to a situation where one or other order of government subordinates the other thereby undermining the basic constitutional feature of federations.²⁰⁵

But however careful the mechanisms of this division of power may be done, it is too difficult to make a supreme Constitution become a track from which no one can deviate, since it is humanly impossible to do so as explained in the previous discussion. For instance, it is impossible to come up with completely a different state Constitution from the federal Constitution, on all principles and vice-versa. The federal Constitution and state Constitutions are related to each other in various ways under federal system of government. Hence, in any federations the federal and state

²⁰³ Id, Article 69.

²⁰⁴ Ronald L. Watts cited above at note 45, p. 157.

²⁰⁵ Ibid.

Constitutions have an interlocked set of relations.²⁰⁶ Always one tends to be the extension of the other; one begins where the other ends or within the bound of the other.²⁰⁷ For this reason, discussing the Constitution governing the federal polity has paramount importance to understand or discuss the sub-national Constitution.²⁰⁸ But it is not mandatory to have sub-national Constitution in all federations separately. Some federations lack the state Constitutions, other federations make having sub-national Constitution optional and again some federal countries explain about states in their federal Constitution in detail rather than having separate state or provincial Constitutions.²⁰⁹ Furthermore, many federal states like USA, Ethiopia, and Switzerland make the states or cantons to have their own Constitution separately from the federal Constitution.

Hence the states and federal Constitution must be compatible at least on certain important principles like ensuring rule of law, adopting the principle of constitutionalism, establishing independent judiciary and acting consistently to democratic culture. For instance, pursuant to Article 28 of the Basic Law of Germany, the constitutional order in Lander is subjected to certain general requirements in the federal Constitution; in particular the stipulation under this provision is that it must conform to the principle of republican, democratic and social government based on the rule of law. The same thing is true for the regional states' constitution under the FDRE Constitution. As per its Article 50(5) of this Constitution claims, consistent to the provisions of the FDRE Constitution, the State Council has the power to draft, adopt and amend the state Constitution. Therefore, comparing the two Constitutions has paramount importance to point out the place of inconsistencies between the two. By doing this, we can ensure uniformity in legal and constitutional adjudication; especially on identical cases both at federal and regional level. Since Constitution is the source of all legitimate authority and accepted as a supreme law, it needs an impartial institution to enforce it. In addition to this, the institution empowered to adjudicate the Constitution must be clearly identified at both state and federal level. On the other hand, even though powers are divided under the Constitution between the two levels of the governments in federation; it may become a cause for disputes. So the major challenge for the

²⁰⁶ Tsegaye Regassa cited above at note 18, p. 42.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ See Nigerian Constitution of 1999, it prohibits state constitution or states are not allowed to enact their own separate constitution. The South African Constitution of 1996 makes having state constitution optional while the Indian Constitution explains about provincial governments in detail under the union constitution of India.

constitutional adjudicator is to keep the federal and state government within their respective limit specified under the federal Constitution. Therefore, the attempt to make the federal Constitution better, without checking it in relation to the state Constitution through comparison in federation and vice-versa does not have any earthly effect, to bring legal harmony in certain federation on important democratic principles.

Furthermore, since constitutional disputes are inherent in federation and can be settled in various ways in different federal states; it is necessary to compare the two Constitutions in order to have a best mechanisms and consistent laws in resolving constitutional disputes at both levels. Constitution is not simply considered as the supreme law, but also it is one means to control the government. This fact is true for both the regional and federal Constitution. Hence constitutional adjudication or review can be considered as an institutional means of limiting the government from arbitrariness. So comparing the two Constitutions is important, in order to restrict the government within their power given under the Constitution by the institution empowered to review or adjudicate the Constitution. But if we do not compare the two Constitutions and check the possible legal inconsistencies existed between them, it is difficult to talk about federal integration, since bringing federal integration through having incompatible laws on important principles like constitutional adjudication is unthinkable. The regional state and federal state may act as different two independent countries, unless a sort of relationship is created, for instance, through comparison and molding the two Constitution in the way they ensure principle of constitutionalism and democratic culture.

For these reasons, the writer is interested to compare and contrast the FDRE Constitution with the Oromia National Regional State Constitution on the mechanisms employed under both Constitutions to adjudicate constitutional disputes. Continuously, to explore the incompatibility between the two Constitutions (Oromia State Constitution and the FDRE Constitution) and its possible effects on establishing feasible federal system in Ethiopia through constitutional adjudication; since constitutional adjudication plays a great role to ensure the rule of law and federal system cannot be successful without impartial tribunals to adjudicate constitutional disputes and umpire the federation.

Hence the objectives of comparing the two Constitutions (federal and state) under this thesis is to understand the legal and practical problems prevailing at federal and Oromia regional state

level, particularly in area of constitutional adjudication, its negative impacts on the resolving of constitutional disputes, principles of check and balances among the three branches of government, separation of powers, ensuring independence of judiciary from executive organ and give suggestions to reconcile the two Constitutions on the issues of constitutional adjudication.

4.1.1 Comparing the laws (Provisions of the Constitutions)

Comparing the provisions of the FDRE Constitution and the Oromia National Regional State Constitution on the area of constitutional adjudication is critically explored and analyzed under this topic. A central feature of the democratic consolidation wave has been the strengthening of the judiciary.²¹⁰ So the writer is interested to analyze the provisions of the FDRE and Oromia State Constitutions and tries to point out, which one of the two Constitutions consolidate the power of courts to ensure democratic consolidation under the Ethiopian federation.

First it is better to compare Article 84 (2) of the FDRE Constitution with Article 69 (2) of the Oromia National Regional State Constitution, since both of them are critical provisions in constitutional adjudication process at federal and regional level of Oromia respectively. Article 84 (2) of the FDRE Constitution says, “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 the Federation for final decision.” On the other hand, Article 69(2) of the Oromia State Constitution says, “Where any law, regulation or directive issued by Regional state organs, 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 Constitutional Interpretation Commission for final decision.”

Article 84(2) of the FDRE Constitutions says, ‘any law’ but Article 69(2) of the Oromia State Constitution provides this in a modified way by saying any law, regulation or directive issued by Regional state organs’. Hence under the FDRE Constitution, ‘any law ‘can be defined as Proclamation, regulations or directives. But the Amharic version gives a certain clue to the term any law as discussed in the previous discussion. It says, “*Befederalu Mengistm hone bekilil hig*

²¹⁰Patricio Navia and Julio Ríos-Figueroa, the Constitutional Adjudication: Mosaic of Latin America (Comparative Political Studies, New York University, Vol. 38 No. 2, March 2005), P. 1.

awochi Akalat Yemiwotu higochi” Here the term “*higochi*” or laws refers to laws enacted by the federal or state legislative organ of the government. Amharic is the language having final legal authority.²¹¹ From these constitutional provisions, one can apply the Amharic version and define the term ‘*any law*’ in the federal Constitution as every proclamation enacted by the federal or regional parliaments. Under this provision (Article 84(2) Amharic version), the term law is restricted to the Proclamations enacted by the legislative organ of the government through interpretation.²¹² But there is no version difference under Article 69(2) of the Oromia State Constitution. All the three versions, Afan Oromo, Amharic and English have the same wording. That means any law; regulations or directives are submitted to the Regional Constitutional Interpretation Commission if being contested as unconstitutional by an interested party.

One can conclude that at federal level, only Proclamations enacted by the parliament are submitted to the CCI for investigation and HoF for final decision, though there is lack of consensus on this conclusion as explained in chapter three, under the subtopic dealing with the role of courts in constitutional adjudication. Therefore, based on this explanation courts have the power to check the constitutionality of subordinate legislations of the executive organ like regulations and directives through constitutional adjudication at federal levels under the FDRE Constitution. But the constitutional provisions of Oromia have clearly excluded the courts even from determining the constitutionality of the enabling legislations enacted by the executive organ of the government at Oromia regional state level. Since any laws, regulations or directives must submit to the Constitutional Interpretation Commission for final decision if their constitutionality is being questioned. Here one can easily understand that the Regional State Constitution of Oromia widens the definition of the term ‘any law’ in connection with determining the issue of constitutionality and settling constitutional disputes. For this reason, when it says ‘any law’ the Oromia Constitution means or defined the term ‘law’ for the sake of settling constitutional disputes as, any law means Proclamations enacted by the legislature , regulations and directives enacted by the executive.

²¹¹ Article 106 of the FDRE Constitution of 1995. It explains about the version with final legal authority. As per this Article Amharic version of this constitution shall have final legal authority.

²¹² See a case for instance, referred to the Council of Constitutional Inquiry for investigation in 1996, Ethiopian *Blind men National Association v Education Bureau of Oromia*, (File No. 58/92, Unpublished). This case is analyzed under this thesis in the next topic. Some Authors, For instance, Assefa Fisseha argued that the term any law must be interpreted as a legislative enactments or proclamations excluding the enabling legislation of the executive. See Assefa Fisseha, Cited above at note 37, p. 393.

