

Chapter 6: Human rights advocates and their role in the realisation of constitutional rights in Ethiopia

1. Introduction

Although states are the principal actors, the role of human rights advocates and civil society organisations in ensuring the realisation of human rights and complementing democratic and development efforts both at the domestic and international level cannot be overstated. At the international level, the United Nations General Assembly Resolution on Human Rights Defenders reaffirmed that individuals, groups, institutions and non-governmental organisations have an important role and responsibility in ‘safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic societies, institutions and processes’.¹ Accordingly, the Declaration recognises the right ‘individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels’.² At the African level, the African Commission on Human and Peoples’ Rights recognised ‘the crucial contribution of the work of human rights defenders in promoting human rights, democracy and the rule of law’.³ The African Charter on Democracy, Elections and Governance also obliges states to create ‘conducive conditions for civil society organizations to exist and operate within the law’ and to work in partnership with and foster the participation of CSOs in areas of social, political and economic governance.⁴

The role of CSOs in resorting to constitutional litigation to advance legal and social change is particularly crucial. CSOs strengthen the ‘litigation infrastructure’ necessary for more effective and sustained recourse to national and international tribunals. For instance, in post-apartheid South Africa almost all the major constitutional human rights cases were litigated by CSOs. Experiences in constitutional review in Ghana, Uganda and Malawi, discussed in Chapter 2, reveal that CSOs, human rights advocates and

¹ UN General Assembly Resolution 53/144, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (UN Declaration on Human Rights Defenders), A/RES/53/144 (8 March 1999), article 18(2). The Declaration was adopted by consensus by the UN General Assembly after a long negotiation process involving governments and CSOs. The Ethiopian government indicated that it has ‘no reservation towards the Declaration’ – Report of the Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sekagya: Summary of cases transmitted to Governments and replies received, A/HRC/13/22/Add.1 (24 February 2010) para 811.

² UN Declaration on Human Rights Defenders, article 1.

³ African Commission on Human and Peoples’ Rights, Res.69 (XXXV) 04: Resolution on the Protection of Human Rights Defenders in Africa (4 June 2004).

⁴ African Charter on Democracy, Elections and Governance, articles 12(3), 27(2), 28; The Charter was adopted on 30 January 2007. It entered into force on 15 February 2012. Ethiopia ratified the Charter on 12 May 2008.

political parties have been at the forefront of constitutional litigation. Rights and rights litigation may become practically powerful only where there exists a 'support structure for legal mobilization'.⁵ Epp argues that 'proponents of expanded judicial protection of rights should not place *all* hope in judges or constitutional reforms but should provide support to rights-advocacy lawyers and organisations'.⁶ Drawing from the works of Epp, Ginsburg and Moustafa observe as follows:⁷

The most critical variable determining the timing, strength and impact of rights revolutions is neither the ideology of the judges nor the specific rights provision, nor a broader culture of rights consciousness. ... Rather the critical ingredient is the ability of rights advocates to build organizational capacity that enables them to engage in deliberate, strategic, and repeated litigation campaigns.

Authoritarian regimes may, therefore, contain judicial activism by incapacitating judicial support networks, primarily human rights advocates, through illegal harassment and legal restrictions:⁸

The weakness of judicial institutions vis-à-vis the executive is not only the result of direct constraint that the executive imposes on courts; it is also related to the characteristic weakness of civil society in authoritarian regimes. ... Harassment of rights advocates can come in the form of extralegal coercion, but more often it comes from a web of illiberal laws spun out from the regime.

This Chapter discusses the legal and practical challenges that have undermined the activities of CSOs in supporting the realisation of human rights primarily through constitutional review in Ethiopia. It also examines the possible role of opposition political parties in activating the constitutional adjudication system. Legal restrictions on the activities of CSOs working on issues of good governance and human rights issues have crippled their role not only in constitutional litigation but also generally in complementing democratisation and development efforts. It concludes that CSOs and opposition political parties do not actively rely on constitutional review primarily because of the perceived lack of independence and impartiality in the constitutional adjudicators, the House of Federation (HoF) and the Council of Constitutional Inquiry (Council). Human rights advocates do not also have any relevant experience in constitutional adjudication. There is very little understanding of the potential role of

⁵ C Epp 'Do bills of rights matter? The Canadian Charter of Rights and Freedoms' (1996) 90 *American Political Science Review* 765; C Epp *The rights revolution: Lawyers, activists, and supreme courts in comparative perspective* (1998) 2 – 3 arguing, in the US context, that 'sustained judicial attention and approval for individual rights grew primarily out of pressure from below [interest groups] not leadership from above [the Supreme Court]. This pressure consisted of deliberate, strategic organising by rights advocates'. The support structure for legal mobilisation consists of rights-advocacy organisations, rights-advocacy lawyers, and sources of financing.

⁶ Epp (1998) (n 5 above) 6. Epp further observes that 'if a nation – the United States or any other – wishes to protect individual rights, it would do well not to confine its effort to encouraging or admonishing its judges, fine-tuning its constitution, or relying on the values of popular culture to affect rights by osmosis. Societies should also fund and support lawyers and rights-advocacy organisations – for they establish the conditions for sustained judicial attention to civil liberties and civil rights and for channelling judicial power toward egalitarian ends'.

⁷ T Ginsburg and T Moustafa 'Introduction' in T Ginsburg and T Moustafa (eds) *Rule by law: The politics of courts in authoritarian regimes* (2008) 20.

⁸ Ginsburg and Moustafa (n 7 above) 20.

constitutional review in challenging government decisions. The strict standing rules governing constitutional adjudication in Ethiopia also partly contribute to the so far miniscule role of organised groups in constitutional rights litigation.

2. The legal framework governing the operation of CSOs in Ethiopia

The legal framework governing the establishment and operation of CSOs is one of the most crucial factors affecting the conduciveness of the environment for their efficient and effective operation.⁹ In general terms, the legislative framework thinly delineates what is legal from what is illegal. That is why, more often than not, authoritarian regimes resort to restrictive legal provisions to constrain the activities of CSOs. In contrast, a favourable legal environment enhances the potential influence and vibrancy of CSOs. However, '[a]n enabling legal framework is certainly no guarantee of a vibrant civil society, and a disabling or restrictive legal framework is not necessarily an insurmountable barrier for civil society engagement and participation in public affairs'.¹⁰ A supportive legal framework is an important, but in no way sufficient, condition for the growth and nurturing of a strong and sustainable civil society sector.¹¹

The Ethiopian Constitution guarantees, among others, the right to association of everyone for any cause or purpose.¹² The first detailed legal framework governing associations including non-profit CSOs was outlined in the 1960 Civil Code of Ethiopia. Due to the fact that the provisions of the Civil Code did not recognise the peculiar features of charitable organisations, CSOs had been calling on government to enact more liberal and comprehensive legislation to govern their formation and operation. The enactment of a law to govern charitable organisations has also been in the agenda of the ruling party since the early 2000s. The idea of enacting a separate CSO Law also gained momentum within government out of the desire not merely to provide for a comprehensive legislation but to codify a growing discontent and distrust towards increasingly critical CSOs.¹³

⁹ International Center for Not-For-Profit Law and United Nations Development Programme 'The role of legal reform in supporting civil society: An introductory primer' (2009) 6.

¹⁰ International Center for Not-For-Profit Law (n 9 above) 6. During apartheid South Africa, for instance, CSOs were very active, despite the fact that the legal environment was not the most favourable.

