

Chapter 1: Introduction to the thesis

1. Background and problem statement

Prior to the Second World War, the practice of constitutional review – the power of constitutional adjudicators to review legislative and executive decisions based on constitutional standards – was largely unknown outside the United States of America (US).¹ Once considered to be of an ‘exceptional and American character’, the role of constitutional adjudicators in policy-making through constitutional review has become a common phenomenon in all corners of the world.² The constitutional recognition of human rights and the establishment of a system of constitutional review is a significant feature of constitutional democracies worldwide.³ The rights and constitutional review tandem has become ‘an essential, even obligatory, component of any move toward constitutional democracy’.⁴ The idea of a limited government that inheres in the concept of constitutionalism and constitutional supremacy has provided the theoretical foundation for the proliferation of judicial or quasi-judicial organs charged with ensuring that government decisions comply with constitutional requirements. Constitutions around the world empower either regular courts or establish a constitutional court or council with the task of reviewing the decisions of political organs in line with constitutional standards including mainly constitutional rights.⁵

¹ M Shapiro ‘The success of judicial review and democracy’ in M Shapiro and A Stone Sweet *On law, politics and judicialization* (2002) 149. Although it was not practiced extensively to constrain government power, judicial review was recognised in many Latin American countries due to the influence of the US – P Navia and J Rios-Figueroa ‘The constitutional adjudication mosaic in Latin America’ (2005) 38 *Comparative Political Studies* 189. Constitutional review is currently recognised throughout the world. Western European countries, such as Germany and Italy, established constitutional courts after the Second World War. Constitutional review spread to Eastern Europe, East Asia and Africa particularly after the fall of the Berlin Wall.

² N Tate ‘Comparative judicial review and public policy: Concepts and overview’ in D Jackson and N Tate (eds) *Comparative judicial review and public policy* (1992) 4. Hirschl talks of ‘profound transfer of power from representative institutions to judiciaries’ worldwide – R Hirschl ‘The new constitutionalism and the judicialisation of pure politics worldwide’ (2006) 75 *Fordham Law Review* 721, 721.

³ L Keith *Political repression: Courts and the law* (2012) 2 observing that ‘the global script for state legitimacy calls for a written constitution or the equivalent, with an embedded bill of rights, democratic processes and institutions and, increasingly, a judicial check on state power to protect an internationally recognized set of rights’.

⁴ Shapiro and Stone (note 1 above) 136.

⁵ As at 2008, 158 of the 191 constitutional systems in the world include some formal provision for constitutional review – see T Ginsburg ‘The global spread of constitutional review’ in K Whittington *et al* (eds) *Law and politics* (2008) 81 & 87. For a tabular presentation of constitutional review systems around the world, see A Mavric ‘Constitutional/judicial review around the world’ <http://www.concourts.net/comparison.php> (accessed 9 February 2012). Although most constitutions in the world have established constitutional review systems, there are also constitutions that include clear provisions excluding any possibility of judicial review in respect of all or a certain category of statutes. For instance, article 120 of the 1983 Constitution of the Netherlands unequivocally prohibits any form of judicial review of primary statutes and international treaties – see D Law and M Versteeg ‘The declining influence of the United States Constitution (2012) 87 *New York University Law Review* 763, 793 observing that, as of 2006, 18% of the world’s constitutions do not explicitly recognize judicial review.

The constitutionalisation of rights and the establishment of some form of constitutional review has now become part of the 'conventional wisdom of contemporary constitutional thought'.⁶ Within the African context, the Assembly of Heads of State and Government of the African Union (AU) has expressed its satisfaction with the fact that African states have progressively provided for judicial mechanisms of control over the constitutionality of laws.⁷ This expansion of the institution of constitutional review reflects the general consensus on its instrumentality to guaranteeing fundamental rights and building, maintaining and reinforcing constitutional democracy.⁸ The power of constitutional review tilts the balance of power in favour of constitutional adjudicators.⁹ As a result, the role of constitutional adjudicators in shaping and influencing decisions on important constitutional and policy issues has been augmented. Constitutional adjudicators in all kinds of states, including authoritarian states, actively decide issues of enormous social, economic and political significance.¹⁰

The Ethiopian Constitution was adopted in 1994 and entered into force in 1995.¹¹ The Constitution was drafted and adopted under the dominant, if not the sole, tutelage of the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) – a coalition of 'independent' ethnically-based political parties that ousted the Derg communist regime in 1991. Paul notes that 'none of the political and ethnic forces

⁶ R Hirschl *Towards juristocracy: The origins and consequence of the new constitutionalism* (2004) 2. A cursory assessment of the institutional and procedural design of constitutional review in different parts of the world reveals an interesting variety. Depending on the organ in charge of constitutional review, constitutional review can be 'centralised' (European or Kelsenian), where only one court exercises constitutional review, or diffused (American) where all courts exercise constitutional review. Constitutional review can be 'concrete' or 'abstract' depending on the context within which the review is conducted. In concrete review, review may only be conducted in relation to actual and continuing cases. In the case of abstract constitutional review, the constitution is interpreted to resolve constitutional issues and not disputes as such. Depending on when the constitutionality of laws can be challenged, judicial review can be classified into '*a priori*' or '*a posteriori*' review. *A priori* review is a procedure whereby a bill may be challenged after its final adoption by parliament but before its official enactment. *A posteriori* judicial review relates to a situation where the constitutionality of a law may only be an issue once the law has been officially enacted. There are also other common variations. Constitutional review can have *inter partes* effect only in relation to the actual parties and the particular case, or *erga omnes* effect on all parties, government organs, and lower courts. Constitutional systems also differ in relation to who can access constitutional adjudicators (standing rules) and in relation to which issues (jurisdiction). The appointment procedure and number of the members of constitutional adjudicators and their term of office also vary. See generally M Sachor 'Mapping comparative judicial review' (2008) 7 *Washington University Global Studies Law Review* 257; Tate (n 2 above); K Geck 'Judicial review of statutes: A comparative survey of present institutions and practices' (1965-1966) 51 *Cornell Law Quarterly* 250.

⁷ Decision on the Establishment of an African Framework for Constitutional Justice, Doc. Assembly/AU/17(XVII) Add. 5 (2010) para 4.

⁸ P Pasquino 'Constitutional adjudication and democracy. Comparative perspectives: USA, France, Italy' (1998) 11 *Ratio Juris* 38, 38 noting that constitutional control of legislation is an essential character of the constitutional state.

⁹ D Beatty 'The forms and limits of constitutional interpretation' (2001) 49 *American Journal of Comparative Law* 79, 79 observing that with the constitutionalisation of rights, 'the authority of judges has grown apace'. Hirschl talks of 'judicial empowerment' – R Hirschl 'The political origins of judicial empowerment through constitutionalisation: Lessons from Israeli's constitutional revolution' (2001) 33 *Comparative Politics* 315.

¹⁰ R Hirschl *Constitutional theocracy* (2010) 248; Hirschl (n 2 above). See also P Woods and L Hilbink 'Comparative sources of judicial empowerment' (2009) 62 *Political Research Quarterly* 745, 750 observing that 'regime type is not a significant predictor of judicial empowerment'. Constitutional adjudication is particularly associated with the protection of fundamental rights.

¹¹ Federal Democratic Republic of Ethiopia (FDRE) Constitution Proclamation no 1/1995 (FDRE Constitution).

which make the opposition to [the EPRDF] had participated in the constitutional making'.¹² Young similarly observes that

constitution-making under the EPRDF has little in common with the bargaining, trade-offs, and compromises that usually typify such processes; rather it reflects the weakness of the country's democratic institutions, the political objectives of the governing party, and its position of dominance within a state where serious opposition had been crushed or marginalised.¹³

The EPRDF was able to dominate the drafting process and determine the final content of the Constitution as it had the largest number of delegates.¹⁴ Prior to the adoption of the Constitution, the EPRDF either constructively dismissed or forcefully crushed all the major political opposition groups. After it came to power, the EPRDF saw itself as a long-term, if not eternal, political leader of the country.¹⁵

In stark departure from its predecessors, the Constitution establishes a federal form of government with regional states drawn primarily along ethnic lines. Both the federal and regional governments have their own legislative, executive and judicial organs. At the federal level, the Constitution establishes a parliamentary form of government with two chambers. The House of Peoples' Representatives (HPR), the Lower Chamber, is the principal federal legislative organ composed of members directly elected by the people. The House of Federation (HoF), the Upper Chamber, is the organ in charge of adjudicating constitutional disputes, but it also has limited legislative powers.¹⁶ The HoF is composed of representatives of nations, nationalities and peoples (ethnic groups) who are appointed by the legislative councils of the regional states.¹⁷ The legislative councils have the option to organise elections

¹² C Paul 'Ethnicity and the new constitutional orders of Ethiopia and Eritrea' in Y Ghai (ed) *Autonomy and ethnicity: Negotiating competing claims in multi-ethnic states* (2000) 189.

¹³ J Young 'Regionalism and democracy in Ethiopia' (1998) 19 *Third World Quarterly* 191, 195. See also T Vestal 'An analysis of the new Constitution of Ethiopia and the process of adoption' (1996) 3 *Northeast African Studies* 21.