The problem comes when we see these incompatible constitutional provisions in light of the supremacy clause of the FDRE Constitution. Article 9 of the FDRE Constitution ensured the supremacy of the Constitution. It says, “The Constitution is the supreme law of the land. Any law, customary practice and a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect.’ ’In addition to this supremacy clause , pursuant to Article 50 (5) of the FDRE Constitution, the State Council has the power of legislation on matters falling under state jurisdiction and also consistent with the provisions of the FDRE Constitution, the Council has power to draft, adopt and amend the state Constitution. But as one can easily understand from Article 69(2) of the Oromia State Constitution, the ‘Caffee ’has adopted a provision inconsistent to Article 84(2) of the FDRE Constitution on the issue of resolving constitutional disputes. Hence under the Oromia Constitution, ordinary courts are ousted out from adjudicating the constitutionality of executive legislations like regulations and directive though the FDRE Constitution favours the courts to check the constitutionality of subordinate enactments of the executive organ of the government under its Article 84(2) Amharic version.

There are serious challenges, if one considers the provisions of the Oromia State Constitution with the FDRE Constitution on the area of adjudicating the constitutionality issues under Chapter three of both Constitutions or on the issues related with fundamental rights and freedoms recognized under the two Constitutions. Here the regional Constitutional Interpretation Commission has the power to adjudicate the constitutionality issues raised in connection to fundamental rights and freedoms and passes final decision on them, since all constitutional dispute raised at regional level is adjudicated with this organ for its settlement.²¹³ At federal level the same task is performed by the HoF.²¹⁴ A cursory look at chapter three of both Constitutions is one and same. Therefore, Chapter three of the Regional States Constitutions, which deal with about fundamental rights and freedoms, including Oromia State Constitution is the carbon copy of chapter three of the FDRE Constitution. For instance, Article 16 of the FDRE Constitution says that every one has the right to protection against bodily harm. Article 16 of the Oromia State Constitution repeats it with the same statement what is written under Article 16 of the FDRE Constitution. Hence the same or identical provisions are going to be interpreted or used in constitutional adjudication by different organs of the government, because of the mere fact that

²¹³ See Article 69 (2) of the Oromia State Constitution.

²¹⁴ See Article 83 and 84 of the FDRE Constitution.

two of them exist under both the federal and regional state Constitution. Still we have no problems; but the challenge comes when the Regional Constitutional Interpretation Commission adjudicates or interprets the provisions of fundamental rights and freedoms narrowly or inconsistent to the interpretation or adjudication of the federal HoF on similar cases, since the provisions of the regional state Constitutions are almost the same with those provisions under the FDRE Constitution. Any legal remedy is identified, neither under the FDRE Constitution nor under the Regional State Constitution of Oromia for this problem. There is no mechanism to appeal from the final decision of the Regional Constitutional Interpretation Commission on this issue to the HoF either.

But can one conclude that the decision of the Regional Constitutional Interpretation Commission may be reviewed by the HoF under the guise of supremacy clause specified under the FDRE Constitution pursuant to Article 9(1) of the same Constitution, since this supremacy clause claims that any decision of an organ of the state or a public official which contravenes the FDRE Constitution is null and void. Or it may possible to apply the provisions of Council of Constitutional Inquiry Proclamation (Procl. No.250/2001) to resolve this challenge, since Pursuant to Article 23(1) of Proclamation Number 250/2001, any person who shall allege his fundamental rights and freedoms have been violated by the final decision of any government institution or official may present his case to the Council of Constitutional Inquiry for constitutional interpretation. So, since the decision rendered by the Regional Constitutional Interpretation Commission is final and furthermore, it is a type of adjudication that has been exhausted and against which no appeal lies to the same path way, so it may be sound to argue appeal to the HoF from the final decision of the regional Constitutional Interpretation Commission possible.

For all these questions, there is no clear answers based on the provisions of the federal and Regional State Constitution under the Ethiopian federation, since both Constitutions lack clear provisions which clarified this matter and yet practice of constitutional adjudication on this matter is not available or no case is decided in relation to this issue by HoF until this thesis is written. But the writer argues that it is impossible to take appeal from the final decision given under Article 69(2) of the Oromia State Constitution for instance, based on the supremacy clause of the FDRE Constitution. Because, if appeal is possible from the final decision rendered by the

Constitutional Interpretation Commission to the HoF, there is no need to stipulate under the Regional Constitution in a clear manner that the decision of the Interpretation Commission is final. The Regional State Constitution of Oromia empowered this Commission as a final arbiter on the issues of constitutionality arising under the Regional State Constitution as we observe from its Article 69(2). On the other hand, there is no clear legal provision in order to show the procedures in which appeal is made on this particular issue. So that, without having clear legal procedures, it is too difficult for the interested party in order to proceed its appeal to the HoF from the final decision of the Regional Constitutional Interpretation Commission.

It is also difficult to use the provisions of Proclamation number 250/2001 to come out from the above deadlock. Since the Regional Constitution is the supreme law of the land only subjected to the federal Constitution.²¹⁵ Therefore, the Regional Constitution says clearly that the decision rendered on the constitutionality by the Constitutional Interpretation Commission is final while under Proclamation number 250/2001 pursuant to its Article 23 says; appeal to CCI for investigation and to HoF for final decision is possible from any final decision of the government organ. Hence it seems impossible to apply these two concepts together, since they are incompatible, but to reconcile them, one can apply the simple interpretation principle that says, superior law prevails over inferior law on the hierarchy of laws. Therefore, we can conclude that the Regional State Constitution of Oromia that claims the decision of the Constitutional Interpretation Commission is final on any constitutional disputes arising under the Regional Constitution overrides, the concept under the above Proclamation that claims appeal is possible from any final decision of the government organs, even from the decisions of the Regional Constitutional Interpretation Commission, since the Regional Constitution is supreme law of the land to the extent that it is not contrary to the FDRE Constitution. Based on this one can conclude that appeal from the final decision of the Regional Constitutional Interpretation is final and not appealable; since the Regional Constitution of Oromia prevails on the federal Proclamation if certain incompatibility is exist between them. Here there is incompatibility between the Oromia State Constitution pursuant to its Article 69(2), which claims the decision of the Commission on constitutionality issue is final and Proclamation number, 250/2001 which claims appeal from the final decision of the Regional Constitutional Interpretation Commission

²¹⁵ See Article 9(1) of the Oromia Regional State Constitution. It says, “without prejudice to the supremacy of the Federal Democratic Republic of Ethiopia, this constitution is the supreme law of the regional state.”

may be possible pursuant to its Article 23. So, the concept under Article 69(2) of the Oromia State Constitution is acceptable through interpretation and appeal from the final decision of the Constitutional Interpretation Commission is impossible under the Regional Constitution of Oromia.

Taking the mechanisms by which ordinary courts used and try to apply it by analogy is completely impossible in case of constitutional adjudication. With regard to appeal to the next higher level of courts from the lower courts decision is obvious in line of regular courts. The Federal Supreme Court has the power of cassation over any final court decision containing a basic error of law under the FDRE Constitution.²¹⁶ But with regard to constitutional adjudication with connection to the decision of Regional Constitutional Interpretation Commission on constitutionality issues and HoF at federal level, we have not such links as the cassation over cassation of the regular courts (Taking appeal for checking error of laws from the Regional Supreme Court Cassation Bench decision to the Federal Supreme Court Cassation Bench division is possible). Hence on the matters related to constitutionality issues, victims may be confused as a result of lack of clear provisions of laws in order to enforce their fundamental rights and freedoms both at federal and regional state of Oromia. In addition to this, even it is impossible to identify the jurisdiction of the federal HoF and Regional Constitutional Interpretation Commission, especially on cases related to fundamental rights and freedoms. Because fundamental rights and freedoms cannot be specified as federal or regional; they are indivisible in their nature. For instance, to whom can we make our petition for the violation of our right to make a peaceful demonstration if such right is violated by the lower government officials? To HoF or Regional Constitutional Interpretation Commission since the right to make a peaceful demonstration is granted under both the FDRE Constitution and the State Constitution? Which level of the government has original jurisdiction to adjudicate the violation of these fundamental rights and freedoms if an interested party wants to bring a claim against the violators of these rights and freedoms? Or is it optional for the interested party to make petition either to the HoF or to the Regional Constitutional Interpretation Commission to respect their fundamental rights and freedoms? There is no clear answer for all these above questions under both the FDRE Constitution and the Oromia State Constitution. Therefore, at regional level of

²¹⁶ FDRE Constitution, Article 80(3).

Oromia, an interested party may be confused where he/she go, with what type of case and what types of remedies may be available if the Regional Constitutional Interpretation Commission violates the fundamental rights and freedom of an individual while it adjudicates the constitutionality issue is, remains unanswered.