¹¹ International Center for Not-For-Profit Law (n 9 above) 6 concluding that 'the legal framework is only one factor among many that influence the scope and strength of civil society in any given country. Political, cultural, historical, and economic factors also play defining roles' – 23.

¹² FDRE Constitution, article 31: Every person has the right to freedom of association for any cause or purpose. Organisations formed in violation of appropriate laws or to illegally subvert the constitutional order or which promote such activities are prohibited.

¹³ D Hailegebriel 'Ethiopia' (2010) 12 *International Journal of Not-for-Profit Law* 9.

Government discontent and enmity towards CSOs sharpened particularly following the active role of CSOs before, during and immediately after the 2005 elections. The government openly accused CSOs of providing disguised support to the opposition. According to Hailegebriel, '[i]mmediately after the 2005 National Election, the tone of the Government toward CSOs changed' leading to government 'denying not only the role and contribution of CSOs in the economic and democratic process but also the foundational principles of the sector'.¹⁴ The government ideology towards NGOs is hostile.¹⁵

NGOs are not organizations established by citizens to protect their rights. These organizations are rather established by individuals mainly for personal benefit, accountable to, and advancing the interests of foreign agencies. Their leaders are not accountable to the staff of the organizations and the beneficiaries. As result, they cannot have a democratic nature and role. ... Therefore, the government has to confront the rent-seeking nature of NGOs, for example, by considering those organizations receiving 15% of their income from foreign sources as foreign organizations and denying them recognition as a means of expression of freedom of association as well as democratic forums.

The government presented CSOs as voracious rent-seekers spending the lion-share of their budget on administrative activities for the benefit of the founders rather than the people, on whose behalf resources are obtained. The government unequivocally indicated that only mass-based organisations, such as youth and women leagues and trade unions, can and have visible roles in complementing democratisation and development efforts. According to the Prime Minister, by definition, only mass-based organisations qualify as CSOs.¹⁶ The desire to impose legal restrictions on what government refers to as 'so-called civil society' is inherent in the ideological foundations of the ruling party, the EPRDF, which is 'wary of institutions aspiring to play a public role but not affiliated or accountable to it'.¹⁷

In defiance of international and domestic pressure to reconsider some of the most restrictive provisions of the draft law,¹⁸ Ethiopia adopted in 2009 one of the most controversial and criticised laws to regulate

¹⁴ D Hailegebriel 'Restrictions on foreign funding of civil society: Ethiopia' (2010) 12 *International Journal of Not-for-Profit Law* 18, 20.

¹⁵ EPRDF 'Revolutionary democracy and struggle for the development of democratic rule' (2006) cited in Hailegebriel (n 14 above) 20. This policy of the government to suppress foreign funding of CSOs was the intention of the EPRDF since it came to power, although such policy was not codified into law until 2009. In 1997, for instance, Human Rights Watch reported that CSOs working on human rights and democratisation issues, such as the then Ethiopian Human Rights Council (now registered as Human Rights Council), were categorised as political parties and refused registration and were subject to controls on foreign funding. The government called on 'donor agencies telling them not to enter into any formal or informal relationships with local agencies that were not registered with the government' – Human Rights Watch 'Ethiopia: The curtailment of rights' Vol. 9, no 8(A) (December 1997) <http://www.hrw.org/node/78531> (accessed 31 May 2011).

¹⁶ Response of the Prime Minister to questions from NGOs and other stakeholders (24 May & 3 June 2007) (on file with author).

¹⁷ J Markakis *Ethiopia: The last two frontiers* (2011) 251. Markakis further observes that the ruling party often conveniently questions the legitimacy of civil society groups and has moved to suppress or supplant its most important members. This is part of a trend where the ruling party supplants political parties, the media, CSOs and other public actors with entities accountable to or sympathetic towards the government.

¹⁸ The drafting process of the CSO Proclamation was one of the most consultative in Ethiopian legislative history with the Prime Minister and Minister of Justice hosting a series of meetings with representatives of CSOs and other stakeholders – perhaps this

the activities of CSOs.¹⁹ The CSO Law gives strong legal expression to the hostile philosophies of the ruling party towards CSOs, as reflected in the policy document quoted above. The legislation does not as a result recognise the role of CSOs in the democratisation and development process. In many respects, the Law legalises and purports to legitimise the restrictions on civil society activities, particularly those related to human rights and good governance, and essentially plots their ultimate burial.

The legislation classifies CSOs into three categories: ‘Ethiopian charities or societies’, ‘Ethiopian resident societies or charities’, and ‘foreign charities’.²⁰ ‘Ethiopian charities or societies’ are formed under the laws of Ethiopia, have only Ethiopians as their members, generate income from Ethiopia and are wholly controlled by Ethiopians. They may receive less than 10% of their funds from foreign sources. ‘Ethiopian resident societies or charities’ are formed under the laws of Ethiopia, consist of members residing in Ethiopia, and receive more than 10% of their funds from foreign sources. CSOs are classified as ‘foreign charities’ if they are formed under the laws of a foreign country, or consist of members who are foreign nationals, or are controlled by foreign nationals, or receive more than 10% of their resources from foreign sources. It should be noted that the criteria to determine whether a CSO is a foreign CSO are not cumulative – the satisfaction of one of these criteria makes the CSO a foreign CSO.²¹

Because Ethiopian charities or societies are considered as Ethiopian corporate citizens, they are granted better rights than the others, which are considered as foreign elements. Unlike Ethiopian resident charities or societies and foreign charities, Ethiopian charities and societies have, for instance, the right to engage in a wide range of activities including human rights and good governance issues and the right

participatory engagement in the drafting process was the only positive aspect of the CSO Law. However, the consultations were mainly to convince and marshal consensus rather than to discuss the provisions of the draft law. It also provided government with the opportunity to claim the legitimacy of the law. The main areas of concern such as the categorisation of foreign organisations and Ethiopian organisations receiving foreign funds as ‘foreign’, with the attendant limitations on their activities and sources of funding, were considered non-negotiable by the government. Nevertheless, the discussions led to the replacement of prison sentences with fines as liability for violations of the law. It also led to the creation of a third category of CSOs, Ethiopian Resident Charities and Societies – in addition to the originally proposed ‘foreign’ and ‘Ethiopian Charities and Societies’ – which are permitted to receive not more than 10% of their funds from foreign sources. Moreover, the Board of Charities and Societies, which hears appeals against decisions of the Charities and Societies Agency, now has two representatives from CSOs out of a total of seven members.

¹⁹ Charities and Societies Proclamation no 621/2009 (CSO Proclamation or Law). In accordance with the Proclamation, the Council of Ministers has adopted the Charities and Societies Regulation no 168/2009 (CSO Regulation).

²⁰ CSO Proclamation, articles 2(2 – 4, & 15). Charities are institutions established exclusively for charitable purposes – article 14(1). Societies are associations of persons organised on a non-profit making and voluntary basis for the promotion of the rights and interests of their members and to undertake similar lawful purposes as well as to collaborate with institutions with similar objectives – article 55(1).