¹⁴ M Ashenafi 'Ethiopia: Processes of democratization and development' in A An-Na' im (ed) *Human rights under African constitutions: Realizing the promise for ourselves* (2003) 32.

¹⁵ See EPRDF's 'Our revolutionary democratic goals and the next steps' (1993). The document outlines the long term goal of the party to unilaterally dominate Ethiopian politics and political power without losing elections even once. For a summary of the document, see 'TPLF/EPRDF's strategies for establishing its hegemony and perpetuating its rule' (1996) *Ethiopian Register* http://www.enufforethiopia.net/pdf/Revolutionary_Democracy_EthRev_96.pdf (accessed 9 November 2011).

¹⁶ The principal legislative functions of the HoF include its role in constitutional amendment and its power to determine which civil matters should be under the legislative jurisdiction of the federal or the regional states – see FDRE Constitution, articles 62(5) & (8), 105(1)(c) & 105(2)(a). The HoF is composed of representatives of ethnic groups ('nations, nationalities, and peoples'). Each ethnic group has at least one representative and an additional one more for every one million members of the ethnic group. For example, an ethnic group that has 20 million people will have 21 representatives. Although the HoF is considered as a parliamentary organ, it barely has any legislative powers. It rather acts as a superior parliament that determines the constitutionality of laws enacted by the HPR. It is also the organ in charge of resolving disputes between different government organs and between the federal and regional governments.

¹⁷ Legislative councils of the regional states (the provinces that make up the federal state) are the law-making organs of the regional states composed of members directly elected by the people.

for the purpose of electing the members of the HoF.¹⁸ In practice, so far the members of the HoF have been appointed by the legislative councils of the regional states. The Executive is headed by the Prime Minister who serves as the Head of Government and Commander-in-Chief of the armed forces. As the Head of State, the President of the country enjoys ceremonial powers and is intended to serve as a unifying figure. The Constitution vests all federal judicial powers in an independent federal judiciary.

The Constitution is the supreme law of the land.¹⁹ Any law, customary practice or a decision of an organ of the state or a public official that violates the Constitution is, therefore, invalid. To ensure its supremacy, the Constitution establishes a novel system of constitutional review. The design for constitutional review to invalidate unconstitutional measures is different from the American (diffused) or European (centralised) constitutional review models common around the world. The Constitution empowers the HoF to adjudicate ‘all constitutional disputes’.²⁰ Since members of the HoF are not legal technocrats, the Constitution establishes the Council of Constitutional Inquiry (Council), composed predominantly of legal experts, to assist the HoF in determining whether there is need for constitutional interpretation and, if so, to provide recommendations to the HoF for final decision.²¹ The role of regular courts in the constitutional adjudication process is largely limited to referring constitutional issues to the Council. Whenever a constitutional issue arises in judicial proceedings, courts must stay the proceeding before them and refer the constitutional matter to the Council. If the Council rules that there is indeed a constitutional issue, it passes its recommendations to the HoF for a final decision. The HoF is not bound by the recommendations of the Council. If the Council rules that there is no constitutional issue involved, it refers the matter back to the court that referred the matter.

The Constitution enshrines a robust catalogue of human rights encompassing ‘civil and political’, ‘economic, social and cultural’ and ‘group’ rights.²² The emphasis on human rights is reflected in the fact that the Constitution conditions the success of its socio-political objectives to the full respect and

¹⁸ FDRE Constitution, articles 62 & 84.

¹⁹ FDRE Constitution, article 9(1).

²⁰ FDRE Constitution, articles 62(2) & 83(1).

²¹ See FDRE Constitution, articles 82 – 84. The Council is composed of 11 members including the President and Vice President of the Federal Supreme Court, six legal experts with ‘proven professional competence and high moral standing’ appointed by the President of Ethiopia upon the recommendation of the HPR, and three others nominated by the HoF from among its members.

²² FDRE Constitution, Chapter three. More than one-third of the Constitution is devoted to enshrining human rights. For a discussion of the human rights provisions in the Ethiopian Constitution, see A Abebe ‘Human rights in the Ethiopian Constitution: An overview’ (2010) 3 *Journal of African and International Law* 639; T Regassa ‘Making legal sense of human rights: The judicial role in protecting human rights in Ethiopia’ (2009) 3 *Mizan Law Review* 287; G Aneme and S Yeshanew (eds) *The constitutional protection of human rights in Ethiopia: Challenges and prospects* (2009); F Nahom *A constitution for a nation of nations: The Ethiopian prospect* (1997) Chapters 8 & 9.

protection of human rights.²³ It also declares that international instruments ratified by Ethiopia form ‘part and parcel’ of the law of the land.²⁴ The human rights provisions of the Constitution must be interpreted in line with the principles recognised in international human rights instruments adopted by Ethiopia.²⁵ The Constitution is unalterable through ordinary legislative procedures. It entrenches the human rights provisions more securely than the rest of the Constitution by imposing more stringent procedures for the amendment of constitutional rights provisions.²⁶

As can be garnered from the experiences of many countries, constitutional review can play a significant role in advancing the realisation of human rights. Socio-economic rights litigation in India²⁷ and litigation relating to sexual minorities in South Africa²⁸ provide evidence of the potential role of constitutional review in ensuring the realisation of rights and the transformation of law and society.²⁹ The existence of a reasonably expansive panoply of constitutional rights in Ethiopia provides the basic normative foundation for constitutional rights litigation as a desired critical standard against which any government action or inaction – whether legislative, executive or judicial – may be tested. Nevertheless, however robust and ideal, the principles and standards that a constitution embodies, including the constraints on the democratic majority, are nonsensical unless there are independent and effective institutional arrangements to ensure that the constraints actually shape the behaviour of

²³ The Constitution articulates the common objective of ‘building a political community founded on the rule of law and capable of ensuring a lasting peace guaranteeing a democratic order’. It notes that ‘the full respect for individual and people’s fundamental rights’ is a foundational principle and condition-precendent for the success of this ambitious objective – FDRE Constitution, preamble, paras 1, 2, & 5.

²⁴ FDRE Constitution, article 9(4). Ethiopia has ratified several international human rights instruments including the African Charter on Human and Peoples’ Rights (African Charter, ratified 15 June 1998), the International Covenant on Civil and Political Rights (ICCPR, ratified 11 June 1993), and the International Covenant on Economic, Social and Cultural Rights (ICESCR, ratified 11 June 1993).

²⁵ FDRE Constitution, article 13(2).

²⁶ FDRE Constitution, article 105. The human rights provisions of the Constitution may only be amended when all the legislative councils of the regional states approve the proposed amendment; and when the HPR and the HoF, in separate sessions, approve the proposed amendment by a two-third majority vote. Other provisions of the Constitution may be amended if: the HPR and the HoF, in a joint session, approve the amendment by a two-third majority vote, and when two-third of the legislative councils of the regional states (six out of nine) approve the proposed amendment by majority vote. Note, however, that under the current political realities, these procedural safeguards do not provide the intended constraint as the ruling Ethiopian People’s Revolutionary Democratic Front (EPRDF) masters more than 99% of the federal parliamentary seats after the sycophantic May 2010 elections. There has been a similar dominant trend since the first Ethiopian multi-party elections in June 1995. For a discussion of the amendment procedure and its implications to human rights, see Abebe (n 22 above) 662 – 664.

²⁷ P Bhagwati ‘Judicial activism and public interest litigation’ (1984-1985) 23 *Columbian Journal of Transnational Law* 561; J Balakrishnan ‘Growth of public interest litigation in India’ (2008) (Address at the Singapore Academy of Law, Fifteenth Annual Lecture) [http://supremecourtindia.nic.in/speeches/speeches_2008/8\[1\].10.08_singapore_-_growth_of_public_interest_litigation.pdf](http://supremecourtindia.nic.in/speeches/speeches_2008/8[1].10.08_singapore_-_growth_of_public_interest_litigation.pdf) (accessed 9 February 2011).

²⁸ I Currie and J de Waal *The bill of rights handbook* (2005) 25; S Woolman *et al* (eds) *Constitutional law of South Africa* (2007) 35-64 – 35-69.

²⁹ For a discussion on the role constitutional rights litigation can play, see Chapter two, section two.

constitutionally bound actors and that any violations are addressed and reversed.³⁰ Unless properly given meaning and enforced through a 'puissant judiciary', constitutional rights will remain 'printed futility'.³¹ The organs entrusted with the power of constitutional review have a real burden of facilitating the realisation of rights, particularly in aspiring and emerging constitutional democracies in Africa.³² Constitutional review mechanisms play an important role in ensuring that the limits on the exercise of government power are given effect.³³

However, in Ethiopia, despite the existence of justiciable constitutional rights, the constitutional review system has not played much of a role in constraining government power. The situation in Ethiopia has been characterised by the dominance of the EPRDF and, increasingly, the narrowing of political space. Currently, Ethiopia can best be described as an electoral authoritarian state.³⁴ Since the dawn of democracy and multi-party politics in 1991, Ethiopia witnessed a slow transition towards democracy. The early years of transition were characterised by great optimism about respect for the rule of law and human rights.³⁵ Since the entry into force of the Constitution, there have been four national elections at the federal level, in 1995, 2000, 2005 and 2010.³⁶ The 2005 elections were praised for being the most contested elections in Ethiopian history. Significantly, during the 2005 elections the opposition won more than 170 of the 547 HPR seats, a major improvement over the 2000 elections where the opposition won only 12 seats. The 'openness and dynamism' that preceded the 2005 elections was 'unprecedented'.³⁷

³⁰ For a detailed discussion of the main factors that determine the success of constitutional review, see Chapter two, section three.