But if we consider the other federal states, the above problems are avoided or at least reduced to its minimum level, through enacting clear provisions of Constitutions and other relevant laws on the issue of adjudicating fundamental rights and freedoms. For instance, under the Basic Law of Germany, some of the basic rights are exclusively left for the jurisdiction of the Federal Constitutional Court. Article 93(4) (a) of the Basic Law states that the Federal Constitutional Court decides, “on complaints of unconstitutionality, which may be entered by any person who claims that one of his basic rights or one of his rights under paragraph 4 of Article 20 or under Article 33, 38, 101, 103 or 104 has been violated by public authority”²¹⁷ Pursuant to these Articles of Basic Law of Germany, these identified Articles are only applied by the Federal Constitutional Court. However, the other rights can be decided by the Land Constitutional Court subjected to the review of the Federal Constitutional Court. So if an individual feels that one of his rights has been violated by any act of a public authority, whether it is a federal or a land authority, he may have direct recourse to the Federal Constitutional Court of Germany.²¹⁸ Unlike the Experience of Germany, the FDRE Constitution has neither identified the provisions on which the federal constitutional adjudicatory organ only has direct jurisdiction nor allows an individual to have a direct recourse on any decision or act of the regional state constitutional adjudicatory organ.

Furthermore, the absence of law is another problem to the Regional Constitutional Interpretation Commission under the State Constitution of Oromia to perform constitutional adjudication, although the power to do so is granted for it under the same Constitution. As discussed in the previous explanation, at federal level, in addition to the provisions of the FDRE Constitution dealing with the constitutional adjudication issues, two Proclamations were enacted by the

²¹⁷ The Basic Law of the Federal Republic of Germany, 1990, Article 93(4)(a).

²¹⁸ Press and Information Office of Foreign Affairs Division of Federal Republic of Germany: Documents on Democracy in the Federal Republic of Germany, Basic law of the Federal Republic of Germany, Law on the Federal Constitutional Court, Law on Political Parties, Federal Electoral Law, Rules of Procedures of the German Bundestag, (2nd Edition, D-53113, Bonn, September 1994), p. 21.

parliament in order to facilitate the constitutional adjudication process for the CCI and HoF.²¹⁹ But at the level of Oromia regional state, no laws are enacted yet to regulate the over all functions of the Regional Constitutional Interpretation Commission and CCI to conduct constitutional adjudication at regional level. Furthermore, under the Regional State Constitution of Oromia, we never find either an indication in detail; how these constitutional adjudicatory organs proceed to perform their main functions. Hence it is naive to think that the Regional Constitutional Interpretation Commission and CCI adjudicate all constitutional disputes arising at regional level without having legally or constitutionally established basic procedures. A closer look at the provisions of Regional Constitution of Oromia State seems nice, but it remains a paper tiger, since it lacks the mechanisms of enforcement of its well copied provisions from the FDRE Constitution.

In addition to this, the status of the Regional Constitutional Interpretation Commission is not clear under the Oromia State Constitution. At federal level, it is clearly identified that HoF is the upper house of the parliament.²²⁰ But at Oromia regional state level, there is only a single parliament.²²¹ Therefore, at Oromia regional state level, the form of regional parliament organ is not bicameral one, in which we observe either two separate assemblies like the Senate or House of People Representatives of the USA or one with law making power and the other with the power to adjudicate the constitutional disputes like the HPR and HoF in Ethiopia respectively. Again the status of the Regional Constitutional Interpretation Commission is not known, if we compare it with those countries adopt a separate organ for constitutional adjudication. For instance, in Germany at federal level, the “Federal Constitutional Court may not belong to the Bundestag, the Bundesrat, the Federal government or the corresponding organs of a Land.”²²² The Lander Constitutional Courts are also independent of any government organ. Under the FDRE Constitution, the HoF is a representative of each Nations, Nationalities and People which is not accountable to any of the three organs of the federal government. But under the Oromia State Constitution, the status of the Regional State Constitutional Interpretation Commission is not identified like the above one. It is not clear whether or not it has equal status

²¹⁹ See proclamation No. 250/2001 and 251/2001, as cited above at note 141.

²²⁰ See Article 53 of the FDRE Constitution. It says, “There shall be two Federal Houses: The House of Peoples Representatives and the House of Federation.”

²²¹ See Article 46(1) of the Oromia State Constitution. It identifies that legislative power in the Oromia Regional State is vested in ‘Caffee’ Oromia.

²²² Basic Law of Germany cited above at note 83, Article 94.

with the other organs or branches of the regional state government or assumes a higher status as that of the House of Federation at federal level. The Regional State Constitution does not clearly show to whom the Regional Constitutional Interpretation Commission is accountable. The state Constitution says only the members of the Commission are representatives, nominated from each District council pursuant to its Article 67(1). Furthermore, the State Constitution of Oromia says, the term office of the Commission shall be five years pursuant to its Article 67(3) and it shall get the necessary secretarial and financial support from the Caffee pursuant to Article 67(4) of the same Constitution.

4.1.2 Comparing the Practices

In all the above explanations, the writer has tried to explain the legal problems prevailing both at federal and regional level on the issue of settling constitutional disputes and conflicts under the current Ethiopian federation. Here in below, the writer tries to briefly explain how these legal problems contribute to practical problems both at federal and regional level and disrupt the uniformity of decisions on similar issues and resulted in miscarriage of administrative and constitutional justice ultimately. The practice of constitutional adjudication is not known in Ethiopia. Very few cases have been submitted to the HoF for the sake of constitutional adjudication under the FDRE Constitution. Few cases are critically analyzed as follows among those submitted to the CCI for investigation at federal level

Summary of case one

A case investigated on 1/4/1996 E.C. by the Council of Constitutional Inquiry²²³

- *Ethiopian Blind men National Association v Education Bureau of Oromia*

Claimant: Ethiopian Blind men National Association

The Ethiopian Blind men National Association brought a claim against the Oromia Region Education Bureau and Jimma Teachers College on behalf of two blind students at a Federal First Instant Court in 1992 E.C. These students, Habtamu Guta and Alem Jember were competing to enter the teachers college based on the opportunity given for the West Wollegga Zone for the academic year of 1991 E.C. They fulfilled all criteria and passed the competition, but as soon as they reported to the college, it refused to accept them because of their blindness. Based on these

²²³This case was referred to Council of Constitutional Inquiry for investigation in 1996 (File No. 58/92, Unpublished).

facts the claimant claimed that these students' chance to learn was violated as a result that Jimma Teachers College enacted a selection policy inconsistent with Article 9(1) and 25 of the FDRE Constitution and as well as incompatible with the country's educational policy, as a result, its act had resulted in the violation of the disabled right to learn. The claimants claimed additionally that this incorrect policy enacted by Education Bureau creates dissimilarity in violation of the Constitution against disabled persons, so it must be cancelled and the right to enter the college must be confirmed for these blind students.

Defendant: Education Bureau of Oromia

The defendant defended itself that it enacted the policy based on Article 36 of the FDRE Constitution that deals with the rights of children and convention on the right of the children. It said, since the claimants claimed that there is a constitutionality issue; this case must be transferred to the Council of Constitutional Inquiry for investigation as pursuant to Article 83 and 84 of the FDRE Constitution. It claimed that court has no jurisdiction in this case.

Court: Examination

After examining both the statement of claim and statement of the defence, they framed the issue that says does constitutionality issue exists or not? They said that since the claimants claimed that the constitutional right of these students was violated because of enactment of laws by education bureau in violation of the Constitution, there is a constitutionality issue. Finally they concluded their examination and decided that there is issue of constitutionality of laws and they ordered that the case submitted to the Council of Constitutional Inquiry.

Investigation by Council of Constitutional Inquiry

The Council of Constitutional Inquiry in their investigation said that the content of this claim is that the Education Bureau of Oromia enacted a *directive* inconsistent with the educational policy of the country. They explained that all laws, Proclamations, regulations and directives must be consistent with the Constitution and follow constitutional spirits. They said that if issue of constitutionality of law raised and a need for submission to Council of Constitutional Inquiry arises, as explained clearly under Article 84(2) of the FDRE Constitution, only Proclamation enacted by legislative organs both at federal and regional level are submitted to Council of Constitutional Inquiry for investigation. Not as much as the issue of constitutionality is raised,

the case is submitted to Council of Constitutional Inquiry. They decided that in this case the claim is concerned with the *directive* and they remand this case to the Federal First Instant Court. They further explained that the court has the power to entertain the constitutionality of the directive, so it must give decision on this directive whether it is constitutional or not. (*Note: all the translation is mine*).