²¹ CSO Proclamation, articles 2(2, 3 & 4). ‘Income from foreign source’ refers to donation or delivery or transfer made from foreign sources of any article, currency or security. Foreign sources include the government, agency, or company of any foreign country; international agency or any person in a foreign country (including Ethiopians living abroad) – article 2(15).

to appeal to courts against decisions of the CSO Agency.²² Although the legislation has several restrictive provisions, two of the most controversial aspects of the Proclamation are the restrictions on foreign funding of CSOs working on human rights and democratisation issues, and the denial of the right to appeal to regular courts against decisions of the CSO Agency, an executive organ all seven of whose members are appointed by the government without even parliamentary approval, in relation to Ethiopian resident charities or societies and foreign charities.²³

2.1. Mandatory registration of CSOs

All forms of CSOs must apply for registration before the CSO Agency within three months of their formation.²⁴ At the formation stage, CSOs may not raise funds of more than 50,000 Ethiopian Birr (approximately \$2 800).²⁵ The Agency may refuse registration if the prescribed three months period has lapsed, unless the CSO can show good cause for the delay.²⁶ Registration will be refused if, in the opinion of the Agency, the rules of the proposed CSO do not comply with the necessary conditions of the legislation, or if the CSO ‘is likely to be used for unlawful purposes or for purposes prejudicial to public peace, welfare, or good order in Ethiopia’.²⁷ CSOs must renew their licenses regularly every three years.²⁸ Failure to renew license provides a lawful ground to cancel registration.²⁹ The Agency has a wide discretion to revoke or cancel registration if it decides that the organisation has been used for unlawful purposes or for purposes ‘prejudicial to public peace, welfare, or security’.³⁰ In addition, failing to comply with the Agency's orders to amend any rule of the organisation or correct another fault provides justification to suspend CSOs.³¹

The registration requirement grants the Agency, which is accountable only to the Ministry of Justice, the opportunity to censor the activities of CSOs and deny entry to politically undesirable CSOs. The Board of

²² CSO Proclamation, article 14(5) exclusively reserves activities on human and democratic rights to Ethiopian CSOs.

²³ For a discussion of the most controversial aspects of civil society organisations, see Hailegebriel (n 13 above). Note, however, that two of the seven members who are nominated by the government should be from civil societies. The decision to include two representatives of civil society was a result of the negotiation process prior to the adoption of the CSO Law. Nevertheless, civil societies do not have any role in the selection of the two members. Only those representatives who are sympathetic towards the government will be given preference, as it has been the case in practice.

²⁴ CSO proclamation, article 64(2). The applicability of the time limit in relation to CSOs formed under foreign laws is not clear. It seems that they have to be registered within three months of commencement of operations in Ethiopia.

²⁵ CSO Proclamation, article 65(3).

²⁶ CSO Proclamation, article 65(3).

²⁷ CSO Proclamation, articles 69(1&2).

²⁸ CSO Proclamation, article 76(1).

²⁹ CSO Proclamation, article 92(2)(d).

³⁰ CSO Proclamation, article 92(2)(c).

³¹ CSO Proclamation, article 92(1)(a).

the Agency has seven members, all of whom are nominated by the government.³² The requirement to renew the license to operate further burdens CSOs and allows government to regularly censor CSO activities and refuse to renew license to organisations that are considered to be politically adverse.³³ Ethiopian resident charities or societies and foreign charities will bear the maximum brunt of the CSO Law as they do not have the right of access to courts to challenge decisions of the Agency in any circumstance.³⁴ They can only appeal against the decision of the Director General of the Agency to the Charity and Society Board, whose decisions are final.³⁵ In contrast, Ethiopian charities and societies are allowed to appeal to the Federal High Court against decisions of the Board.³⁶

2.2. Restrictions on activities based on membership and sources of funding

The legislation most importantly prohibits Ethiopian resident charities or societies and foreign charities from engaging in issues involving:³⁷

- the advancement of human and democratic rights;
- the promotion of equality of nations, nationalities and peoples and that of gender and religion;
- the promotion of the rights of the disabled and children's rights;
- the promotion of conflict resolution and reconciliation; or
- the promotion of the efficiency of justice and law enforcement services.

These activities are exclusively reserved to Ethiopian charities or societies, which cannot receive more than 10% of their funds from foreign sources. The activities represent the lion-share of advocacy works that are considered 'political' activities, which only citizens are allowed to engage in. These 'political' activities, the government believes, 'should not be left to foreigners and foreign funds'.³⁸ The limitations on foreign funding, the government noted, are necessary 'if the exercise of public affairs is required to be free and the sovereignty and independence of a State and its people are to be maintained'.³⁹ The government indicated that the limited application of the right to participate in public affairs to citizens under article 25 of the ICCPR supports the restrictions on the political activities of foreigners and, by extension, foreign funding. However, the UN Special Rapporteur on the situation on human rights

³² CSO Proclamation, article 8. Two of the members must be nominated from members of charities and societies in Ethiopia. The law is silent on the role of charities and societies in selecting the two CSO representatives. Although the law does not say which organ in the government will appoint the members of the Board, given that the Agency is accountable to the Ministry of Justice, the Minister of Justice makes the nomination and appointment.

³³ International Center for Not-for-Profit Law (note 9 above) 40.

³⁴ CSO Proclamation, article 104(2).

³⁵ In addition to serving as a review body, the Board provides policy advice to the Minister of Justice on issues related to CSOs. It also approves directives in line with the CSO Law – CSO Proclamation, article 9.

³⁶ CSO Proclamation, article 104(3).

³⁷ CSO Proclamation, article 14(5).

³⁸ Report of the Special Rapporteur on the Situation of Human Rights Defenders (n 1 above) para 814.

³⁹ Report of the Special Rapporteur on the Situation of Human Rights Defenders (n 1 above) para 814.

defenders observes that ‘human rights activities and monitoring, including the denunciation of human rights abuses, should not be considered as political activity’.⁴⁰

In line with the policy of the government, even CSOs that are formed in Ethiopia by Ethiopians are considered ‘foreign’ and cannot engage in ‘political’ activities if they receive more than 10% of their resources from foreign sources. The 10% limitation in the CSO legislation is even lower than the 15% limitation indicated in the government policy on CSOs that preceded and guided the adoption of the Law. And even in relation to domestic funds, CSOs may organise public fund raising activities (public collections) only with the prior permission of the Agency.⁴¹ Moreover, CSOs cannot receive anonymous donations, and should at all times keep records clearly indicating the identity of all donors.⁴²

The limitations on foreign funding only concern organisations working on human rights and democratisations issues. They do not apply to other service providing CSOs, which are considered as ‘development partners’ by the government. According to the Prime Minister, the reasons for imposing restrictions on foreign funding of human rights CSOs is because development activities are expensive whereas human rights advocacy works are labour intensive and, therefore, can be undertaken with low expenses.⁴³ The current legislative and political milieu is, therefore, more receptive to service-providing CSOs than to advocacy ones; currently, the bulk of registered CSOs in Ethiopia are involved in service delivery and other politically uncontroversial development activities.

It should be noted that the Proclamation provides for possible exemptions from the applicability of the legislation to international or foreign organisations operating in Ethiopia based on an agreement with the Ethiopian Government. Foreign Charities may, therefore, benefit from this possible exemption.⁴⁴ Although the exemption provision only mentions foreign organisations, there is nothing that prohibits the government from exempting even Ethiopian resident charities and societies from all or some of the legislative requirements. So far, only two Ethiopian charities working on human rights issues, namely, Prison Fellowship Ethiopia/Justice for All, and the National Coalition of Women against HIV/AIDS, have

⁴⁰ Report of the Special Rapporteur on the Situation of Human Rights Defenders (n 1 above) para 824.

⁴¹ CSO Proclamation, article 91(1).

⁴² CSO Proclamation, article 77(3). According to the Ethiopian Human Rights Council, this provision is ‘designed with the specific aim of discouraging members of the public from joining and supporting domestic NGOs’ – Human Rights Council ‘The impact of the CSO proclamation on the Human Rights Council (July 2011) 8 <http://ehrc.org/images/impact.pdf> (accessed 18 October 2011).