³¹ V Iyer *Justice at the crossroads* (1992) 59.

³² N Udombana 'Interpreting rights globally: Courts and constitutional rights in emerging democracies' (2005) 5 *African Human Rights Law Journal* 47, 55.

³³ Issachnaroff identifies two major justifications for the idea of constitutionalism and constitutional review: to protect individual and minority rights including against majoritarian will, and also to ensure that 'majorities can change, that the rules of the [democratic] game remain fair, and that those elected remain accountable to the electorate' – S Issachnaroff 'Constitutionalizing democracy in fractured societies' (2003/2004) 82 *Texas Law Review* 1861, 1862 – 1863. The purpose of this thesis is to critically assess whether the current Ethiopian constitutional review system can ensure that individual and minority rights are not abridged at a stroke of legislation and that temporary majorities are constrained from enacting laws to entrench themselves to the disadvantage of other competitor political forces.

³⁴ L Aalen and K Tronvoll 'The 2008 Ethiopian local elections: The return of electoral authoritarianism' (2009) 108 *African Affairs* 111.

³⁵ S Pausewang *et al* (eds) *Ethiopia since the Derg: A decade of democratic pretension and performance* (2002) 1 – 25.

³⁶ According to articles 54(1) and 58(3) of the FDRE Constitution, elections must be organised every five years to elect members of the HPR.

³⁷ J Abbink 'Discomfiture of democracy? The 2005 election crisis in Ethiopia and its aftermath' (2006) 105 *Africa Affairs* 173, 181. See also K Tronvoll 'Ambiguous elections: The influence of non-electoral politics in Ethiopian democratisation' (2009) 47 *Journal of Modern African Studies* 449, 454 noting that '[d]uring the electoral process, the electorate witnessed an unprecedented context of openness and plurality of political opinions through campaigning and broadcast through public media'.

Alas, the 2005 elections ended fatally due to the post-election violence that claimed more than 200 lives. The elections were followed by the harassment, prosecution and punishment of the major critical voices including mainly opposition party members, journalists and human rights defenders.³⁸ The gains of the first decade of democratic transition have since been reversed and democratic space is narrowing.³⁹ Since the 2005 elections, the human rights situation in Ethiopia has deteriorated as a result of both illegal and clandestine harassment, as well as legal harassment based on a series of laws that have legalised restrictive policies and ideologies of the government. Several laws, such as the Media law,⁴⁰ Election Law,⁴¹ Anti-Terrorism Law,⁴² and the CSO Law,⁴³ which have severely restricted constitutional rights, have been adopted. The enactment of these laws has legalised the authoritarian tendencies of the government in what can be characterised as rule *by law*.⁴⁴ The landslide electoral

³⁸ For a detailed discussion of the post-election violence and trials following the 2005 elections, see Amnesty International 'Ethiopia: Prisoners of conscience on trial for treason: Opposition party leaders, human rights defenders and journalists' (May 2006) <http://www.amnesty.org/en/library/asset/AFR25/013/2006/en/d1ce45d9-d43e-11dd-8743-d305bea2b2c7/afr250132006en.pdf> (accessed 10 April 2012). Most of the opposition leaders were convicted although they were later pardoned by the President of the country after publicly apologising to the government and peoples of Ethiopia.

³⁹ Clapham observes that the Ethiopian ex-Prime Minister, Meles Zenawi, 'officially adopted market liberalism as an economic ideology, [but] his approach to politics is thoroughly Marxist' – C Clapham 'Ethiopian development: The politics of emulation' (2006) 44 *Commonwealth and Comparative Politics* 108, 116.

⁴⁰ Freedom of the Mass Media and Access to Information Proclamation no 590/2008. The law criminalises, among others, criticism of public officials as an aggravated form of defamation.

⁴¹ Electoral Law of Ethiopia Amendment Proclamation no 532/2007, and the Revised Political Parties Registration Proclamation no 573/2008. These laws highly restrict, among others, access to resources of political parties and ban anonymous donations of funds to political parties.

⁴² Anti-Terrorism Proclamation no 652/2009. This law criminalises, among others, any form of publication that is 'likely' to directly or indirectly 'encourage' terrorism. The law also allows gathering information through surveillance and interception of all forms of communication. Such information obtained through surveillance and interception must be kept in secret. It is, therefore, inaccessible to suspected terrorists. The law also authorises arrest without court warrant and the remanding of suspects of acts of terrorism for up to four months without charge. Once charged with terrorism, suspects cannot be released on bail.

⁴³ Charities and Societies Proclamation no 621/2009. The most restrictive aspect of this law relates to the prohibition on activities related to human rights and democratisation issues if a CSO receives more than 10% of its funds from 'foreign' sources.

⁴⁴ For a discussion of rule *by law* in Ethiopia, see A Abebe 'Rule *by law* in Ethiopia: Rendering constitutional limits on government power nonsensical' (April 2012) *CGHR Working Paper 1*, Cambridge: University of Cambridge Centre of Governance and Human Rights. Rule *by law* is a situation where governments use the law to govern, whether or not the law complies with constitutional rights or other higher law requirements. In rule *by law*, 'law is amoral and an instrument of power' – an instrument of maintaining and strengthening power; power controls law and not the other way round. Rule *by law* is procedural in the sense that any law that is made following established procedures is considered valid regardless of its consequences or implications. Rule *of law*, on the other hand, represents a case where governments rule based on laws that comply with constitutional or other higher law standards. 'Although no canonical formula exists for the rule of law, a moral ideal lies at the core'. Rule of law requires that laws comply with certain substantive requirements in addition to the procedural requirements of making laws – see generally A Bedner 'An elementary approach to the rule of law' (2010) 2 *Hague Journal on the Rule of Law* 48; K Winston 'The internal morality of Chinese legalism' (2005) 2 *Singapore Journal of Legal Studies* 313; B Tamanaha *On the rule of law: History, politics and theory* (2004).

victory for the ruling EPRDF in May 2010, which has effectively created a de facto one party-state, is directly attributable to these laws.⁴⁵

In Ethiopia, the executive exercises enormous and untrammelled powers. The legislature merely serves as ‘a façade of legitimacy for party and executive decisions’, decisions that are detached from society and with inconsequential civil society participation and influence.⁴⁶ The parliamentary form of government that the Constitution establishes further strengthens the power of the executive and blurs the distinction between the executive and legislature.⁴⁷ In practice, the EPRDF strictly adheres to the principle of democratic centralism whereby the politburo, the party Executive Committee, takes all the important decisions. Prime Minister Meles Zenawi served as the head of government between 1991 and 2012 as there are no term limits on the position of the Prime Minister.⁴⁸

The measures taken after the unprecedentedly competitive 2005 elections including mainly the establishment of elaborate administrative structures of control, and the enactment of repressive laws targeting the media, opposition political parties, CSOs and human rights advocates have led scholars to conclude that Ethiopia has ‘returned firmly into the camp of authoritarian regimes’.⁴⁹ After the 2005 elections, Ethiopian ‘has undergone a markedly negative political development, severely undermining liberal values and the politics of plurality in the country’.⁵⁰ The unprecedented openness that preceded the 2005 elections transpired into an unprecedented restriction leading to ‘not more democracy, but

⁴⁵ The EPRDF won 99.6% the seats in the HPR. See K Tronvoll ‘The Ethiopian 2010 federal and regional elections: Re-establishing the one-party state’ (2010) 110 *African Affairs* 121, 132 attributing the results of the 2010 elections to, among others, a set of ‘restrictive legislative acts imposing severe limitations on freedom of expression and organisation’.

⁴⁶ M Wolde ‘A critical assessment of institutions, roles and leverage in public policymaking: Ethiopia, 1974-2004’ unpublished PHD thesis, University of Stellenbosch, 2005 iii. Absolute executive dominance similarly characterised the two previous regimes.

⁴⁷ A parliamentary form of government is a system where the head of the executive or government is elected by and from members of parliament rather than independently and directly by the people. Moreover, members of parliament may be appointed Ministers (cabinet members). Theoretically, parliamentary systems of government provide lesser checks and balances on power than presidential systems as in the latter case one is not part of or otherwise subject to the other.

⁴⁸ Some have described the Prime Minister as a ‘benevolent dictator’ – W Easterly ‘Benevolent autocrats’ (May 2011) <http://williameasterly.files.wordpress.com/2011/05/benevolent-autocrats-easterly-2nd-draft.pdf> (accessed 25 August 2011). Given that the Constitution clearly imposes two term limits on the position of the President, who serves as the Head of State, the absence of term limits on the position of the Prime Minister was a deliberate omission. Zenawi indicated that the absence of term limits is in line with the parliamentary form of government the Constitution establishes. Zenawi died in August 2012. Following the election of Hailemariam Desalegn as the new Prime Minister, the EPRDF has announced that it has imposed two five-year-term-limits on all ministerial positions including the Prime Minister. However, the term limits are mere internal party rules. The limits have not been included in the Constitution.