Analysis and comments on the above case

The most important question raised is that which types of laws are submitted to Council of Constitutional Inquiry (CCI) for investigation if a certain law is being contested as unconstitutional in practice. As a principle under Article 84(2) of the FDRE Constitution, only the Proclamation enacted by legislative organs are submitted to CCI for investigation and House of Federation (HoF) gives final decision on this contested law. But on the above case, the court submitted the case to CCI after it framed the issue that says whether constitutionality issue exists or not. The court did not examine which type of laws are under its jurisdiction or did not explain whether proclamation enacted by the parliaments or subordinate legislation enacted by executive organ is being contested as unconstitutional under this case. This case was related with a directive that means subordinate legislation of the executive, but the court submitted it to the CCI for investigation thinking that the ordinary court has no power to entertain the issue of constitutionality of laws even subordinate legislations such as directives and regulations. Hence the court failed to apply Article 84(2) of the FDRE Constitution or it was confused by the ambiguous provision, that means English version says “any law” while Amharic version says only the Proclamation enacted by the legislative organ. In addition to this, the court may be misled or confused by the two Proclamation enacted²²⁴, since these Proclamations have defined the term law in an extended way including the enabling legislations in order to entertain the constitutionality issues. Hence, if we consider Article 84(2), only formal enactments of the parliaments are subjected to CCI’s investigation and HoF’s decision for determining their constitutionality. But regulations, directives, orders, circulars, internal rules and administrative decisions of the executive organs of the government which are based on empowerment by parliament are not excluded from constitutionality review by ordinary courts pursuant to the spirits of the FDRE Constitution. One paradox is that the two enacted Proclamations after the

²²⁴Proclamation No.250/2001 and 251/2001, cited above at note 141.

FDRE Constitution (Proclamation no.250/2001 and no.251/2001) are inconsistent with Article 84(2) of the FDRE Constitution on the issue of defining the term law in relation with determining the issue of constitutionality of subordinate legislations as explained in the previous discussions. Because of legal ambiguity between the versions and inconsistencies between the laws and Constitutions the jurisdiction of the court to determine the constitutionality of subordinate legislations is blurred and judges are confused in practice whether they have the power to determine the constitutionality of subordinate legislation or not at federal level

Since I used the Oromia State Constitution in explanation part, here also I try to use it in analysis part. At regional level (Oromia regional state), Article 69(2) of the Oromia Revised State Constitution is inconsistent with Article 84(2) of the FDRE Constitution like the above Proclamations.²²⁵ Article 69(2) says, “Where any law, regulation or directive, 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 Constitutional Interpretation Commission.” As it is clearly specified Article 69(2) of the Oromia Constitution is inconsistent with the FDRE Constitution (Article 84(2)) and the practice of CCI at federal level as we conclude from the above investigation of the CCI. That means pursuant to the FDRE Constitution and practice of the CCI, only formal enactments of the parliaments (Proclamations) are subjected to CCI for investigation and HoF for final decisions for their constitutionality. But the Oromia State Constitution broadly defined the term law including subordinate legislations with respect to deciding the constitutionality issues. Therefore, under Oromia State Constitution, if subordinate legislation like regulation and directive are contested as unconstitutional, the power to deal with them is given for the Regional Constitutional Interpretation Commission rather than the ordinary courts like the FDRE Constitution.

Hence courts have lost the power to review the constitutionality of subordinate legislation under the Oromia State Constitution. If we see this Regional Constitution and apply it to the above case, it wiped out the power of courts to check the executive branch by reviewing their laws and decisions and ensure the principle of check and balance between the three wings of the government. Again if we see in relation with the delegation issues one can see easily how this case may be complicated. Had this case been submitted first to one of the Oromia regional high

²²⁵ Ibid.

court, since the Federal First Instant Court delegates its power to regional high court pursuant to Article 80(4) FDRE Constitution, the decision is completely different from the decision given by the CCI on the above case, because the court submits this case to the regional CCI as per Article 69(2) of the Oromia State Constitution. So as per Article 69(2) of Oromia State Constitution, if directive enacted by the executive body contested as being unconstitutional, the power to give final decision on its constitutionality is vested in the Regional Constitutional Interpretation Commission.

To sum up this case analysis, it is clearly observed from the above case that the issue of determining the constitutionality of subordinate legislation is full of legal and practical problems. There are inconsistencies between the federal Constitution and federal laws²²⁶, and there are also inconsistencies between the federal and Regional Constitution of Oromia State, and the practice of courts is also confused with the laws. These legal and practical problems cause unclarity regarding the extent of court power to check the constitutionality of subordinate legislation which creates the dissimilarity of decisions on similar issues and wiped out the principle of judicial independence from the executive organ of the government since executive organ can enact a regulation which can erode the independence of courts or interfere or influence the day to day activities of the courts, through enacting different regulations and directive . For instance, the executive organ may enact a regulation which orders the courts to give reports to them or may enact any directive which may encroach to the personal independence of judges and judges afraid to give decision on certain acts against the interests of the executive organ. Moreover, if the executive acts are not subjected to judicial review, for its constitutionality, one cannot talk about independence of the judiciary from the executive organ.

Case Summary Two

*The Coalition for Unity and Democracy (CUD) versus Prime Minister Meles Zenawi Case*²²⁷

This case was litigated between the CUD and Prime Minister Meles Zenawi after the 2005 election was disturbed and the Prime Minister Meles banned outdoor assemblies and

²²⁶ Ibid.

²²⁷ See *Coalition for Unity and Democracy vs. Prime Minister Meles Zenawi Asres*, Federal First Instant Court, File no.54024, ruling of 3 June 2005.

demonstration in Addis Ababa and its vicinities following the riots that took place in the capital in the immediate aftermath of the May 2005 elections. The case involved a contestation of constitutionality of the prime Minister's ban on outdoor assemblies and demonstration. The CUD's claims were partly based on a Proclamation that provides for procedures of demonstration and public political meetings.²²⁸ The complaint, the CUD, complained in order to ensure that this case must be tried by the ordinary court. The CUD claimed that it had the right to be heard by the court under Article 37 of the FDRE Constitution that the court has the jurisdiction and constitutional duty to entertain a justiciable case of this type. The CUD stressed that its claim was based on Proclamation (Proclamation-based), and that the court should not refer this case to the Council of Constitutional Inquiry. But objecting all these claims of the CUD the court referred this case to CCI. The court did not frame any question of law. The court asked the application of the Constitution to the facts in this case.

Comments on this case

First of all, the court must craft the issue of constitutionality of the contested acts of the Prime Minister Meles and try to see the Proclamation no.3/1991 on the issue of demonstration and public political meetings. But the court did not consider the constitutionality of Proclamation no.3/991 whereupon much of the CUD complaint was based; nor did it frame the constitutionality of any laws. It did not test the prime Minister's ban against any ordinary law, primarily proclamation no.3/1991. The court simply requested CCI, whether the directive of the prime Minister (which banned outdoor meetings and demonstrations for one month) in contravention of the FDRE Constitution or not.

Under this case again like the above case (case one), the court did not apply Article 84(2) or at least not followed the spirits of this provision which says only Proclamations enacted by the parliaments are submitted to CCI and HoF to determine their constitutionality if being contested by any interested party or by the court. As one can understand from this case courts' judicial powers to determine the constitutionality of subordinate legislations are either taken over by the CCI/HoF or courts are wilfully relinquished their power in case of politically sensitive issues like the CUD case here. Not only this, but also courts may be confused by the two Proclamation

²²⁸ See Proclamation no.3/1991, the proclamation to provide for Peaceful demonstration and public political Meetings.

enacted after the FDRE Constitution for the purpose of constitutional adjudication.²²⁹ Since according to the Council of Constitutional Inquiry Proclamation, the HoF has the power to decide on the constitutionality of any law or decision by any government organ or official, which is alleged to be contradictory to the Constitution.²³⁰ As explained under chapter three, according to these two Proclamations the term ‘law’ means Proclamations, regulations and directives. Therefore, the review power of the House of Federation is not limited only to laws issued by the federal and state legislative bodies but also extends to executive enactments like regulations and directives.

Hence under the first case the practice of CCI investigation showed that the term ‘law’ in connection with constitutional adjudication is considered as, only the Proclamation enacted by the parliaments both at federal and regional level. Not only the first case in other cases also the CCI decided that the constitutionality of regulations or directives are subjected to judicial review or their constitutionality must be checked by the ordinary courts as we observe from practice of the CCI. For instance, in the case of *Addis Ababa Taxi Drivers Union v. Addis Ababa City Administration*²³¹ and in the case of *Biyadigligh Meles et al v. Amhara National Regional State*,²³² the CCI ruled the remedies concerning the conformity of regulations with the enabling legislation as well as violation of rights by the executive do not amount to reviewing constitutionality of laws and thus parties have to seek remedy from the regular courts. But according to the second case this interpretation of the term ‘law’ is changed to Proclamation and subordinate legislations, may be because the two Proclamations were enacted subsequent to the FDRE Constitution; or courts are not interested to adjudicate the constitutionality of certain enabling legislation which are more related to politically sensitive issues. But up to the time this thesis is written, there is no case submitted to the regional CCI of Oromia. So it is difficult to talk about the practices of constitutional adjudication at regional level of Oromia. But what is clear under the Oromia National Regional State Constitution is that, ordinary courts are excluded from entertaining the issue of constitutionality of both Proclamations and subordinates legislations like

²²⁹Proclamation No.250/2001 and 251/2001 Cited above at not 141.