⁴³ Response of the Prime Minister (n 16 above).

⁴⁴ CSO Proclamation, article 2.

been exempted from the application of the Law including the restriction on funding.⁴⁵ No foreign charity has been granted an exemption so far.⁴⁶

2.3. Invasive supervisory oversight

The broad supervisory powers of the Agency keep CSOs under constant and intimidating surveillance. CSOs must notify the Agency in writing of the time and place of any meeting of the General Assembly no later than seven working days prior to such a meeting.⁴⁷ Failure to notify the meeting seven days in advance for the first time entails a written warning.⁴⁸ The Agency has the power to remove CSO officers who do not satisfy the requirements under the CSO Law and to assign a replacement officer.⁴⁹ It may suspend an officer responsible for misconduct or mismanagement of the administration of the charity or society and order the appropriate organ of the charity or society to assign another person.⁵⁰ Upon the request of one or more members or officers of the society, the Agency may convene the meeting of the CSO General Assembly through the Chairperson of the CSO or on its own. The Agency may, where it deems it appropriate, nominate the Chairperson of the General Assembly.⁵¹

CSOs may not spend more than 30% of their funds on administrative costs.⁵² They are required to submit statements of accounts, annual activity reports, and bank accounts.⁵³ The Agency is allowed to institute

⁴⁵ CSO Task Force for Enabling Environment 'Assessment of the impact of the Charities and Societies regulatory framework on civil society organizations in Ethiopia' (June 2011) (Researchers: K Dagne and D Hailegebriel) (on file with author). It should be noted that the National Coalition of Women against HIV/AIDS is headed by the wife of the Prime Minister (First Lady). Prison Fellowship Ethiopia/Justice for All is led by a member of the National Pardon Board. Given these are the only NGOs that have been exempted, and given that the CSO Law does not define the circumstances under which exemptions may be granted – entailing absolute discretion, the danger of selectivity and arbitrariness in granting exemptions is real.

⁴⁶ However, some international organizations, such as the Institute for Security Studies (ISS), have branches in Addis Ababa. The Charities and Societies Agency has informed ISS that, since ISS works on regional and continental levels with almost no focus on Ethiopia, there was no need for it to be registered based on the CSO Law. ISS had to instead sign an agreement with the Ministry of Foreign Affairs to open the office in Addis – email from Solomon Dersso on 5 April 2012. There is no express legal support for arrangements like this. The CSO Law requires all CSOs to be registered with the Agency. Apparently, if the CSO does not have exclusive or significant focus on Ethiopia, the Law does not apply and, hence, can only operate based on a discretionary agreement with the Ministry of Foreign Affairs.

⁴⁷ CSO Proclamation, article 86. This provision replaced a draft provision which authorised the presence of a police officer or an officer of the Agency or other government organ in all meetings of CSOs.

⁴⁸ CSO Regulation, article 24. Such warning may not be given more than once.

⁴⁹ CSO Proclamation, article 70. Among others, individuals outside Ethiopia whose absence impedes the proper administration of a charity or society cannot be assigned as officers of charities or societies, including foreign charities.

⁵⁰ CSO Proclamation, article 91.

⁵¹ CSO Proclamation, article 61.

⁵² Administrative costs are defined to include those costs incurred for emoluments, allowances, benefits, purchasing goods, and services, travelling, and entertainments necessary for the administrative activities of a charity or society – article 2(14). Although the law is not explicit about foreign charities, this provision logically applies in relation to their Ethiopian operations.

⁵³ The statement of account (accounting record) must show all sums of money received and expended by the charity or society on a day-to-day basis, the context in which the receipts and expenditures took place and a record of the assets and liabilities of the charity or society. It should be noted that Ethiopian societies are not required to submit annual activity reports.

inquiries with regard to all CSOs or particular CSOs.⁵⁴ It may from time to time institute random inquiries on CSOs without any kind of limitation or notice and demand the production of any documents or information orally or in writing.⁵⁵ If the Agency is satisfied that misconduct or mismanagement has occurred and that it is necessary to protect the property of the charity or society, it can suspend officers, restrict the organisation's transactions or the nature or amounts of payments made, or order the retention of property.⁵⁶ The Ministry of Justice can establish sector administrators within government departments to provide assistance to the Agency concerning the license and registration of CSOs. The sector administrators also evaluate and provide recommendation on programs and projects, supervise and control operational activities, and take measures against CSOs falling under their mandate.

2.4. Serious sanctions for violations of the provisions of the Proclamation

The proclamation imposes severe penalties on CSOs and officials responsible for violations of the provisions of the CSO Proclamation. CSOs are liable to the punishments prescribed in the Criminal Code and, in addition, fines ranging from 5 000 to 100 000 Ethiopian Birr (approximately US \$300 – \$6000).⁵⁷ The fines replaced severe prison sentences proposed in the initial drafts of the legislation. The implications of the reference to the punishments in the Criminal Code in the CSO Proclamation is not clear and can induce self-censorship of CSO activities. According to the government, however, '[w]ith or without reference, the Criminal Code applies to all crimes and punishment without distinction to anyone including charities and societies and officers associated with them'.⁵⁸

In summary, the CSO legislation enshrines restrictive requirements and grants the Agency wide discretion powers to oversee the establishment of CSOs particularly those intending to work on human rights issues – thus making entry difficult. Once established, as well, CSOs may be deregistered and their working license revoked based on vague and unsubstantiated reasons at the discretion of the Agency. The Agency has wide powers to meddle in the internal activities of CSOs without any real substantive or procedural safeguards. The duty to renew licenses gives the government a constant opportunity to distil critical and politically undesirable CSOs. Any CSO found guilty of violating any of the provisions of the legislation will be liable to severe civil and criminal sanctions. A very restrictive law reinforced with strict criminal and civil sanctions can keep CSOs on their toes and obstruct their activities. To make things

⁵⁴ CSO Proclamation, article 84.

⁵⁵ CSO Proclamation, article 85(1).

⁵⁶ CSO Proclamation, article 90.

⁵⁷ CSO Proclamation, article 102.

⁵⁸ Report of the Special Rapporteur on the Situation of Human Rights Defenders (n 1 above) para 816.

worse, all these are done without appropriate appeal procedures to independent judicial organs. It is no wonder that the CSO Proclamation has been dubbed as one of the most restrictive laws in the world.

3. Declared objectives vs underlying reasons

According to the Preamble, the purpose of the Law is to ensure the realisation of the constitutional right to association of citizens, and to aid and facilitate the role of CSOs in the overall development of the Ethiopian people. The Agency is established with a view to enable and encourage CSOs to develop and achieve their purposes in accordance with Law, and to ensure that the operation of charities and societies is transparent and accountable.⁵⁹

Contrary to the Constitution, which guarantees the right to association to ‘everyone’, the Preamble of the CSO Law refers to the right to association of ‘citizens’. The government understands everyone to mean citizens as the right to association is a ‘democratic’, not a ‘human’, right.⁶⁰ Although there is no explicit mention in the Law, the restriction on foreign membership and funding is based on a convenient ideology that the constitutional right to association is guaranteed only for the benefit of citizens and that the involvement of foreign funding necessarily implies foreign supervision or accountability. Activities relating to the relationship of government with its people are considered inherently political and, hence, only citizens may engage in such activities. The Prime Minister notes that foreign CSOs do not have rights, only privileges.⁶¹ Ethiopian organisations engaged in human rights and good governance areas that receive more than 10% of their funding from foreign sources are for all practical purposes considered as foreign organisations. According to the Prime Minister, seeking foreign funds to engage in political activities creates ‘politics by agency’, which is inherently undemocratic.⁶² He, moreover, indicated that CSOs should by definition be mass- or membership-based. The enactment of the Ethiopian CSO Law coincides with an increasing global trend to restrict foreign funding of CSOs to purportedly prevent foreign ‘interference’ with state sovereignty and guard against alleged foreign influence in domestic political affairs that comes along with foreign funding.⁶³

⁵⁹ CSO Proclamation, article 5.