⁴⁹ See generally L Aalen and K Tronvoll ‘The end of democracy? Curtailing political and civil rights in Ethiopia’ (2009) 36 *Review of African Political Economy* 193. For some, the authoritarian tendency of the EPRDF regime is inherited from the previous regimes – see R Kasleder ‘Semi-authoritarianism: The case study of Ethiopia’, unpublished MA thesis, College of Graduate Studies and Research, University of Saskatchewan, 2011.

⁵⁰ K Tronvoll ‘Ambiguous elections: The influence of non-electoral politics in Ethiopian democratisation’ (2009) 47 *Journal of Modern African Studies* 449, 469.

more authoritarianism'.⁵¹ The cumulative effect of several restrictive laws and policies and the sole control and use of state-owned media have enabled the government to monopolise the public sphere without any meaningful alternatives.

Ethiopia was classified as 'partly free' in the 2010 *Freedom in the World Index* published by Freedom House.⁵² According to the 2011 Report, however, the freedom status plummeted to 'not free' for the first time since 1995, showing a decline in the enjoyment of political rights.⁵³ The regression is particularly attributable to the suppression of civil and political rights before and after the 2010 elections including based on the repressive laws. The Mo Ibrahim Foundation ranked Ethiopia thirty-fourth out of 51 states in Africa in its 2011 *Ibrahim Index of African Governance* – thirty-eighth in the sub-categories of 'safety and rule of law', and 'participation and human rights'.⁵⁴ In its 2010 *Democracy Index*, *The Economist* classified Ethiopia as one of the 55 'authoritarian' regimes in the world, a regression from the 'hybrid' status in 2008.⁵⁵

⁵¹ Aalen and Tronvoll (n 49 above) 194. They conclude that '[t]he journey from instrumentalised liberalisation ahead of the 2005 election to outright repression and legalisation of restrictive policies after the contested polls of that year show that Ethiopia is not on its way towards democracy; but is confirming its place among authoritarian regimes' – 203.

⁵² Freedom House 'Freedom in the World in 2010: Erosion of freedom intensifies – Table of Independent Countries' http://www.freedomhouse.org/uploads/fiw10/FIW_2010_Tables_and_Graphs.pdf (accessed 26 October 2010). Freedom House uses three broad categories to classify states and territories: 'free', 'partly free' and 'not free'. 'Free' represents an average score of 1 – 3 and signifies broad scope for open political competition including whether voters have the right to change their rulers through regular, fair and free elections, a climate of respect for civil liberties, significantly independent civic life, and independent media. 'Partly free' represents an average score of 3 – 5.5 and signifies limited respect for political rights and civil liberties. 'Partly free' states frequently suffer from an environment of corruption, weak rule of law, ethnic and religious strife, and often a setting in which a single political party enjoys dominance despite the façade of limited pluralism. 'Not free' represents an average score of 5.5 – 7 and signifies a situation where basic political rights are absent, and civil liberties are widely and systematically denied. The highest a country scores, the lowest level of freedom; the lowest it scores, the better – 1 represents most free and 7 least free countries. The *Freedom in the World* survey is released annually. It is one of the most widely accepted and reliable yardsticks to assess progress towards constitutionalism and full-fledged democracy.

⁵³ Freedom House 'Freedom in the World 2011: The authoritarian challenge to democracy' http://www.freedomhouse.org/images/File/fiw/FIW%202011%20Booklet_1_11_11.pdf (accessed 17 January 2011). This is the first time Ethiopia has been classified as 'not free' by Freedom House since 2002. Even after the violent 2005 elections, Ethiopia was classified as 'partly free' in the 2006 Freedom in the World Index – Freedom House 'Freedom in the World – Ethiopia (2006)' <http://www.unhcr.org/refworld/docid/473c555749.html> (accessed 18 August 2011).

⁵⁴ Mo Ibrahim Foundation 'The Ibrahim Index' <http://www.moibrahimfoundation.org/en/section/the-ibrahim-index> (accessed 10 December 2011).

⁵⁵ The Economist Intelligence Unit 'Democracy Index 2010: Democracy in retreat' http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy_Index_2010_Web.pdf&mode=wp (accessed 12 December 2011). According to the Report, Ethiopia has become more authoritarian in 2010 compared to 2008. Ethiopia's ranking dropped from 105 to 118 'reflecting the regime's crackdown on opposition activities, media and civil society'. The Economist Intelligence Unit's Index of Democracy is based on five categories: electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture. Countries are placed within one of four types of regimes: full democracies; flawed democracies; hybrid regimes; and authoritarian regimes.

Since 2005, political freedom in Ethiopia is shrinking and the democratic gains since the inception of the transition to democracy in 1991 are being reversed.⁵⁶ Currently, Ethiopia has a hegemonic party system where elections merely serve as facades of authoritarianism, 'in which a relatively institutionalized ruling party monopolizes the political arena, using coercion, patronage, media control, and other means to deny formally legal opposition parties any real chance of competing for power'.⁵⁷ More than 17 years down the line under the Constitution, 'the democratization process has not resulted ... in the political institutionalization of democracy'.⁵⁸

While constitutional review has been used to challenge legislative and executive measures and ensure the realisation of human rights in many countries, including some in Africa, its role in Ethiopia has been insignificant. Despite the adoption of repressive laws and executive measures, the constitutional review system has not been relied on.⁵⁹ Although the laws targeting political parties, CSOs, human rights advocates and the media have been described as the most restrictive, none of them has so far been challenged as unconstitutional. The constitutional adjudication system in Ethiopia has not been able to actively engage constitutional rights. It is consequently very difficult to identify successful constitutional rights cases and even cases that were considered on the merits at all. Indeed, more than 17 years since the Constitution entered into force in 1995, the total number of constitutional cases submitted to the Council has been insignificant. In fact, there have only been two successful constitutional challenges so

⁵⁶ Abbink (n 37 above) 173 observing that there is a relapse into centralist authoritarian tendencies and linking the trend to the authoritarian political tradition and heritage, elite rule and patronage in Ethiopia inherited from the previous regimes; S Pausewang 'Political conflicts in Ethiopia – in view of the two faced Amhara identity' in S Ege *et al* (eds) *Proceedings of the 16th International Conference of Ethiopian Studies* (2009) 549 observing that after the 2005 elections 'the process of democratisation, which made generally acclaimed progress until days before the election, seems to be seriously reversed'; Tronvoll (n 45 above) 132 concluding, after considering the results of the 2008 and 2010 elections, that Ethiopia has effectively re-established the one-party state. The reversal is especially visible after the 2005 elections – see, for instance, European Union Election Observation Mission 'Final Report: House of Peoples' Representatives and State Council Elections, May 2010' <http://fr.allafrica.com/download/resource/main/main/idatcs/00020329:1ca36540c3dfc9b90fe80b88e2275f1c.pdf> (accessed 9 January 2011) noting that 'the changes in the legal framework together with the fragmentation of the main opposition forces in the aftermath of the 2005 elections, as well as the imprisonment of leading opposition figures and the departure in exile of one opposition leader, resulted in a cumulative narrowing of the political space within the country'; Human Rights Watch 'One Hundred ways of putting pressure: Violations of freedom of expression and association in Ethiopia' (2010) <http://www.hrw.org/en/reports/2010/03/24/one-hundred-ways-putting-pressure> (accessed 5 January 2011); Freedom House 'Freedom in the World: Country Reports: Ethiopia (2010)' <http://www.freedomhouse.org/template.cfm?page=22andyear=2010andcountry=7821> (accessed 9 January 2011) noting that the Ethiopian government has 'bolstered restrictions on political activity'; Human Rights Watch 'Development without freedom: How aid underwrites repression in Ethiopia' (19 October 2010) <http://www.unhcr.org/refworld/docid/4cbd2fce2.html> (accessed 5 January 2011); M Chebsi 'Ethiopia: Political space narrowing' *International Press Service* (12 January 2009) <http://www.ipsnews.net/africa/nota.asp?idnews=45382> (accessed 9 January 2011) noting frustrations that 'gaining power through the ballot box is impossible' and that 'the fear is that a growing number may instead consider following the route of armed struggle'.

⁵⁷ G Sartori *Parties and party systems: A framework for analysis* (1976) 230 – 238.

⁵⁸ Abbink (n 37 above) 196.

⁵⁹ Regassa (n 22 above) 327.

far – one relating to language requirements to stand for elections and another relating to the subjection of a woman without her consent to the jurisdiction of religious courts.⁶⁰

All the other contentious constitutional cases have been struck out on procedural grounds and lack of need to interpret the Constitution. The Council found the need for constitutional interpretation only in a handful of cases.⁶¹ It has rejected constitutional claims relating, among others, to the right to bail,⁶² suspension of rights during emergencies,⁶³ and jurisdictional ouster clauses.⁶⁴ The Council has so far referred only three cases for final determination to the HoF.⁶⁵ Although many of the cases challenged the constitutionality of laws, no law has so far been declared unconstitutional. Simply stated, despite the adoption of several potentially unconstitutional laws, policies and other measures that constrain political space and outlaw dissent, and the increasingly authoritarian tendency of the government, the number of constitutional challenges has been significantly low. The constitutional history of Ethiopia since the adoption of the Constitution has been as if a system of constitutional review did not exist. The problem is that the constitutional review system has failed to protect human rights.