²³⁰ Id, See of Proclamation No. 250/2001. Article 17 (2).

²³¹ Decision of the CCI on January 25, 2000(Un published) as quoted in Assefa Fisseha, cited above at note 37, p. 393.

²³² Decision of the CCI on an application made on April 8, 1997, Unpublished as quoted in Assefa Fisseha, cited above at note 37, p. 393.

regulations and directives in clear manner and therefore, they lack the power of adjudicating any constitutionality issues which arises from both primary legislations of the ‘Caffee’ or subordinate enactments of the regional executive organ of Oromia state.

4.1.3 Possible Effects of the Incompatibilities between the FDRE Constitution and the Revised Oromia National Regional State Constitution on the Issues of Constitutional Adjudication

All the above discussions show that there is incompatibility between the provisions of the FDRE Constitution and Oromia National Regional State Constitution on the issues of adjudicating constitutionality of laws. No uniform practices in determining the constitutionality of laws at the federal level and no practice of constitutional adjudication at regional level of Oromia. The provisions of FDRE Constitution are not clear enough and other relevant laws enacted in relation with constitutional adjudication are confused with this Constitution. At regional level of Oromia, the Constitution itself prevented courts from entertaining the issue of constitutionality before hand. Lack of any relevant law through which the regional constitutional adjudicatory organs undertake the constitutional adjudication process at Oromia state level makes constitutional adjudication practically impossible for courts under the Regional Constitution of Oromia. Hence the possible effects of all these incompatibilities may include the following points.

a) Principle of check and balance

The modern principle of separation of powers is based on the concept of reciprocal relations between the different branches of power such that each branch checks and balances the other branches.²³³ Therefore, when reviewing the executive acts, judiciary operates within the framework of its classical role in separation of powers and in accordance with its role of maintaining the rule of law.²³⁴ But the principle of check and balance among the three wings of the government is clearly violated by the Oromia State Constitution; since courts lack the power to determine the constitutionality of regulations and directives under this Constitution and furthermore, the organ established for this purpose also lacks the procedure to check the constitutionality of laws, regulations and directives as a result of absence of relevant laws to

²³³ Aharon Barak cited above at not 29, p. 241.

²³⁴ Ibid.

proceed its functions or constitutional adjudication, as explained in the above discussions. Pursuant to Article 69(2) of the Oromia State Constitution, courts have the duty to refer the subordinate legislations, if they are being contested for their unconstitutionality or if the courts themselves think that certain executive enactments are unconstitutional. Hence there is no way left for the judiciary to check the acts of the executive organ of the regional government unless the courts are empowered to determine the constitutionality of the executive acts and enactments. Therefore, the extension of definition of the term 'law' under this Constitution to subordinate legislations like regulations and directives, in connection with settling constitutional disputes and conflicts may result in violation of the principle of check and balances without which democracy, separation of powers and rule of law cannot be ensured.

Hence we are left with two strong organs of the government branches or executive and legislature, since the judicial organ cannot participate in controlling neither of these two organs of the government under the Regional Constitution of Oromia. Executive organs are left without any control on their acts, even if they act beyond their specified powers under this regional constitution. Check and balance means, naturally going together in parallel manner and if one organ deviates from the line given, the other organ must check it or correct it. The same thing is true in case of the relationships between the three organs of the governments. When the executive acts beyond its power given or contravene the provisions of this Regional Constitution, the court must check it, which means invalid the unconstitutional acts of the executive branch under the Oromia Regional State Constitution. But if the courts lack, such powers, there is no issue of check and balance, the executive acts and decisions are not subjected to the courts review; hence the executive organ is somewhat above the judiciary in position and its acts and decisions are unreachable by the ordinary courts. As a result of this, it is possible to put the 'Caffee' at the top, executive organ next to it and judiciary is far below from the executive in the ladder of powers practically under the State Constitution of Oromia. Therefore, practically the principle of check and balance does not exist at regional level of Oromia state.

The absence of principle of check and balance, especially between the executive and judicial organ under the State Constitution of Oromia may result in the absence of the principle of constitutionalism. Because, it is difficult to consider a certain government's power is limited, where there is lack of mechanisms to limit its power in practice like what we observe from the

above discussions. Under the Oromia State Constitution court lacks the power to check the constitutionality of executive acts. Moreover the established organ for reviewing the constitutionality of acts of the legislature and executive is not functional. The Constitution does not identify, clearly the mechanisms through which the checking of constitutionality issues proceeded either. There are no relevant laws to entertain the issue of constitutionality at all. Hence it is impossible to think that the executive organ of the regional government of Oromia is a limited government, while the principle of check and balance between the three wings of government is not practically enforced as a result of the above discussions.

Generally, when a single government branch creates the statutes, administers them, and adjudicates disputes arising from them arbitrary government results, freedom suffers and real democracy does not exist.²³⁵Therefore, balancing and reviewing among the three branches is needed, to ensure the equal status that must be achieved among three wings of government, in order to ensure real democracy and the principles of limited government.²³⁶But under the Regional State Constitution of Oromia the principles of separation of power becomes futile, since courts are left with limited power under this Constitution. The Regional Constitution of Oromia, even though it claims that all judicial power shall be vested only in the courts as per its Article 63(1); the work of the court is reduced to entertain the private cases throughout their time of work. Hence, if courts are excluded from reviewing the constitutionality of acts, legislations and decisions of the executive organ; the concept of separation of power and its objective cannot be enforced practically, under the Regional State Constitution of Oromia. Since judicial power is nothing, unless it includes the power to check the constitutionality of the executive acts, legislations and decisions; otherwise the concept of separation of power is left in the air without having any contribution to ensure the principles of constitutionalism.

The most important purpose of separation of power is, to strengthen freedom and prevent the concentration of power in the hand of one governmental actor in a manner likely to harm the principles of limited government and freedom of the individuals.²³⁷But the challenge comes when there is lack of mechanisms to prevent the concentration of powers or when there is absence of mechanisms to check the illegality or unconstitutionality of the acts of the

²³⁵ Id, p. 35

²³⁶ Id, p. 36.

²³⁷ Id, p. 35.

government wings, especially the executive organ under a certain Constitution. The same problem exists under the Regional State Constitution of Oromia; because, the courts cannot check the illegal acts or unconstitutional acts of the executive organ under this Constitution. On the other hand the other organs established for checking the constitutionality of the executive and legislative organs' acts have not established practically, even though this Regional Constitution of Oromia established them on paper as explained previously. Hence the executive organ at Oromia regional state level is left without any control; since courts lack the power to review the constitutionality of acts of executive organ under the Regional Constitution of Oromia and the Constitutional Interpretation Commission established for the purpose of checking the constitutionality issues arising at regional level of Oromia is currently not functional.

Furthermore, a branch of government should not judge itself; therefore, the final decision about the constitutionality of the activities of legislative and executive branches should be taken by a mechanism external to these branches.²³⁸ If this concept is not ensured practically, there is no need to talk about separation of powers. Separation of power means, naturally giving powers to each government organs. For instance, vesting legislative powers in the hands of the legislature, the power to adjudicate disputes or interpret the laws to courts, and the power to implementing or enforcing a law to the executive. But separating and vesting different powers in the hands of different government organs under the text of Constitution, does not ensure the principle of separation of power; unless we have strong organs and clear laws to restrict these government organs within their lawful province given for each of them under the Constitution. But under the Regional State Constitution of Oromia the executive organs acts, legislations and decisions are not checked by any other organ in practice, unless the constitutionality of their acts and decisions are checked by themselves, contrary to the concept that says the government organ cannot judge the constitutionality or legality of its own acts and decisions as discussed above. Hence under the Regional State Constitution of Oromia, courts role to preserve and protect the separation of powers is eroded as a result of clear exclusion of courts under this State Constitution to do so. So having three wings of government under the text of Constitution and vesting powers in their hands separately as legislative, judicial and executive powers does not show enforcing the

²³⁸ Id, p. 43.

principle of separation of power and check and balances; unless there is real and practical check between the three organs of government under the State Constitution of Oromia.

Therefore, it is impossible to conclude that the principle of separation of power in general and check and balances in particular, among the three branches of government is enforceable practically under the Regional State Constitution of Oromia. As a result of absence of these principles, it is too difficult to think that, the modern concept of democratic and limited government is ensured under the Regional State Constitution of Oromia. Especially the non-existence of mechanisms in practice to review the constitutionality of acts and legislations of regional executive organ at regional level of Oromia blurred the whole concept of constitutionalism in general and makes the ensuring of principles of check and balance a pious wish under the Regional State Constitution of Oromia.