⁶⁰ Chapter 3 of the Ethiopian Constitution bizarrely categorises the Bill of Rights into ‘democratic’ and ‘human’ rights. The ground for classification of the rights is not clear. It is interpreted by the government to coincide with what is guaranteed to citizens (democratic rights) and everyone (human rights). The Prime Minister indicated this in his reply to questions from CSOs on 24 May and 3 June 2007 – Response of the Prime Minister (n 16 above).

⁶¹ Response of the Prime Minister (n 16 above).

⁶² Response of the Prime Minister (n 16 above).

⁶³ Report of the Special Rapporteur on the Situation of Human Rights Defenders, A/64/226 (4 August 2009) para 94 observing that ‘[m]any countries have put in place legislation that significantly restricts the ability of human rights organizations to seek and receive funding, especially foreign funding’; Report of the Special Representative of the Secretary-General on Human Rights

It was indicated earlier that the legislation was a codification of a growing government discontent with and resentment of the 'political' activities of CSOs, which purportedly act in cahoots with opposition political parties. This appears to be in line with a tendency of the ruling party to dismantle political pluralism by discrediting and systematically attacking CSOs and the media that tend to speak out on issues that the government considers sensitive, or are sensationalised for the sake of attacking these groups. However, when asked if there was any CSO that has become politically obstructive, the Prime Minister indicated that the Law was a codification of the revolutionary philosophies of the ruling EPRDF party and not a reaction to the past activities of CSOs.⁶⁴ He further stated that the 2005 unrest might have involved CSOs peripherally but it was a movement of the people organised under the umbrella of political parties. CSOs were not the sources of the post-election problem and the Law was, according to the Prime Minister, therefore, not a reaction to recorded hostile activities of CSOs.

The popular perception that CSOs are shortcuts to amassing personal wealth provided the government with the opportunity to garner popular support, or rather popular non-resistance, in adopting the Law. Controlling CSOs that receive funds on behalf of the public and restricting their administrative spending to less than 30% of their budget is a populist cause as the public considers CSOs elitist organisations established as personal trustees of the founders.⁶⁵ This coupled with the fact that CSOs never really attempted to mobilise popular support against the draft law made it easy for the government to resist domestic pressure from the few CSOs and focus on defying international pressure which was also malleable.⁶⁶ CSOs only managed to establish an ad-hoc Ethiopian CSOs Task Force which was not strong enough to influence the formulation of the most controversial aspects of the Law. The process of

Defenders A/57/182 (2 July 2002) para 95 observing that '[t]he issue of foreign funding has become a flash point of tension between Governments and human rights defenders. Governments have shown an inordinate sensitivity to international funding for non-governmental organizations'.

⁶⁴ Response of the Prime Minister (n 16 above).

⁶⁵ The government presented the purpose of the law as regulating the abuse of funds by CSOs. If the sole purpose was to control abuse of funds, the government could only have prescribed the 70/30 restriction without also restricting activities based on sources of funds. It should be noted that the writer is not in principle opposed to restrictions on administrative costs. Nevertheless, the rigid percentage fixation is a cause of concern, as different CSOs may require different levels of balance.

⁶⁶ Human Rights Watch criticised international partners and major donors for failing 'to adequately respond to the country's deteriorating human rights situation' and for following 'quite diplomacy' and 'making representations to the government only behind closed doors, refusing to publicly criticize the Ethiopian government' – Human Rights Watch 'One Hundred ways of putting pressure' (March 2010) 54 – 57 <http://www.hrw.org/en/reports/2010/03/24/one-hundred-ways-putting-pressure> (accessed 5 January 2011). Most of the serious criticism was launched by international CSOs which were themselves affected by the Law.

adopting the Law clearly manifested the detachment of CSOs from the general public belying the understanding that CSOs exist for the benefit of the public.⁶⁷

The fact that CSOs are only budding in Ethiopia, and are, therefore, fragile, combined with the lack of a concerted public support including from the media and the academic and legal community paved the way for the enactment of the Law with little domestic resistance. In fact, it was the government that was able to somehow garner popular support through smear and propaganda campaigns launched to discredit and vilify the works of CSOs via government owned media. The government presented the control of abuse of funds by so-called unpatriotic leaders or founders of CSOs as the principal aim of the Law. The government conveniently denies the contribution of CSOs in complementing democratisation and development efforts.⁶⁸ The ease with which the CSO Law was enacted demonstrates the capacity, embodied in its overwhelming majority in parliament, and willingness of the ruling party to translate its restrictive policies and ideology into law.

The underlying reason behind the CSO Law appears partly to be political ideology and partly the desire to screen alleged foreign influence. However, the Law does not in any way imply that ‘foreign’ interests or views are not desirable, nor that foreign influence necessarily accompanies funding. Such a philosophy clearly contradicts the explicit provisions of the Constitution and international human rights law which guarantees the right to association to everyone and not just to citizens.⁶⁹ Besides, even assuming that the Constitution guarantees the right to association only to citizens, the restriction on foreign funding unreasonably restricts the right to association of citizens. The political ideology merely served to camouflage the real intention of the government to absolutely and singularly dominate the public space. Ethiopia is characterised by the lack of a robust media, influential opposition groups, and a crippled civil society. The only visible political actor is the ruling party. Along with other very restrictive

⁶⁷ Hailegebriel also indicated that CSOs do not have the constituency or support-base on which to lean back. To the ordinary people, individuals who work for NGOs are considered rich, living the good life and stealing donor money. He also indicated that the lack of inter-sector coordination between the media, CSOs and opposition groups made it easy for the government to attack each at a time. There is, therefore, need for a common coordinated effort from these groups – interview with Debebe Hailegebriel, independent consultant, 28 September 2011, Addis Ababa, Ethiopia.

⁶⁸ Interview with Amedie Gobena, 26 September 2011, Addis Ababa, Ethiopia.

⁶⁹ The Constitution clearly limits the application of a right to Ethiopians whenever it deems it necessary regarding each right. Thus the right to vote and be voted for, socio-economic rights, right to nationality, right to property, and the right to development are explicitly granted only to Ethiopians. Freedom of expression and the right to association are granted to the benefit of everyone, although they are placed in the part dealing with democratic rights. The attribution of citizenship to rights that do not include an internal citizenship limitation simply because they are shelved under the ‘democratic rights’ catalogue is, therefore, inconsistent with the Constitution. Moreover, limiting the application of rights to citizens will be inconsistent with international human rights instruments adopted by Ethiopia. Most of the rights in the ICCPR, for instance, apply to all persons within the territory or jurisdiction of ratifying states – article 2.

laws that have been enacted since the controversial 2005 elections, the CSO Law was designed to reinforce this status quo to the advantage of the ruling party.