2. Research questions

The main problem this thesis addresses is the absence of meaningful constitutional adjudication amidst the violation of constitutional rights in Ethiopia. It assesses whether constitutional review can narrow the gap between rhetorical constitutional rights guarantees and their realisation in practice by invalidating unconstitutional laws, policies and other government decisions and practices. The thesis

⁶⁰ *Benishangule Gumuz* case, House of Federation (March 2003); *Kedija Beshir* case, House of Federation (May 2004) – see the House of Federation of the Federal Democratic Republic of Ethiopia (July 2008) 1 *Journal of Constitutional Decisions* 14 – 34 & 35 – 41 respectively.

⁶¹ For a discussion on selected cases, see G Kassa ‘Mechanisms of constitutional control: A preliminary observation of the Ethiopian system’ (2007) 20 *Africa Focus* 75, 88. In all the cases submitted since 2007, the Council ruled that there was no need for constitutional interpretation. No constitutional case has been referred by the Council to the HoF for final decision since 2007.

⁶² Case concerning the constitutionality of the law that excluded bail in corruption offences, Council of Constitutional Inquiry (2004) (on file with author). In this case, the Council dismissed a challenge to the constitutionality of a law that automatically precluded bail in relation to all corruption offences.

⁶³ Emergency declaration case, Council of Constitutional Inquiry (14 June 2005) (on file with author). In this case, the Council ruled that the Prime Minister has the power to declare a state of emergency, without the need for approval from the Council of Ministers, and that the determination of whether the facts that justified the emergency actually exist is made solely by the Prime Minister.

⁶⁴ Case concerning the validity of ouster clauses, Council of Constitutional Inquiry (10 February 2009) (on file with author). The Council ruled that in a parliamentary form of government, the legislature has the right to limit the jurisdiction of courts, and, hence, jurisdictional ouster clauses do not violate the right to access to justice or any other provision of the Constitution.

⁶⁵ The Council has been criticised for arrogating the legitimate powers of the HoF by rejecting cases for lack of need for constitutional interpretation but nonetheless interpreting the Constitution. The Council generally confuses the lack of need for constitutional interpretation and a finding that there is no constitutional violation. As a result, it does not refer to the HoF the ‘no violation’ decision for confirmation – T Bulto ‘Judicial referral of constitutional disputes in Ethiopia: From practice to theory’ (2011) 19 *African Journal of International and Comparative Law* 99, 119 – 120.

explores the existence of the preconditions for successful constitutional review and identifies the challenges in the constitutional review system in Ethiopia. It considers how a climate for effective constitutional rights litigation can be forged. Within these broad themes, the thesis answers the following specific questions:

1. What are the basic normative and institutional preconditions that determine the prospect of success of constitutional review in ensuring the realisation of rights?
2. To what extent is the constitutional review system in Ethiopia appropriate for the effective realisation of human rights?
3. To what extent does the counter-majoritarian character of judicial review justify the Ethiopian constitutional review system?
4. What is the role of ordinary courts in interpreting the Constitution and ensuring the realisation of constitutional rights in Ethiopia?
5. What factors have impeded the active resort of CSOs, opposition groups and human rights advocates to constitutional review in Ethiopia?
6. Which theory of constitutional review best explains the original design, and retention, of the novel Ethiopian constitutional review system?

The thesis identifies and analyses the potential and actual impediments that have undermined the success of constitutional review in ensuring the realisation of human rights in Ethiopia. It investigates why the constitutional review system has failed to ensure the realisation of human rights and inquiries whether the basic conditions for constitutional review are present in Ethiopia. It provides a normative assessment of whether the constitutional adjudication system is able to provide an independent and effective forum to discharge its counter-majoritarian functions by purging laws that violate constitutional rights, or whether it is designed to reinforce and legitimise the exercise of political power. In short, the thesis investigates what can and should be done to create a more favourable environment to boost the prospect of success of constitutional review in ensuring the realisation of human rights.

Exploring the role of constitutional review in the realisation of human rights is particularly significant in the Ethiopian context. Due to the parliamentary form of government the Constitution establishes, which ensures that the highest members of the executive are elected from and represent the political group which has the majority in the legislature, there are no real checks and balances or other effective control mechanisms operating between the legislative and executive organs. Moreover, the political party under whose control the Constitution was adopted has continued to dominate all the political organs. The Ethiopian legislative organs merely serve as 'legitimising houses' rubber-stamping the ideologies

and policy preferences of the ruling party politburo.⁶⁶ Indeed, while it is common that parliaments do not often initiate major legislative proposals, compared to other African parliaments, the Ethiopian Parliament has never initiated any consequential legislative proposals, nor has it rejected or even substantively modified any legislative initiative by the executive. It is exceptional for a parliament never to substantively modify legislative proposals tabled by the executive. Due to the restrictive political environment in Ethiopia, which also makes the rise of broad-based social movements difficult, constitutional review provides the only peaceful mechanism to challenge government decisions.⁶⁷

Under the Ethiopian Constitution, the power to enact federal statutes is entrusted solely to the HPR, without any potential veto from any other institution.⁶⁸ The Ethiopian legislative and executive bodies are disproportionately dominated by the ruling political party and its affiliates.⁶⁹ As the political organs act in cahoots with, rather than as check and balances over each other, only an independent and effective constitutional adjudicator can serve as the guardian of constitutional rights and as a bulwark against legislative and executive excess. Moreover, the likelihood of the current ruling party losing political control is slim. There is, therefore, a need to focus on controlling legislative and executive measures from a constitutional perspective. Piecemeal constitutional attacks on governmental measures that do not immediately threaten the foundations of the ruling party should be given more attention. The continued dominance of the political organs by a single group makes constitutional review not only the most effective but also the only alternative for Ethiopians seeking to enforce their rights and restrain the political majority from violating constitutional rights, including through the use of law. Studying the Ethiopian constitutional adjudication system to assess its potential in counterbalancing the decisions of legislative and executive organs is, therefore, important.

The Ethiopian government so far has a policy of avoiding submission to individual complaints mechanisms in international and regional human rights treaty bodies. The only exceptions are the

⁶⁶ Wolde (n 46 above) 258 & 262.

⁶⁷ Moustafa observes that due to the authoritarian and corporatist political environment that characterised Egypt in the 1980s and 1990s, the initiation of broad social movements became almost impossible. In such an environment, litigation provided the only opening to challenge the state – T Moustafa ‘Law and resistance in authoritarian states: The judicialisation of politics in Egypt’ in T Ginsburg and T Moustafa (eds) *Rule by law: The politics of courts in authoritarian regimes* (2008) 151. It should, however, be noted that the revolutions in 2010 – 2011 in North Africa indicate that broad-based social movements can happen even in very constrained environments in stable authoritarian regimes.

⁶⁸ Constitutions may establish different veto points within the state structure to prevent the enactment of laws and other measures that violate human rights and other constitutional limits. In the US, for instance, the Constitution establishes at least three veto points where the Senate, House of Representatives and the President of the Republic can veto legislation that is, *inter alia*, considered in violation of the Constitution. On top of this, US courts are allowed to expunge a law they consider unconstitutional, even when the law has passed all the other veto points.

⁶⁹ The Ethiopian federal parliament has been disproportionately controlled by the EPRDF and its allies – 82.9% (1995), 87.9% (2000), 66% (2005), and 99.6% (2010).

African Commission on Human and Peoples' Rights and the African Committee on the Rights and Welfare of the Child, under which individuals automatically have a right of recourse to the regional level once domestic remedies have been exhausted.⁷⁰ However, it should be taken into account that both these organs only have recommendatory powers. As a result, resort to supranational human rights judicial or quasi-judicial organs is not a real option.⁷¹ Investigating the role of the domestic constitutional review system in ensuring the realisation of human rights is, therefore, significant.

The focus on constitutional adjudication should not be seen as undermining the role of other non-state actors such as CSOs, opposition parties, the media and other domestic and international actors. However, the weakness of domestic actors in Ethiopia means that their views are barely taken into account by the ruling party. In fact, most of the legal harassment is targeted at weakening these institutions. Moreover, the impact of international pressure on Ethiopia has been insignificant due to Ethiopia's strategic relevance to Western States in the fight against extremism and terrorist cells in the horn of Africa.⁷² Nevertheless, given that CSOs and opposition political parties are the principal litigation support structures for constitutional review, the thesis devotes a separate chapter to discuss their role and the challenges they face in advancing human rights through constitutional review.

⁷⁰ So far, all the cases submitted to the African Commission on Human and Peoples' Rights against Ethiopia were rejected on procedural grounds. For a list of cases in the African Commission against Ethiopia, see <http://caselaw.ihrda.org/acmhpr/search/?c=45> (accessed 6 February 2012). It should also be noted that, although remote, there is a possibility to resort to the Common Market for Eastern and Southern Africa (COMESA) Court of Justice to challenge laws and practices in Ethiopia based on article 6(e) of the COMESA Treaty, which endorses as one of the fundamental principles 'the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'. Ethiopia is a state party to the COMESA Treaty.