Hence, at regional level of Oromia courts are left with very limited tasks of adjudicating simple cases and their hands are cut off to prevent them from reaching to review the constitutionality of executive acts. In addition to this, the legal custom of considering courts as the custodian of rule of law remains under question, under the Regional State Constitution of Oromia while courts are prohibited from checking the constitutionality of executive acts under the same Constitution. So, the statement of President Museveni of Uganda which says, “*The major work for the judge is to settle chicken and goat theft cases...*”²³⁹ is applicable for the Oromia state judges.

b) Principle of Independency of State Judiciary

Judicial independence is the life and blood of constitutionalism in democratic societies, without which preservation of democracy and its values is unthinkable.²⁴⁰ The existence of judicial independence is based on the existence of legal arrangements that guarantee it; arrangements that are actualized in practice and are themselves guaranteed by public confidence in the judiciary.²⁴¹ We have two type of judicial independence. One is personal independence of the judges while the other is institutional independence of the judicial branch of the government. Two of this judicial independence is equally important. Therefore, a judge’s personal

²³⁹ Quoted in Assefa Fisseha, *The Concept of Separation of Powers and Its Impact on the Role of the Judiciary in Ethiopia*, (Ethiopian Constitutional Law Series, Vol. III, Addis Ababa University Press, 2010), P. 24.

²⁴⁰ Aharon Barak cited above at note 29, p. 76.

²⁴¹ *Id.*, p. 77.

independence is incomplete, unless it is accompanied by the institutional independence of the judicial branch, designed to ensure that the judicial branch can fulfil its role in protecting the Constitution and its values.²⁴² Hence institutional independence is designed to build a protective wall around the judicial branch that prevents the legislative and executive branches from influencing the way judges realize their roles as protectors of the Constitution and its values.²⁴³ The judicial branch must therefore, be run on the organizational level in an independent manner.²⁴⁴ It should not be part of the executive branch and should not be subjected to the subordinate enactments of the executive branch and administrative decisions.²⁴⁵ This means, the court must be separated from the executive organ and check acts of executive for its constitutionality as well as the executive cannot enact regulation which erodes the independence of courts by any means. Executive can enact certain regulations or directives which influence the activity of courts or pass administrative decisions which put the independence of courts under question; since there is no mechanism to review the constitutionality of executive enactments under the Regional State Constitution of Oromia currently as explained above. For instance, there is no way for the courts to protect, an individual right from illegal violation by the executive organs, if the executive enacts regulations or directives, which are contrary to the individual rights guaranteed under the Regional Constitution of Oromia; since courts lack the power to check the constitutionality of these regulations or directives under pursuant to Article 69(2) of the same Constitution.

Though the principle of independence of judiciary is recognized under the Oromia State Constitution²⁴⁶; it is too difficult for the courts to become independent practically as a result of the following reasons. Pursuant to Article 49(2) of the State Constitution of Oromia, ‘Caffee’ is the supreme political organ of the region with full powers in the affairs of the region. Currently, as one can observe from the practice, all the members of the ‘Caffee Oromia’ are full of the supporters of the regional ruling political party or the Oromo Peoples Democratic Organization (OPDO). On the other hand, the president and vice president of the regional Supreme Court of Oromia, shall upon the recommendation by the president of regional government of Oromia, be

²⁴² Id, p. 80.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ See Article 63 of the Oromia State Constitution.

appointed by the 'Caffee' as per Article 65(1) of the Oromia State constitution. The 'Caffee' plays important role in removing judges from his duties, in case when the removal of judges is decided by the Judicial Administration Commission pursuant to Article 63(4) of the State Constitution of Oromia for various reasons like, violations of disciplinary rules, gross incompetence, in efficiency and others. The budget of the regional courts of Oromia, though prepared by the regional Supreme Court, it must be approved by the 'Caffee' Oromia as per Article 64(7) of the State Constitution of Oromia. Furthermore, judges of the state Supreme Court, High Court, District Court shall be appointed by the 'Caffee' up on submission of nominees by regional Judicial Commission pursuant to Article 65(2) of the State Constitution of Oromia.

Hence as we observe from the above explanations, the regional courts of Oromia are accountable to the regional parliament. The judges' appointment, removal and courts budget must be approved by the 'Caffee' as one can conclude from the above discussion. It is difficult to see the 'Caffee' separately from the executive organ of the Oromia region practically, since all the members are from the supporters or promoters of the regional ruling parties. Therefore, it is possible to argue that the interest that the 'Caffee' support is the interest of the ruling party at this region, since all the members are from the supporters of the regional executive. So it is naive to think that the regional parliament or the 'Caffee' and executive Organ is different in practice, though they are established as different government institutions, under the text of the State Constitution of Oromia. Hence it is difficult to have an independent judicial organ in practice, since the appointment and the removal of the judges are in the hands of the 'Caffee', which is indirectly the other face of the regional executive organ in Oromia regional state. If the regional Supreme courts president and vice president are politicians and if the judges are selected or appointed based on their political ideology or if judges are the supporter of the regional ruling parties and if the political atmosphere exist as a whole, in practice does not allow judges to give decisions independently; especially to pass decisions against the interest of the regional executive organ or ruling political parties, it is unthinkable to have an independent judiciary.

In addition to add insult to injury, when all the above problems impose a negative impact upon the independency of judiciary at regional level of Oromia in practice; the Regional Constitution of Oromia clearly avert the courts to check the constitutionality issues as discussed before.

Hence, when there are practical problems on the appointment and removal of judges as well as when the Constitution prevent the courts from entertaining issues of constitutionality of the acts of the other two organs (executive and legislative), it is impossible to establish an independent courts at regional level of Oromia practically. It is too difficult for judges to act independently under such circumstances; because any decisions may be taken against such type of judges. For instance, if the regional Supreme Court judge interested to ensure the independency of judiciary from the two government wings at regional level of Oromia, or if he/she wants to act according to the interest of justice rather than according to the interests of the regional government, it is easy to remove him/her from his/her position. Because, this president shall recommended by the regional state president and appointed by the 'Caffee' as discussed above. Hence, since the interest of the regional executive or ruling party is the same with the interest of the 'Caffee', if the regional ruling party is not interested in the act of certain judge, the 'Caffee' easily approves the removal of such unwanted judges by the regional ruling parties or executive government organ of Oromia. Hence, judges are not saved from unconstitutional or illegal removal from their position even under the current Regional Constitution of Oromia State practically, although the State Constitution of Oromia says judges shall exercise their judicial functions in full independence and shall be directed solely by the law pursuant to its Article 63(3). Thinking about the enforcement of the principle of judicial independence, while practical and legal problems are prevailing at regional level of Oromia as explained above remains anomalous.

c) Violation of the Federal constitution

When I say violation of the federal Constitution, I mean that since all the above characteristics of democratic government (check and balance, Independence of judiciary and separation of power) guaranteed and recognized under the FDRE Constitution is not respected under the Oromia State Constitution fully, this Regional Constitution of Oromia State clearly violates the federal Constitution of Ethiopia. As per Article 9 of the FDRE Constitution the Regional Constitution cannot contradict the FDRE Constitution (Supremacy of the federal constitution on all other laws including the Regional State Constitution), but Article 69(2) of the Oromia State Constitution violates this principles set out under Article 9(1) of the FDRE Constitution. It is really surprising to have such contradictory Constitutions (state and federal Constitution) on such important

principle of federalism like independency of courts and check and balances without having effective mechanism of resolving it.

d) The Oromia State Constitution contradicts with itself

If we see the supremacy clause of the Oromia State Constitution, it says, “*Without prejudice to the supremacy of the constitution of the Federal Democratic Republic of Ethiopia, this constitution is the supreme law of the Regional State. Any law, customary practice or any act of an agency of government or official that contravenes the provisions of this Constitution is null and void.*”²⁴⁷ Here it says without prejudice to the supremacy of the FDRE Constitution, it is the supreme law of the land in Oromia region. One can understand from this wording of the Oromia Constitution that it cannot violate the FDRE Constitution especially on the matter of pillars of federalism as well as principle of democracy like independence of judiciary, check and balance among governmental branches and separation of powers. But it contradicts with what it claims under its supremacy clause or Article 9(1), since the Oromia State Constitution wiped out the power of courts to determine the constitutionality of subordinate legislations under its Article 69(2). In addition to this under its preamble paragraph four, the Oromia State Revised Constitution of 2001 says, “*Convinced that our constitution, which is in force now, should be revised in accordance with the principle of separation of state power, check and balance and transparency, which can strengthen and ensure popular participation, reveal accountability and effective state structure.*” But what is proclaimed under the preamble of this Constitution is violated under Article 69(2) of the same Constitution without going far. The preamble talks about check and balance, Article 69(2) prevents the courts from reviewing the constitutionality of subordinate legislation and avoided from entertaining and settling constitutional disputes at state level of Oromia, hence it is paradoxical, how the effective state structure and principle of check and balance is ensured under the Oromia State Constitution while the judiciary is ousted out from checking the constitutionality of the executive enactments and administrative decisions.

e) Absence of Judicial Review of Executive acts under the State Constitution of Oromia

‘Judicial review is a court’s power to review the actions of other branches or levels of government’.²⁴⁸ As discussed above, pursuant to Article 69 of the Oromia State Constitution

²⁴⁷ See Article 9 (1) of the Oromia State Constitution.