Almost all international human rights bodies have criticised the CSO Law and recommended the revision of the law. The Special Rapporteur on the situation of human rights defenders observes that the desire to limit the political activities of foreigners does not justify inscribing funding limitations on CSOs established by Ethiopians and operating in Ethiopia – thereby questioning the conveniently assumed link between foreign funding and foreign political agenda.⁷⁰ Similarly, the UN Declaration on Human Rights Defenders not only imposes a duty on states to refrain from restricting access to foreign funding but also requires states to facilitate access to funding of CSOs.⁷¹ The Declaration guarantees the right ‘individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms’.⁷² The African Commission indicated that the restrictions on foreign funding violated freedom of expression and recommended Ethiopia to revise the Law.⁷³ The Committee on the Elimination of Racial Discrimination (CERD)⁷⁴ and the Committee against Torture (CAT)⁷⁵ also expressed similar concerns at the CSO Law and recommended the government to lift the funding restrictions.

4. Actual impact of the CSO Law

As expected, the impact of the Law has been felt mainly by CSOs working on human rights and democratisation issues more than those working on development and capacity building.⁷⁶ Most of the CSOs that worked on human rights and conflict resolution issues prior to the enactment of the Law were forced to change their mission and objectives, and structure and programmes. As at July 2011, resident charities and societies and foreign charities constituted more than 82% (1617) of the CSOs registered

⁷⁰ Report of the Special Rapporteur on the Situation of Human Rights Defenders (n 1 above) para 824.

⁷¹ UN Special Rapporteur on the Situation of Human Rights Defenders *Commentary to the Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms* (July 2011) 95 *et seq* <http://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf> (accessed 27 July 2011).

⁷² Declaration on Human Rights Defenders, article 13. The Special Rapporteur considers this provision as entitling human rights defenders to receive funds, including from foreign sources –Office of United Nations High Commissioner on Human Rights ‘Declaration on Human Rights Defenders’ <http://www2.ohchr.org/english/issues/defenders/declaration.htm> (accessed 24 June 2011).

⁷³ African Commission on Human and Peoples’ Rights, Concluding Observations and Recommendations on the 1st, 2nd, 3rd, & 4th periodic report of the Federal Democratic Republic of Ethiopia, 47th Ordinary Session 12 – 26 May 2010 paras 45 & 72.

⁷⁴ CERD, Concluding Observations: Ethiopia, CERD/C/ETH/CO/7-16 (7 September 2009) para 14.

⁷⁵ CAT, Concluding Observations: Ethiopia, CAT/C/ETH/CO/1 (November 2010) para 34.

⁷⁶ For a detailed analysis of the impacts of the CSO Law, see CSO Task Force for Enabling Environment (n 45 above). Unless otherwise indicated, the information in this section is taken from this impact assessment.

under the Law. Foreign charities and Ethiopian resident charities or societies are allowed to receive more than 10% of their funding from foreign sources. As a result, they cannot, without special permission from the Agency, engage in advocacy work on human rights and democratisation. The majority of CSOs working on human rights prior to the enactment of the Law have been registered as Ethiopian resident charities, abandoning their human rights activities.⁷⁷ Only 5.3% (112) of the CSOs are registered as Ethiopian charities to work on human rights issues. More than 83% of the human rights organisations reported decrease in budget.

The main impacts of the CSO Law relate to the restrictions on funding. Considering the fact that human rights CSOs rely almost exclusively on foreign funding, the application of the Law has crippled the maintenance and establishment of such CSOs. Ethiopia is a poor country where a significant portion of the population lives on below one US Dollar a day. To require CSOs working on human rights and good governance issues to raise more than 90% of their funds from domestic sources is a death-knell to their survival.⁷⁸ Indeed, in the absence of a culture of donating funds to human rights organisations by business organisations, it is likely that local fund raising activities will continue to be stagnant. Attempts by the Ethiopian Women Lawyers' Association (EWLA), an organisation working on the rights of women, to raise local funds were 'very unsatisfactory'.⁷⁹ The absence of large businesses coupled with the fear amongst business of potential political reprisal by government makes local fund raising activities rather wasteful.

The decision of the Director General of the Agency to freeze the funds of EWLA and the Ethiopian Human Rights Council (EHRC), two of the most prominent domestic human rights CSOs in Ethiopia, both registered as Ethiopian charities, in December 2009 was upheld by the Charity and Society Board.⁸⁰ Their appeal to the Federal High Court challenging the decision of the Board to block the funds was rejected.⁸¹

⁷⁷ International Federation for Human Rights (FIDH) & World Organisation Against Torture (OMCT) *Steadfast in protest: The Observatory for the Protection of Human Rights Defenders: Annual Report 2010* (2010) 51.

⁷⁸ More than 95% of the CSOs in Ethiopia raise more than 10% of their funds from foreign sources – International Federation for Human Rights (n 77 above) 50.

⁷⁹ Interview with Mrs Zenaye Tadesse, Director of EWLA, 29 September 2011, Addis Ababa, Ethiopia. Attempts to raise domestic funds by the Ethiopian Lawyers Association (ELA) similarly failed.

⁸⁰ Ethiopian Human Rights Council 'The impacts of the CSO Proclamation on the Human Rights Council' (July 2011) 9 <http://www.ehrco.org/images/impact.pdf> (accessed 21 December 2011); P Barea 'Ethiopian Charities & Societies Agency shuts down organizations' <http://www.ezega.com/News/NewsDetails.aspx?Page=news&NewsID=2776> (accessed 30 May 2011) quoting the report of Ali Siraj, Director of the Charities and Societies Agency of Ethiopia. The Human Rights Council has appealed the case to the Cassation Division of the Federal Supreme Court. The final decision has not been handed down yet.

⁸¹ 'Ethiopia: Women Lawyers denied access to foreign funds' (15 November 2011) http://www.makeeverywomancount.org/index.php?option=com_content&view=article&id=1986:ethiopia-women-lawyers-

The funds were frozen based on allegations that the funds were received from foreign sources. The EHRC has appealed against the decision of the High Court to the Cassation Division of the Federal Supreme Court. As at April 2012, the Cassation decision has not yet passed a judgment. The argument that the funds were raised prior to the enactment of the CSO Law was ignored by the Agency and the court. As a result, the EHRC was forced to close ten of its branch offices due to shortage of funds. It also reduced its staff from more than 60 to less than 15 and formally terminated its Legal Aid, Advocacy, Human Rights Education and other units.⁸² EWLA was forced to scale down on some of its activities including legal aid and retrench many of its workers. It has maintained its branch offices but has now to rely on volunteers. Another CSO working on human rights, Transparency Ethiopia, reduced its activities and budget by more than 50%. Most of the human rights CSOs had to drastically cut down on staff.

The Agency forced EHRC to remove election monitoring and voter education programmes before registration.⁸³ More than 17 CSOs were forced to change their organisational objectives from human rights to development activities. For instance, Action Professionals' Association for the People abandoned its focus on research and advocacy on economic and social rights and shifted to building the capacity of community-based organisations and nurturing volunteerism. The Ethiopian Lawyers Association (ELA) abandoned, after being suspended for a month and under threat of cancellation, its popular name, Ethiopian Bar Association, to get re-registered. In total, 486 organisations were compelled to change their names as a direct consequence of the Law.