⁷¹ Given the subsidiary nature of international and regional human rights bodies, there is always a need to focus on the domestic human rights system as the primary means of ensuring the realisation of human rights. It is in recognition of this primacy of domestic law and litigation that recent research is increasingly focusing on how to strengthen the capacity, *inter alia*, of domestic judicial mechanisms and ensuring that domestic courts and tribunals apply international human rights standards rather than merely looking up to international and regional entities for review in individual cases – in the African context, see M Killander (ed) *International law and domestic human rights litigation in Africa* (2010); see also the Oxford Reports on International Law in Domestic Courts at www.oxfordlawreports.com. However, it should be clear that this thesis is not belittling the potential opportunities international and regional treaty bodies offer to the realisation of human rights. In fact, international tribunals present an opportunity to complement the protection of human rights at the domestic level. Any international decision that finds a violation is an improvement over the domestic understanding of a particular right. International tribunals are more progressive or liberal than domestic courts as more often than not, international tribunals find a violation in cases where the highest domestic court did not find a violation. This is particularly so as states cannot approach international tribunals to challenge progressive decisions of their own highest courts.

⁷² See A Borchgrevink 'Limits to donor influence: Ethiopia, aid and conditionality' (2008) 2 *Forum for Development Studies* 195 observing that donors have failed to influence the Ethiopian government. The West considers Ethiopia a stable strategic ally in the war against terrorism and extremism in the Horn of Africa. This has enabled Ethiopia to continue to receive large amounts of money in foreign aid and loan from the international community regardless of its poor human rights record and the increasingly authoritarian tendencies of the government.

3. Literature review

Constitutional adjudicators around the world play significant roles in the realisation of human rights. Constitutional review characterises contemporary constitutions,⁷³ particularly in states where the protection of human rights has been constitutionally entrenched and in federal states.⁷⁴ It has become an important tool to ensure the realisation of human rights and other constitutional limits.⁷⁵ The role of constitutional review is particularly important in protecting ‘discrete and insular minorities’ and individual rights.⁷⁶ Independent constitutional review systems are often associated with ‘greater freedom’.⁷⁷ With increasing constitutionalisation of rights, constitutional adjudicators have been empowered to decide ‘core political controversies that often define and divide whole polities’.⁷⁸ As a result, constitutional review has become an attractive strategy for CSOs, human rights advocates and opposition groups around the world.⁷⁹

Despite its worldwide recognition and practice, the role of constitutional review in ensuring the realisation of human rights in Ethiopia has been insignificant. Charles Epp has identified the minimum conditions that determine the realisation of a ‘rights revolution’ through constitutional review.⁸⁰ The prospect of success of constitutional review in ensuring the realisation of human rights depends on the existence of certain factors, namely, (1) justiciable constitutional rights, (2) an independent and activist constitutional adjudicator, and (3) potential litigants that constitute the ‘support structure for legal mobilization’. The politico-legal context necessarily influences the existence of these preconditions. Although these conditions were identified within the context of the US and other democratic states, they can be extrapolated to any jurisdiction. This thesis is intended to explore the (non)existence of these normative and institutional preconditions within the Ethiopian context with a view to explain the so far insignificant role of constitutional review in Ethiopia.

⁷³ Hirschl (n 2 above); M Cappelletti *The judicial process in comparative perspective* (1989) 4. Cappelletti notes that ‘one of the forceful reasons for the expansion of the scope of judicial review is the trend towards the adoption and judicial enforcement of declarations of fundamental rights’.

⁷⁴ W Newman ‘Standing to raise constitutional issues in Canada’ in S Kay (ed) *Standing to raise constitutional issues: Comparative perspectives* (2005) 195 noting that the capacity to challenge the validity of state action before the courts of the land is one of the cornerstones of modern constitutionalism.

⁷⁵ E Chemerinsky ‘Losing faith: America without judicial review?’ (2000) 98 *Michigan Law Review* 1416.

⁷⁶ J Ely *Democracy and distrust: A theory of judicial review* (1980).

⁷⁷ R La Porta *et al* ‘Judicial checks and balances’ (2004) 112 *Journal of Political Economy* 445.

⁷⁸ Hirschl (n 10 above) 248.

⁷⁹ ‘Introduction’ in ‘Litigating human rights: Promise v. perils’ (2000) 2 *Human Rights Dialogue* 1 (Carnegie Council on Ethics and International Affairs).

⁸⁰ C Epp *The rights revolution: Lawyers, activists, and supreme courts in comparative perspective* (1998) 2 & 3. Epp’s book explores the role of organised human rights groups – litigation support structures – in ensuring ‘sustained judicial attention and approval for individual rights’.

The existing literature investigating the factors impeding the role of constitutional review in Ethiopia is both insufficient and incomplete. To my knowledge, no work has attempted to explain the paucity of constitutional rights adjudication in Ethiopia. There is also no work that systematically addresses the role of litigation support structures, mainly CSOs, human rights advocates, and opposition political parties, in constitutional adjudication. The issue of which organ has the power to adjudicate constitutional disputes has been discussed by some scholars. However, the focus of these works has been limited to determining the institutions in charge of constitutional adjudication to answer the question whether the Constitution has left anything regarding constitutional adjudication to ordinary courts.⁸¹ The primary focus of existing works has been to provide an interpretive description of the power of constitutional adjudication. This thesis takes the discussion further to a prescriptive vision to lift the prospect of success of constitutional review in Ethiopia. To this extent, it elevates the discussion from *what is* – which has so far been the main focus of scholars – to *what ought to be* concerning the constitutional review system in Ethiopia. The thesis is, therefore, a significant addition to the research world.

Two articles have considered whether there is need to change the institutional design for constitutional adjudication in Ethiopia.⁸² After assessing the independence and impartiality of the HoF in politically sensitive cases and its ability to effectively protect minorities, Mgbako *et al* conclude that the HoF, as a majoritarian organ, ‘has proven itself a conceptual and practical failure in constitutional adjudication’.⁸³ They recommend that a strong and reformed judiciary should assume the power of constitutional review. Fessha similarly concludes that the HoF is ‘neither institutionally suited nor competent to engage in complex constitutional debate’.⁸⁴ The main goal of Fessha’s work is to show that the granting of the power of constitutional adjudication to the HoF does not address the counter-majoritarian dilemma as the members of the HoF are not directly elected by the people. Nevertheless, the two articles do not comprehensively assess the theoretical foundations and practical implications of the Ethiopian system of constitutional review to the protection of human rights. Neither of them addresses

⁸¹ Eg Bulto (n 65 above); A Fiseha ‘Federalism and the adjudication of constitutional issues: The Ethiopian experience’ (2005) *Netherlands International Law Review* 1; I Idris ‘Constitutional adjudication under the 1994 FDRE (Federal Democratic Republic of Ethiopia) Constitution’ (2002) 1 *Ethiopian Law Review* 63. For a summary of all the major publications on constitutional adjudication in Ethiopia, see G Assefa ‘All about words: Discovering the intention of the makers of the Ethiopian Constitution on the scope and meaning of constitutional interpretation’ (2010) 24 *Journal of Ethiopian Law* 139.

⁸² Y Fessha ‘Judicial review and democracy: A normative discourse on the (novel) Ethiopian approach to constitutional review’ (2006) 14 *African Journal of International and Comparative Law* 53; and C Mgbako *et al* ‘Silencing the Ethiopian courts: Non-judicial constitutional review and its impact on human rights protection’ (2008) 32 *Fordham International Law Journal* 259.

⁸³ Mgbako *et al* (n 82 above) 294.

⁸⁴ Fessha (n 82 above) 77.

the role of litigation support structures in constitutional litigation. Moreover, both works argue or assume that courts do not have any role in constitutional interpretation. This thesis, however, identifies several mechanisms through which courts can engage in constitutional interpretation and shape the understanding of constitutional human rights.

This thesis further explores the different theories of constitutional review to explain the decision of the drafters of the Ethiopian Constitution to establish, and continue to retain, a dependent and weak constitutional review system. Political scientists have developed theories to explain why politicians establish constitutional review systems despite the fact that such systems have the potential to constrain the exercise of political power. The three principal theories are the ‘insurance’ theory, the ‘hegemonic preservation’ theory and the ‘commitment’ theory of constitutional review.⁸⁵ The first two primarily explain why politicians establish formally strong constitutional review systems. The commitment theory, on the other hand, explains decisions to establish both formally weak and strong constitutional review systems.⁸⁶ This thesis analyses whether any of these theories are applicable to Ethiopia, or whether the Ethiopian experience can help to develop a new or related theory of constitutional review. No work has attempted to explore the Ethiopian system of constitutional review from a perspective of the theories of constitutional review.