²⁴⁸ Black’s Law Dictionary, cited above at note32, p. 911.

courts lack the power of judicial review or courts cannot check the constitutionality of both legislature and executive enactments, since if any law, regulations and directives issued by regional state organs contested as being unconstitutional, courts cannot entertain it or reviewing any law, regulation and directive is vested in the hand of regional Constitutional Interpretation Commission rather than in the hand of ordinary courts pursuant to Article 69(1). Hence courts' power to invalidate legislative and executive actions as being unconstitutional is absent or impossible under the State Constitution of Oromia.

But under the FDRE Constitution there is some clue showing the existence of judicial review at federal level. Ethiopian courts have at least three constitutional justifications to review the acts and decisions of administrative agencies under the FDRE Constitution. These justifications for the existence of judicial review are explained as follows.

a) Rule of Law

FDRE Constitution under its Article 9 talks about supremacy of Constitution which is equivalent with rule of laws that is system ruled by the law existing in Ethiopia today. Other Articles like Article 17(1) on Liberty, Article 26(3) on privacy and Article 27(5) on Religion others of this Constitution give good clues for the inevitability of judicial review in Ethiopia. Under the FDRE Constitution the government promised that it will not do anything to curtail these rights unless the law authorized it to do so. These all shows the rule of law. Rule of law claims that everything must be done according to the law. Rule of law needs an independent government organ, which secures the subjection of government power to the laws. Therefore, rule of law demands that justification for any act be held before ordinary court as all judicial power vested in the hand of courts pursuant to Article 79(1) of the FDRE Constitution. Hence, review jurisdiction of court is an essential function for ensuring the practical enforcement of rule of law.

b) Separation of Powers

Again judicial review can be justified in the view of separation of power. Article 50(2) of the FDRE Constitution is talking about the division of powers among the three wings of government. Dividing the powers reduces the abuse of power. Article 79(1) vest all judicial powers in the hand of courts both at federal and regional level. Since the power is divided among the three branches of the

government, they watch each others. Therefore, mutual control of power is constitutionally warranted. So, each government can check the activities of the other two branches. This is talking all about of the principle of check and balance.

c) Fundamental Rights and Freedom

Article 13(1) of the FDRE Constitution explains about the duty and responsibility of all government organs to respect and enforce the fundamental rights and freedoms recognized under chapter three of the same Constitution. Here, fundamental rights and freedoms can be violated by both individual citizen and those on power. Both should be subjected to the same control. When citizens violate, government should question them, when one government branch or the executive violates the fundamental freedoms and rights court should lawfully questioned them; when citizens seek the remedy from it.

To sum up, all these three important constitutional principles (rule of law, separation of powers and fundamental rights and freedoms) strengthen the argument that claims the existence of the judicial review of administrative acts under the FDRE Constitution of 1995, in addition to its Article 84(2) which did not prevent courts from reviewing the constitutionality of the executive acts. Again this explanation shows that there is a great disparity between the FDRE Constitution and the Oromia State Revised Constitution of 2001 on the issue of judicial review. At federal level of Ethiopia, it is sound to argue that judicial review is guaranteed under the FDRE Constitutions based on the above three reasons; at least to the extent of declaring the subordinate legislations of the executive unconstitutional pursuant to Article 84(2) of the FDRE Constitution. The otherwise of this fact is true under the Oromia State Constitution, since pursuant to its Article 69(2) courts have precluded to declare even the unconstitutionality of the subordinate enactments of the regional executives under this regional Constitution. But at federal level though such sound arguments in favour of the existence of judicial review under the FDRE Constitution exists, the two Proclamations²⁴⁹ completely contradict these sound arguments. Since pursuant to these two Proclamations enacted to clarify the power and duties of HoF and CCI in constitutional adjudication process, courts cannot review not only the constitutionality of Proclamations according to Article 84(2) Amharic version of the FDRE Constitution, but also

²⁴⁹ Proclamation No.250/2001 and No.251/2001, cited above at note 141.

they cannot determine the constitutionality of regulations and directives enacted by the executive organ of the government.²⁵⁰

From the above analysis one can understand that there is confusion of laws with a better clear provision of FDRE Constitution (Article 84(2) Amharic version) on the matter of reviewing the acts of the executive branch of the government by judiciary, since the two Proclamations clearly exclude the courts from reviewing the acts of the executive like the Oromia State Constitution. The practices of CCI are also confusing, since CCI followed the spirit of Article 84(2) Amharic version of FDRE Constitution as we observe from the first case analyzed above and other similar cases. But after the enactment of these Proclamations (Procl. No. 250/2001 and 251/2001), this practice is difficult to be maintained by the CCI, since under these Proclamations the constitutionality of subordinate legislations is also determined by the HoF rather than ordinary courts as one can infer from the second case analyzed above. Hence the argument that says, there must be judicial review to check the constitutionality of executive acts and decisions by courts, based on the concept of rule of law, separation of power and enforcements of fundamental rights and freedoms enshrined under the FDRE Constitution fall under question, because of the position of these proclamations.²⁵¹ Therefore, there are incompatibilities between the spirits of the FDRE Constitution which favours the existence of judicial review at least to determine the constitutionality of executive acts and administrative decisions and the Oromia State Constitution which clearly prohibit judicial review to check the constitutionality of both acts of the legislature and executive.

But the whole things became complex after the enactments of the two Proclamations in connection to resolving constitutional disputes under the Ethiopian federation. Almost the current trend shows that Courts at federal level are confused with the ambiguous position of the two Proclamations with the FDRE Constitutions on the issue of adjudicating constitutional disputes. Because before the enactment of Proclamation number 251/2001 and 250/2001, the CCI remanded the case submitted or referred to it for the purpose of determining its constitutionality, if that case is related to the subordinate legislations of the executive organs or

²⁵⁰ Pursuant to Procl. No.250/2001 and 251/2001, the review power of HoF is extended to the subordinate legislations like regulations and directives of the executive branch. For instance, see Article 17(2) of procl.No.250/2001 (CCI Proclamation) and Article 2(2) of Procl. No, 251/2001 (HoF Proclamation).

²⁵¹ Proclamation, No. 250/2001 and 251/2001, cited above at note 141.

if regulations or directives were contested as unconstitutional, the CCI said that courts must check their constitutionality and the only thing submitted to the CCI was the Proclamations of the federal and state government pursuant to Article 84(2) Amharic version of the FDRE Constitution if being questioned for its constitutionality. But after the enactment of the two Proclamations, the argument that said only the enactment of the legislative organs of the government must be submitted to the CCI/HoF is eroded and the two Proclamations came with the new argument that said not only the Proclamations enacted by the parliament, but also the subordinate legislations of the executive organs must be submitted to CCI/HoF in order to determine their constitutionality. Of course, if the Constitution and Proclamations are contradictory, the Constitution prevails as a general principle of interpretation. But in practice, neither the court nor the CCI applies this principle of interpretation and takes the provision of Article 84(2) of the FDRE Constitution in determining the issue of constitutionality of laws after the enactment of these two Proclamations. For instance in the case of *CUD v Meles*, the court submitted the case for the issue of entertaining its constitutionality, which arose from the directive of the executive to the CCI and the CCI did not remand this cases to the courts like what it had done in the past before the enactment of these two Proclamations. Hence, two things may be concluded from this. One is that these enacted Proclamations may confused the courts as well as the CCI or they open the door for the government or the ruling party to bring a case which they are interested in, to the HoF whether such case is arising from the subordinate legislations like regulations and directives of the executive organ or Proclamations of the parliament, if it is being contested for its constitutionality. The other thing concluded from this may be Ethiopian courts fear to adjudicate any cases for its constitutionality, if the interest of the government or the ruling party is involved. But the regional courts of Oromia know their scanty role in determining the constitutionality of the acts of the legislature and executive beforehand, under Article 69(2) of the Regional State Constitution of Oromia.

Conclusion and Recommendation

Conclusion

In federation, absolute avoidance of inconsistencies or incompatibilities between laws, on every subject matter is humanly impossible. As a result of this, in federation inconsistencies may possibly exist between the federal and state Constitutions, federal laws and state laws and among the laws of the states. Hence a certain legislation, act or decision of a government may be questioned for its constitutionality both at federal and regional level in federation. To ensure consistencies, uniformity and integration, federal laws must be consistent on basic democratic principles of the modern states. For instance, the federal and state Constitutions should be compatible on the issue of ensuring the principle of separation of powers, independence of judiciary, check and balances, rule of law and other basic principles of the democratic government. This would require an independent and impartial tribunal that enforces these democratic principles and other guaranteed rights incorporated under the text of the Constitution. Hence in federation, an impartial and independent tribunal necessitates for settling jurisdictional conflicts or disputes that arise among the three wings of governments both at federal and state levels. Therefore, this independent and impartial tribunal adjudicates and resolves any constitutional disputes or conflicts in general and umpires the federation in particular. Certainly, establishing an independent tribunal for the adjudication of constitutional disputes by itself does not help much, unless clear laws and procedures through which all these constitutional disputes are resolved are provided under the constitution and other relevant laws.