The wide discretionary power of the Agency, together with the absence of the right to appeal to CSOs that are not Ethiopia charities, has instilled a sense of fear and induced self-censorship on the part of CSOs. According to one activist '[w]here the Law has been quite successful is in creating a huge layer of fear. ... It has also been successful in creating a lot of self-censorship among NGOs'.⁸⁴ Human Rights Watch reported that 'fear of government reprisals led three of the four major human rights groups that had contributed to the Universal Periodic Review process at the UN Human Rights Council in Geneva in 2009 to pull out of submitting further reports'.⁸⁵ As a result of the Law, Ethiopian organisations have not been able to provide first-hand relevant information to international and regional human rights forums.

[denied-access-to-foreign-funds&catid=42:general&Itemid=135](#) (accessed 22 December 2011). The Court ruled that the freezing of the bank accounts was not in violation of the CSO Law.

⁸² Ethiopian Human Rights Council (n 80 above).

⁸³ Ethiopian Human Rights Council (n 80 above).

⁸⁴ Human Rights Watch (n 66 above) 46. See also International Federation for Human Rights (n 77 above) 53.

⁸⁵ Human Rights Watch (n 66 above) 46.

The contagion of fear has forced CSOs to attempt to reconcile and align their mission, programmes and activities to the CSO Law rather than challenging it.⁸⁶

Despite the challenges, there have been some positive developments. As the saying goes, adversity breeds creativity. The challenges the CSO Law posed have induced some positive and creative developments and initiatives. A recent study assessing the impact of the CSO Law notes that

... by legislating that Ethiopian charities and societies should rely on domestic resources and be constituency driven, the law has in effect forced many organizations to look inward, rethink their strategies and visions and try new initiatives to harness local resources and build their local constituencies.⁸⁷

To cope with the restrictive legislation, many CSOs have revised their strategies to create sustainable networks with local business and communities. Due to shortage of funds, CSOs have to rely more on volunteers, which is increasingly creating a culture of volunteerism and commitment to issues of public interest. Many CSOs, such as EWLA, mainly rely on volunteers to run their legal aid programmes. CSOs are also putting coordinated efforts targeted at building their constituencies and domestic fund raising. The impact assessment also indicated that the CSO-Government relationship has not been tarnished as expected. Instead, the Report details encouraging signs of CSO-Government collaboration and partnership. The Report particularly singles out the role of the Ethiopian Human Rights Commission in providing small grants on a project basis to several CSOs to support their legal aid initiatives. The Commission has also established a joint steering committee with CSOs to further institutionalise and strengthen its partnership with CSOs. The rigorous re-registration and reporting duties under the Law have also contributed to better accountability and self-regulation of CSOs. There is currently a move by CSOs to establish self-regulation arrangements and adopt a code of conduct.

5. Entry points for civil society

Unfortunately, the CSO Law has taken effect and it is unlikely that it will be reviewed or repealed anytime soon. Ethiopia has rejected the recommendations of Canada, United States, United Kingdom, The Netherlands, Norway, Ireland and other countries to repeal the restrictive provisions in the CSO Law during the UPR proceedings.⁸⁸ The recommendation of the African Commission to repeal the provisions

⁸⁶ Human Rights Watch (n 66 above) 45.

⁸⁷ CSO Task Force for Enabling Environment (n 45 above) 72 – 73.

⁸⁸ UN Human Rights Council Universal Periodic Review, Report of the Working Group on the Universal Periodic Review: Ethiopia, A/HRC/13/17 (4 January 2010) paras 99 (23 – 26).

that impose foreign funding restrictions has fallen on deaf ears.⁸⁹ For now, therefore, we have to look for entry points to alleviate the impacts of the CSO Law on activities relating to human rights and democratisation issues.

There are some ways that can help to work around the Law and circumvent the challenges it has posed, particularly the restrictions on sources of funding. First, the Law allows the government to enter into special agreements with international or foreign organisations operating in Ethiopia to exempt the organisations from the requirements of the Law. Although the Law only explicitly anticipates such agreements between the government and international or foreign organisations, and although it is likely to be uncommon, there is nothing that prevents the government from exempting Ethiopian organisations from the requirements of the Law through similar special agreements. Two domestic organisations, namely, the National Coalition of Women against HIV/AIDS, which is headed by the First Lady, and Prison Fellowship Ethiopia/Justice for All have entered into special agreements with the government. According to government reports, the CSO Agency has approved EWLA's request to solicit funds from foreign sources, in addition to facilitating importation of duty free goods.⁹⁰ However, in the absence of any safeguard, such agreements provide the government with the opportunity to reward sympathisers and censor the programmes and activities of critical organisations, particularly domestic CSOs which have little leverage against the government. Indeed, the fact that one of the only two organisations that are benefitting from special exemption agreements with the government is headed by the First Lady signifies the potential selectivity that the discretion breeds.

Another arrangement that can effectively do away with the funding restrictions is agreements between donors and the Ethiopian government to classify donor funds as local funds. The European Union, for instance, has established the European Commission Civil Society Fund in Ethiopia.⁹¹ Under this agreement, the European Commission acts as the contracting authority on behalf of the government of Ethiopia. This has led to the classification of European Development Fund 9 (EDF-9) as a local fund accessible to Ethiopian CSOs. More than ten organisations, including Vision Congress for Democracy (VCODE) and Action Professionals' Association for the People (APAP), have been able to benefit from the

⁸⁹ African Commission on Human and Peoples' Rights, Concluding Observations and Recommendations (n 73 above) paras 45 & 72.

⁹⁰ Replies from the Government of Ethiopia to the list of issues to be taken up in connection with the consideration of the second periodic report of Ethiopia to the Human Rights Committee, CCPR/C/ETH/Q/1/Add.1 (10 May 2011) para 56.

⁹¹ European Commission Civil Society Fund in Ethiopia http://eeas.europa.eu/delegations/ethiopia/documents/eu_ethiopia/ressources/eu_csf_monitoring_strategy_en.pdf (accessed 23 June 2011).

fund so far. EDF-10 is also on the negotiation table and the EU is expected to push for better accessibility of the fund by Ethiopian human rights CSOs. Similar initiatives by the USAID, the World Bank, the Canadian Aid Agency and other major donors should be undertaken and can help to significantly circumvent the impacts of the restrictions on foreign funding.

Another entity that has emerged as an important partner to CSOs is the Ethiopian Human Rights Commission. The Commission has shown its commitment to work with CSOs, particularly in areas of legal aid. It has committed funds and called for proposals from CSOs working on legal aid. The Commission plans to establish a separate fund for legal aid programs of CSOs. EWLA and ELA are negotiating a memorandum of association with the Commission to enable them to access these funds. The initiative will hopefully grow to cover other areas of human rights advocacy. Donor agencies should encourage this arrangement by subjecting aid to the Commission to cooperation with domestic CSOs. The Commission may, therefore, be used as a conduit to transfer resources to domestic CSOs.

The introduction of the CSO Law imposes special responsibilities on the legal profession and academic community. Regrettably, the academic community remained neutral, or rather dormant, throughout the drafting process of the Law. The legal academic community should have stood with CSOs to put pressure on the government. There were no official statements, seminars or debates that were organised concerning the constitutionality of the most controversial aspects of the draft or the Law. There was no comparative research undertaken to situate the CSO Law within the international plane. Now that CSOs working on human rights issues have been effectively neutralised, the academic community has the opportunity and responsibility to plug in the gap that has been created by the implementation of the CSO Law especially on areas of human rights and good governance.

Currently, the curriculum for undergraduate law students includes a mandatory human rights course as well as an optional course on the African human rights system. Moreover, several law faculties have established centres to work on a wide range of issues including research and education on human rights issues. These centres are often established in the form of legal aid centres and most of them work closely with the Ethiopian Human Rights Commission. Given that such centres and law faculties are part of universities and, therefore, not subject to the Law, there is a huge potential to strengthen the existing centres and establish new ones to engage in human rights advocacy and constitutional litigation.