All in all, the purpose of this thesis is to uncover the reasons behind the low level of constitutional rights litigation in Ethiopia by studying the (non)existence of the necessary normative and institutional preconditions for successful constitutional review, including mainly an independent constitutional adjudication system and potential litigants. It is intended to stimulate and contribute to a constitutional reform agenda as it relates to constitutional adjudication. It aims to be the most comprehensive and original study on the potential role of constitutional review in the realisation of human rights in Ethiopia.

⁸⁵ See generally Ginsburg (n 5 above) 90 *et seq.* For a detailed discussion of these theories, see Chapter 7, section 2.

⁸⁶ The main difference between weak-form and strong-form judicial review is whether or not independent courts have the final say on the meaning of the constitution. If the decisions of constitutional adjudicators cannot be overturned by legislatures except through amending the Constitution, the judicial review system is strong-form. If, on the other hand, the legislature can overturn or revise the decisions of constitutional adjudicators through ordinary procedures or if the constitutional adjudicator is one of, or otherwise subject to, the political organs, it is a weak-form judicial review – see generally W Sinnott-Armstrong ‘Weak and strong judicial review’ (2003) 22 *Law and Philosophy* 381; M Tushnet ‘Forms of judicial review as expressions of constitutional patriotism’ (2003) 22 *Law and Philosophy* 353; M Tushnet ‘Weak-form judicial review and “core” civil liberties’ (2006) 41 *Harvard Civil Rights-Civil Liberties Law Review* 1, 3 *et seq.*

4. Assumptions

This thesis does not discuss the philosophical underpinnings of the idea of a limited government and of human rights. It takes as theoretically given the value of limited government, which is imposing restrictions on the unfettered rule of the political majority. This is a reasonable assumption as almost all constitutions around the world are designed to do just this – naturally a constitutional government is a limited government.⁸⁷ The thesis intends to discuss the role of constitutional review as one of the major strategies to ensure that the limits on government power embodied in human rights guarantees are complied with.

Similarly, the thesis assumes the desirability of constitutionalising human rights. It does not explore whether rights should be given a constitutional or higher law status. That status has been conferred on rights by the Ethiopian Constitution as normative limitations on the exercise of political power. This thesis addresses whether the Constitution also establishes effective institutional structures for constitutional review to ensure that the limitations are not abridged at a stroke of legislative or other political action.

5. Methodology

A large part of this thesis is based on desktop research. Research was conducted in Ethiopia, at the University of Pretoria, and at the Centre of Governance and Human Rights, University of Cambridge. While analysing the Ethiopian situation, the preparatory work of the Ethiopian Constitution, the Constitution, and other relevant subordinate laws were closely analysed. Relevant decisions of federal courts, the HoF and the Council were explored. Existing scholarship, mainly articles and books, were thoroughly examined. The scholarly works were selected mainly based on their relevance to answering the research questions this thesis raises.

To further strengthen the work, and hopefully extend its relevance beyond Ethiopia, the thesis employs a general comparative approach. Since the best examples on each issue may not always come from one or two states, the study draws from a variety of states on the relevant thematic issues. With a view to demonstrate the potential contributions of independent constitutional adjudicators in the realisation of human rights even in countries that are not fully democratic, the thesis discusses the experiences of

⁸⁷ Tamanaha observes that ‘the nature of limitations will vary with the society, culture, political and economic arrangements, but the need for limitations on the government will never be obsolete’ – Tamanaha (n 44 above) 101.

Ghana, Uganda and Malawi.⁸⁸ Ethiopia and these three countries adopted their constitutions during the first half of the 1990s. In the *Freedom in the World Index* issued annually by Freedom House, Uganda has been classified as ‘partly free’ since 1995; Malawi was classified as ‘free’ between 1994 and 1999 and as ‘partly free’ since 1999; Ethiopia was classified as ‘partly free’ between 1995 and 2010; in 2011, Ethiopia was classified as ‘not free’; Ghana was classified as ‘partly free’ from 1992-1996, and as ‘free’ since 1997. The cases selected from Ghana were decided during the beginning of the democratic transition in the early 1990s, as the current level of democratic governance cannot be compared to what obtains in Ethiopia. The similarity in the Freedom House categorisation of the states considered here allows for drawing conclusions based on comparable political contexts.

The decisions of the courts in the selected countries were chosen with a view to demonstrate the potential contributions of independent courts in enforcing constitutional rights. The author obviously selects cases where the courts upheld challenges against a legislative or executive action. However, the thesis does not intend to suggest that these courts have been consistent in enforcing constitutional rights. There are and will be cases where the courts fall short of protecting constitutional rights in these selected countries, and in any country for that matter. The main purpose of the discussion of the experiences in these countries is simply to show that, where there are guarantees of justiciable human rights and active litigation support structures, formally independent constitutional adjudicators have the potential to protect these rights even under unpromising political circumstances. A detailed application of the analytical framework to these countries is beyond the scope of this thesis. The analytical framework is applied in detail only in relation to Ethiopia.

In addition to desktop research, interviews with different stakeholders in Ethiopia such as CSOs, members of the judiciary and the Council of Constitutional Inquiry, opposition party leaders and academics were conducted to obtain relevant information, particularly to explore why CSOs, human rights advocates and opposition groups have not challenged some of the most repressive laws despite the dead-end in the ordinary democratic process.⁸⁹ These stakeholders were selected with a view to incorporate qualitative data based on perspectives from both the demand (those who submit constitutional complaints) as well as the supply (constitutional adjudicators) side in the constitutional review equation.

⁸⁸ For more explanation on the reasons for the selection of the three countries, see Chapter 2, section 4 below.

⁸⁹ For a full list of the interviews, see Bibliography.

The thesis attempts to follow a multi-disciplinary approach. Although it is predominantly a study in law, it draws from the findings and theories developed by political scientists. In this regard, my understanding of the different theories of constitutional review and international politics was enriched by the research visit at the Centre of Governance and Human Rights, which is based in the Department of Politics and International Studies (POLIS) of the University of Cambridge.

6. Limitations and scope of the study

This thesis is about litigation that raises the constitutionality of legislative or executive action or inaction in Ethiopia. It is not primarily concerned with litigation that in fact involves human rights issues but does not touch on the constitutionality of the impugned measures. The focus is on constitutional review. Also, although the conclusions and recommendations may have broader implications, the thesis only covers constitutional rights litigation and not constitutional adjudication involving other issues such as impeachment procedures or the division of powers between the central and regional governments in a federal state. The thesis is concerned with constitutional review where the critical constitutional standard is provided by human rights.

The thesis only addresses the Ethiopian constitutional adjudication system at the federal level. As a federal state, Ethiopia has a Constitution at the federal level with a nationwide application, while each regional state has its own constitution applicable within its boundaries. Nevertheless, the regional constitutions are drawn based on the federal Constitution. Due to the comparability of the federal constitutional review system with the systems at the regional level, the discussions in this thesis have direct relevance to those interested in the constitutional adjudication system at the regional level. Similarly, although some reference to litigation at the sub-regional, regional and international levels may be made, the work primarily focuses on the domestic constitutional review system in Ethiopia.

Moreover, this thesis is not mainly about transformative constitutional litigation. In some countries, social movements have relied on litigation with a view to redefine social relations, such as litigation against discrimination based on sex, race or colour, and sexual orientation. Some scholars have questioned the ability and willingness of courts to initiate and implement a broad social reform or transformation agenda.⁹⁰ The thesis rather focuses on the basic role of constitutional review as a means

⁹⁰ See, for instance, G Rosenberg *The hollow hope: can courts bring about social change?* (2008) 422 observing that there is little evidence that court-victories directly or indirectly bring about social change and that litigation often fails to mobilise movement constituents, positively influence public opinion, convince elites, or accelerate the pace of legislative change. See also M Klarman 'Brown, racial change, and the civil rights movement' (1994) 80 *Vanderbilt Law Review* 7.

of constraining government power and invalidating unconstitutional government decisions, which can at times result in legal and social transformation. The existence of an independent system of constitutional review necessarily precedes any transformational role that constitutional adjudicators may play. The focus of this thesis is to explore the (non)existence of the basic preconditions for successful constitutional review in Ethiopia.

The three factors that are explored in this thesis are primarily related to the legal and institutional framework for constitutional review in Ethiopia. The thesis assesses the relevance of the normative and institutional framework for constitutional review in the realisation of human rights. Obviously, the legal and institutional framework does not exist in a vacuum. They are rather embedded in certain social and political realities. Even when the legal and institutional frameworks have been perfectly crafted, the political environment may impose serious constraints on the potential contributions of constitutional adjudication. Indeed, the realisation of human rights depends, more than anything, on a favourable, or at least tolerant, political environment. Arguably, to ensure the fullest possible realisation of human rights, it is not only – or even primarily – the constraints on political power but the nature of the power itself that needs to be changed.⁹¹ This study is, however, limited in that it focuses on the legal and institutional constraints that impede the contribution of constitutional review in ensuring the realisation of human rights in Ethiopia. It does not purport to be a study about the broader political problems that Ethiopia is facing. There should be no doubt that the thesis does not imply that the constitutional review system is a panacea to the protracted political problems the country grapples with. It only addresses the constitutional institutional design that has ensured that the ruling political group does not face significant challenges to its rule. Although the political and legal context is critical and, therefore, some reference to it is unavoidable, it is beyond the scope of this study.