Ethiopia established the House of Federation as an impartial and independent tribunal for the purpose of adjudicating constitutionality issues and resolving other conflicts under the FDRE Constitution. But, there is absence of clear laws with regard to settlements of constitutional

disputes and conflicts under the Ethiopian federation. The FDRE Constitution gives a clue through interpretation that courts have the power to review the subordinate legislations and administrative decisions based on its Article 84(2) and the principle of separation of powers, rule of laws and fundamental rights and freedoms enshrined under this Constitution. In addition to this the practices of CCI favors the review of subordinated legislations of the executive organ by the courts as one can infer from the cases analyzed under chapter four of this thesis. But Proclamations number 250/2001 and 251/2001, extend the definition of the term laws for the purpose of determining the constitutionality of laws and considered the regulations and directives out of the court jurisdiction. Hence Proclamation number 250/2001 and 251/2001) ousted out the power of judiciary to review the constitutionality of subordinate legislations of the executive organ at federal level, though the FDRE Constitution does not prevent courts from reviewing the constitutionality of subordinate legislations enacted by the executive as per its Article 84(2) Amharic version. Therefore, the mechanism by which constitutional disputes and conflicts are settled is not crafted wisely at federal level in the present day Ethiopian federation.

At the sub-national level, all the nine states of Ethiopia vest the power of constitutional adjudication in the other organ rather than in the hands of ordinary courts like the FDRE Constitution. Most of the regional states established the Regional Constitutional Interpretation Commission and CCI as its helper under their respective Regional State Constitutions. But these regional states constitutional adjudication process have more problems than the FDRE Constitution. There is lack of clear laws and procedures, the adjudicatory organs at regional levels are either not yet established or fragile if established where they are established.

As it is explained in the foregoing discussions, the Regional State Constitution of Oromia contradicts with FDRE Constitution, since it prohibits courts to settle constitutional disputes and conflicts pursuant to its Article 69(2) inconsistently with Article 84(2) of the FDRE Constitution, which does not clearly prevent the courts from reviewing the constitutionality of the executive's enabling legislations acts and decisions. The incompatibility between the FDRE and Oromia State Constitutions remains a paradox because of two reasons. Firstly, the supremacy clause of the FDRE Constitution is threatened by this inconsistent Regional Constitution of Oromia. Because any law cannot be enacted inconsistently with the FDRE Constitution as per its Article 9(1); if enacted it is null and void. Secondly the Oromia State Constitution violates its own

supremacy clause, since as per its Article 9(1) its supremacy is subjected to the FDRE Constitution; it cannot contradict with the FDRE Constitution. As adding insults to injury, having this incompatibility between the federal Constitution and regional state Constitution on the issue of constitutional adjudication, the current Ethiopian federation lacks clear laws to resolve such incompatibility. The FDRE Constitution is silent on the matter of conflicts between federal and regional laws.

Furthermore, in addition to this incompatibility on the issue of constitutional adjudication, the State Constitution of Oromia lacks clear and detailed provisions on the mechanisms of resolving the constitutional disputes. There is no laws enacted by the ‘Caffee’ or legislative organ of this regional state, to govern the overall procedures of constitutional adjudication and explains powers and duties of the regional CCI and the Constitutional Interpretation Commission. Moreover, the mere existence of constitutional rights is to mean nothing in the absence of an organ to decide and adjudicate their violation. Even though the Regional CCI and Interpretation Commission are established under the text of the Regional Constitution, they are not functional. Hence having all these legal and practical problems, under the Regional State Constitution of Oromia, attempt to enforce, all the democratic principles enshrined under the text of this Regional Constitution, becomes a pious wish.

Finally, it is unthinkable to ensure the principles of democratic governments in general and having a genuine federation in particular, with all these incompatibilities and legal confusions without having any clear mechanisms to reconcile them, between the federal and regional Constitutions in the current Ethiopian federations.

Recommendation

For having consistent laws, in all cases with the Constitution, any inconsistent laws with the Constitution must be avoided. Therefore, the writer of this thesis recommends that Article 2(2) of Proclamation No.251/2001 and Article 2(5) of Proclamation No. 250/2001, which expand the concept of the term ‘laws’ in connection with determining their constitutionality issues to Proclamations, regulations and directives, must be amended, as only the Proclamations enacted by the federal and state legislative organs are submitted to CCI and HoF for the purpose of

determining their constitutionality, if being contested as unconstitutional by any interested party similar to Article 84(2) of the FDRE Constitution Amharic version.

Article 69(2) of the Oromia State Constitution is incompatible with Article 84(2) of the FDRE Constitution, especially the Amharic version of the same provision. Because Article 69(2) of the Oromia State Constitution excluded, clearly the regional courts from reviewing the constitutionality of the subordinate legislations of the regional executive while Article 84(2) of the Amharic version only prohibits courts from reviewing the constitutionality of the Proclamations enacted by legislative organs both at federal and regional state levels. For this reason, Article 69(2) of the Oromia State Constitution violates the principles set out under Article 9(1) of the FDRE Constitution (the supremacy clause) and Article 9(1) of the same Constitution which makes this Constitution subjected to the supremacy of the FDRE Constitution. Therefore, the writer recommends that Article 69(2) of the State Constitution of Oromia must be amended, as *only proclamation enacted by the regional parliament (Caffee)* must be submitted to the Regional CCI and Constitutional Interpretation Commission for the purpose of determining its constitutionality, if being contested as unconstitutional by any interested party, to have compatible meaning with Article 84(2) Amharic version of the FDRE Constitution on the issue of constitutional adjudication. If Article 69(2) of the Oromia State Constitution is not amended in the above way, the concept of check and balances, especially between the regional judiciary and executive organ, the commitment to enforce rule of law, the principle of independence of judiciary and generally, the concept of constitutionalism remains a paper value without empowering the regional judiciary to review the constitutionality of the acts, decisions and enactments of the regional executive organ of the government; since the executive may violates the constitutional principles, acts beyond their power given and even interfere or influence the courts by enacting various regulations and directives.

The regional CCI and Constitutional Interpretation Commission must be functional, in order to resolve constitutional disputes arising at regional level of Oromia. Hence the problems of absence of clear laws and work procedures to adjudicate constitutionality issues shall be resolved as follows as the writer recommends. Firstly, the ‘Caffee’ Oromia must enact a Proclamation that clarifies the powers and responsibility of the regional CCI and the Interpretation Commission in connection to resolving constitutional disputes as it may fit to the context of this region and

consistent to the spirit of the FDRE Constitution on the constitutional adjudication issues. Secondly, organizing the office of the commission, establishing permanent staff and making the door open for interested parties and enable them to bring their constitutionality issues to the Regional CCI and Constitutional Interpretation Commission.

It is astonishing to have courts which can review the constitutionality of the executive's subordinate legislations, acts and decisions at federal level and courts which lack such power at regional levels like the Oromia state courts as explained above. For this incompatibility between the FDRE and Oromia State Constitutions, the writer suggests two solutions. Especially for 'Caffee' Oromia since it is the maker of the Regional Constitution itself. If this incompatibility is occurred as a result of lack of awareness among the drafters of this Regional Constitution of Oromia, the regional government must appoint experts of laws to draft the Regional Constitution and other laws, enhance the skill of its judges and preparing different mechanisms like justice reform institutes, establish legal research centers, workshops and symposium to point out such problems and check it as much as possible to come out from such deadlock. But if this incompatibility made intentionally by the drafter of the Regional Constitution of Oromia, it is a dangerous move towards eroding the commitment to enforce the principles of rule of laws, check and balances, independency of judiciary and generally, it negates the concept of constitutionalism which are incorporated under the text of the Regional State Constitution of Oromia in practice and makes this Constitution a tiger of paper. Therefore, the writer suggests, the regional government of Oromia in general and the 'Caffee' in particular commit themselves to enforce the democratic principle incorporated under the Regional State Constitution of Oromia. If not checked as soon as possible, this incompatibility has a negative impact on the integration of the Ethiopian federation in general and kills the principles of check and balances between the regional executive and judiciary, independency of judiciary from the influence of the executive organ and the concept of constitutionalism or limited government in particular at regional state level of Oromia.

Finally, in the opinion of the writer, it is too difficult to alleviate the problems arising in connection with resolving constitutional disputes and reconcile incompatibility between the FDRE Constitution and the Regional National State Constitution of Oromia and having viable federal system, unless the FDRE government and the regional government of Oromia work hand

in hand to avoid these inconsistencies between the federal and Regional Constitutions and other relevant laws at least on the basic principles, like adjudication of constitutional disputes. Hence, the writer recommends both the federal and regional governments should work together, in order to avoid inconsistent laws with the FDRE Constitution on the issue of constitutional adjudication in particular, and reconcile other similar incompatibilities, existing among the Ethiopian federation in general.

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