The decisions of Ethiopian courts as well as of the Council and the HoF are not systematically reported.⁹² As a result, accessing the decisions of ordinary courts was a major limitation in analysing the Ethiopian jurisprudence relevant for the thesis. Most importantly, the fact that there are few constitutional cases that were decided on merits can make it difficult to analyse the trend in constitutional interpretation

⁹¹ Mojekwu observes that ‘a written constitution may proclaim lofty ideals as its objectives, but without the will or ability to limit the ‘use or abuse’ of power by the power holders, such a government is unable to enforce legal restraints on the office-holders and could turn into dictatorship’ – C Mojekwu ‘Nigerian constitutionalism’ in R Pennock and J Chapman (eds) *Constitutionalism* (1979) 164 – 165.

⁹² The Cassation Division of the Federal Supreme Court has now started to publish its decisions. The Cassation Division is empowered to decide on all cases alleging basic error of law. The publications are intended to provide access to the decisions of the Cassation Division to lower courts as the decisions set binding precedents. The decisions may be accessed <http://www.fsc.gov.et/faces/indexPages/FCHomePage.jsp> (accessed 6 February 2012).

and understanding. Nevertheless, the focus of this thesis is on the institutional arrangements for constitutional review, not on constitutional interpretation in particular cases. Therefore, the limitations do not affect the findings of this research.

The temporal scope of the study covers the period between 1995, when the Constitution entered into force, and December 2011.

7. Definition of terms

‘Constitutional review’ refers to the review of a statute, regulation, directive, or administrative or judicial action for congruence with a constitution. The terms ‘judicial review’, ‘constitutional litigation’, and ‘constitutional adjudication’ are used interchangeably with constitutional review. ‘Constitutional adjudicator’ refers to the organ in charge of constitutional review, whether a centralised constitutional court or council (following the Austrian or Kelsenian model) or the regular courts (following the diffused or American model). Although there may be overlaps depending on the jurisdiction in question, this thesis distinguishes between constitutional review and ‘administrative judicial review’, which is concerned with whether the actions of government agencies are legally appropriate or constitute an abuse of discretion entrusted by law to administrative agencies.

Rights are considered ‘realised’ when constitutional review precludes the adoption of laws and other measures that violate constitutional rights or leads to the invalidation of unconstitutional laws and other measures. Constitutional rights are also ‘realised’ when the constitutional review system leads to the adoption of new laws and other measures in compliance with constitutional rights, such as after the constitutional adjudicator has expressed its views on the constitutional implications of proposed measures.

8. Overview of chapters

This thesis is presented in seven chapters. This Chapter serves to introduce the thesis and set the background for the subsequent chapters. Given the existence of a robust bill of rights and the supremacy of the Constitution in Ethiopia, it concludes that the basic normative framework for constitutional review has been laid down. Despite this normative framework, constitutional review has failed to ensure the realisation of human rights.

Chapter 2 identifies and discusses the basic normative and institutional prerequisites that determine the prospect of success of constitutional review in the realisation of human rights. It is intended to provide the framework for the subsequent chapters. For any constitutional review system to succeed, it needs, at the minimum, guarantees of justiciable rights (an appropriate normative framework), an independent constitutional adjudicator, and vibrant and organised litigants.⁹³ The existence or non-existence of these preconditions often depends on the political context. The Chapter discusses these preconditions in detail. By drawing from experiences in Ghana, Uganda and Malawi, this Chapter concludes that constitutional review can play a significant role in the realisation of human rights, even in countries that are not fully democratic. The Chapter also discusses the major limitations to human rights litigation in general. As a result of these limitations, even when the minimum preconditions for successful constitutional review are present, litigation should not be the first alternative to ensure the realisation of human rights.

Despite the good normative framework, the role of the Ethiopian constitutional review system in ensuring the realisation of human rights has been negligible at best. With a view to expound on the insignificant role of constitutional review in Ethiopia, **Chapter 3** critically analyses the constitutional review system through the prism of the effective protection of constitutional rights. It concludes that, despite some scholarly works that argue otherwise, the role of Ethiopian courts in the constitutional review system is limited to referring cases that raise constitutional issues to the Council. Ethiopian courts are excluded from invalidating unconstitutional government actions or inactions. It is rather the HoF that exercises the power of constitutional review. The power of constitutional review is granted to a political entity that is designed to be part of and work in harmony with whichever party is governing. After considering the independence and competence of the organs in charge of constitutional adjudication, this Chapter concludes that the Ethiopian system of constitutional review cannot properly restrain the government and protect human rights. The constitutional review system is rather designed to serve as a justificatory and apologist institution for the exercise of political power. The Chapter recommends that the constitutional review system in Ethiopia should be overhauled to empower either the ordinary judiciary or a properly constituted and independent constitutional court with the power of constitutional review if constitutional review is to play its share of responsibilities in ensuring the realisation of constitutional rights.

⁹³ These preconditions are identified based on Epp's seminal work that investigates the factors that determine the realisation of a 'rights revolution' through constitutional litigation – Epp (n 80 above).

Chapter 4 identifies that one of the main factors that motivated the unique constitutional review system designed by the drafters of the Ethiopian Constitution is the alleged counter-majoritarian character of constitutional review by independent adjudicators. The same reasons espoused at the time of constitutional drafting also justify why the government has never considered reforming the constitutional review system. This Chapter assesses and responds to the theoretical basis of the counter-majoritarian difficulty that inheres in the exercise of the power of constitutional review. It outlines the theoretical justifications of rights-based constitutional review. This Chapter argues that constitutional review does not undermine democracy. It is rather instrumental in ensuring the realisation of human rights, which are considered as essential components of democratic theory. Independent courts serve as the principal constituencies for human rights. Political actors often tend to systematically undermine or ignore human rights values in pursuance of other competing policies, or out of political convenience and self-interest. Nevertheless, the chapter recognises that there is an apparent tension between constitutional review and democracy. It therefore analyses the interpretative tools and structural designs crafted by courts and legislatures around the world – in recognition of both the counter-majoritarian implications of constitutional review and the opportunities it presents in ensuring the effective protection of rights – in an attempt to reconcile the tension.

Chapter 3 observes that Ethiopian courts do not have the power to invalidate unconstitutional laws or executive decisions. It also notes that courts can still play a role in shaping the understanding and interpretation of constitutional rights. **Chapter 5** investigates how the judiciary can – despite being excluded from invalidating unconstitutional laws and other measures – contribute to the realisation of constitutional rights. The Ethiopian Constitution provides for an independent judiciary and exclusively vests judicial powers in the courts. However, the Constitution has taken away from the judiciary one of its essential and most powerful functions, constitutional review. Although, as a result, courts and lawyers rarely mention let alone rely on constitutional provisions in adjudicating non-constitutional disputes, the Ethiopian judiciary still has some entry points to engage in constitutional interpretation and, therefore, shape the understanding of constitutional rights thereby contributing to their realisation. This Chapter identifies these entry points and briefly looks at the potential role of the Ethiopian Human Rights Commission and the Institution of the Ombudsman in complementing the realisation of constitutional rights through constitutional review.

Although states are the principal actors, the role of CSOs and human rights advocates in ensuring the realisation of human rights and complementing democratic and development efforts both at the domestic and international level cannot be overstated. The role of CSOs in employing constitutional review as a strategy to advance legal or social change is particularly crucial. CSOs and human rights advocates actively litigate human rights cases and provide legal support to individual litigants in national and international tribunals. **Chapter 6** assesses the legal and practical challenges that have constrained the activities of CSOs and other human rights advocates in facilitating the realisation of human rights through constitutional review. It also examines the possible role of opposition political parties in activating the constitutional adjudication system. It concludes that the role of CSOs and opposition political parties in constitutional rights litigation has so far been miniscule. The lack of an independent constitutional adjudication system and the highly restrictive legal environment governing CSO activities partly explain the policy of disengagement of these litigation support structures towards constitutional review.

Chapter 7 concludes that the absence of an independent constitutional adjudication system coupled with the reluctance of CSOs, human rights advocates and opposition parties – potential litigants – to litigate constitutional rights has resulted in a rather invisible and so far largely irrelevant constitutional adjudication system. The Ethiopian system of constitutional adjudication reflects an undue politicisation of constitutional law. Contrary to worldwide patterns, the HoF, a purely political organ, and not an independent court, is the guardian of the Constitution. Given the improbability of a political majority effectively enforcing the limits embodied in human rights on its powers, and given that the HoF is designed to be fully controlled by the political organs, the Ethiopian Constitution is a constitution without a guardian. The constitutional review system in Ethiopia was designed not to constrain government power. As a result, the role of constitutional review in calibrating legislative and policy making in line with constitutional rights has been utterly limited.

Chapter 7 also explores the different theories of constitutional review developed by political scientists with a view to explain the decision of the drafters of the Ethiopian Constitution to establish, and continue to retain, a formally dependent constitutional review system. It concludes that the dependent and politicised constitutional review system was designed to reinforce and legitimise the status quo, justify the exercise of political power, and countenance executive and legislative supremacy as opposed to constitutional supremacy. Based on this, the Chapter develops a ‘legitimation’ theory of constitutional review.