6. Human rights advocates and constitutional review

One of the main strategies that have been employed by interest groups as part of their reform campaign to effect legal change and reset existing social and state power relations has been strategic litigation.⁹² In addition to the benefits that accrue with winning a case, court victories can ‘lend legitimacy to a cause, mobilise constituencies, and provide much-needed publicity’.⁹³ Favourable decisions also help generate the support of elites, individuals and groups that wield significant resources and influence,⁹⁴ and elevate the bargaining power of a social movement.⁹⁵ Threats of constitutional challenge can increase pressure on adversaries and reset the parameters of out-of-court dialogue and enhance the potential for political compromise. Even when the prospect of winning a court case is slim, social movements can still resort to litigation to bolster and mobilise their constituencies and establish organisational identity.⁹⁶

Despite its potential benefits, strategic constitutional rights litigation has been ignored by Ethiopian CSOs. There is no litigation-centred CSO in Ethiopia. Many human rights CSOs, such as EWLA, ELA and EHRC, are involved in litigation only through their legal aid units which provide legal support to individuals who cannot afford to employ advocates by themselves.⁹⁷ The cases rarely involve constitutional issues. The focus on legal aid has continued even after the enactment of the CSO Law, mainly with financial support of the Ethiopian Human Rights Commission. The absence of reliance on constitutional rights litigation as a catalyst for legal and social change should not be seen as one of the effects of the 2009 CSO Law, although the Law certainly makes the emergence of litigation-centred CSOs even more difficult. The CSOs rely almost exclusively on advocacy work to ensure the repeal of undesirable laws or the adoption of new ones. Litigation is not considered as part of their broader advocacy projects. There has not been a tradition of reliance on constitutional adjudication. Given the

⁹² J Wilson ‘It takes all kinds: Observations from an event-centered approach to cause lawyering’ (2009) 50 *Studies in Law, Politics, and Society* 169.

⁹³ D Nejaime ‘Winning through losing’ (2010-2011) 96 *Iowa Law Review* 941, 944.

⁹⁴ E Steinman ‘Legitimizing American Indian sovereignty: Mobilizing the constitutive power of law through institutional entrepreneurship’ (2005) 39 *Law and Society Review* 759, 771.

⁹⁵ M McCann *Rights at work: Pay equality reform and the politics of legal mobilization* (1994) 144 – 45.

⁹⁶ Nejaime (n 93 above) 945.

⁹⁷ See generally S Gebre-Egziabher ‘The role of civil society organisations in democratisation process’ Paper Presented at the Fifth International Conference of the International Society for the Third-Sector Research (ISTR), 7 – 10 July 2002, the University of Cape Town, South Africa – http://www.istr.org/resource/resmgr/working_papers_cape_town/gebre.pdf (accessed 5 April 2012). The programmes of the Ethiopian Human Rights Council, for instance, do not include constitutional litigation as a strategy – <http://ehrc.org/> (accessed 31 May 2011). EWLA provides legal aid to women and girl victims of human rights violations. It should be noted that although the legal aid programmes are designed to serve the indigent, and not as part of deliberate strategic litigation tools, some of the cases supported by legal aid programmes can have broader impact than the individual case.

fact that the reliance on advocacy work has failed to prevent the adoption of the CSO Law,⁹⁸ one would expect existing CSOs to consider resorting to the constitutional adjudication process to challenge the Law.

Domestic litigation offers a powerful tool to challenge violations of rights and restrictive laws, expose the repressive nature of the governing system, and/or generate public attention and awareness.⁹⁹ However, Ethiopian CSOs do not generally resort to the constitutional adjudication procedure. This has generally been the practice with few exceptions. In one case, EWLA successfully represented a Muslim woman who was subjected to the jurisdiction of Shari'a Courts without her consent.¹⁰⁰ In another case, a judicial challenge was successfully launched by a consortium of CSOs against the decision of the National Election Board of Ethiopia that prohibited CSOs from observing the 2005 elections.¹⁰¹ Despite these rare attempts which proved successful, one can only guess why one or more of the CSOs have not challenged the constitutionality of the CSO Law that has essentially crippled their work. Prior to the adoption of the Law, Ethiopian CSOs established an ad hoc task force which focused on advocacy work to galvanise support against the adoption of the draft law. Similar strategies of engaging the government on the advocacy sphere continued even after the Law was adopted.

A close look at the tone of the government policy and ideology on CSOs and the lack of an independent constitutional review system, as indicated in Chapter 3, can explain the (strategic) decision to refrain from experimenting with constitutional review.¹⁰² It was indicated in Chapter 2 that in the absence of an independent and impartial interpreter and enforcer of constitutional rights, litigation offers little or no hope against legally sanctioned repression. This coupled with the discretion of the Agency to revoke licenses, the duty of CSOs to renew their licenses every three years, and the absence of the right to appeal to courts creates a catch-22 situation where losing the constitutional case is very likely but not a choice for CSOs. Any action by CSOs to challenge the Law can lead to government reprisals, which are

⁹⁸ Gobena indicated in this regard that the dialogue with government to change the law has failed and dialogue has become more of a monologue – Interview with Amedie Gobena (n 68 above).

⁹⁹ D Moore 'Safeguarding civil society in politically complex environments' (2007) 9 *International Journal of Not-for-Profit Law* 3, 19.

¹⁰⁰ See *Kedija Beshir* case, House of Federation (May 2004) – House of Federation of the Federal Democratic Republic of Ethiopia (July 2008) 1 *Journal of Constitutional Decisions* 35 – 41.

¹⁰¹ *Organization for Social Justice in Ethiopia et al v Ethiopian Election Board*, Federal High Court, case no 38472 (11 May 2005); and *Organization for Social Justice in Ethiopia et al v Ethiopian Election Board*, Federal Supreme Court, file no 19699 (May 2005) (on file with author)

¹⁰² Interview with Debebe Hailegebriel (n 67 above). Gobena said that he was not aware of any discussions on challenging the constitutionality of the law. However, he indicated that litigation is unlikely to change anything – Interview with Amedie Gobena (n 68 above).

legally justifiable under the CSO Law. Any challenge to the Law may not be considered as a mere legal change but rather as a ‘challenge to government power’.¹⁰³ CSOs have, therefore, opted to work their ways around the CSO Law smoothly rather than attempting to provoke the government, which might react harshly.¹⁰⁴

Strict standing rules governing constitutional adjudication in Ethiopia also play a screening role to exclude CSOs from litigating cases in which they do not have direct interest.¹⁰⁵ According to the rules governing standing concerning the enforcement of constitutional rights, it is only those whose rights have allegedly been violated that may approach the Council of Constitutional Inquiry. The Proclamation constituting the Council provides as follows:¹⁰⁶

Any person who alleges that *his* fundamental rights and freedoms have been violated by the final decision of any government institution or official may present his case to the Council of Inquiry for constitutional interpretation. (Emphasis added)

It can clearly be observed that this provision upholds the traditional standing rule which only allows those whose rights have been directly affected to have the standing to apply for constitutional interpretation. The mere fact that a person is adversely affected, directly or indirectly, by a particular act or omission does not suffice unless he or she can show that they have a constitutional right which has been violated. Given the Constitution only guarantees rights to individuals and not to legal persons, CSOs cannot directly claim violations of constitutional rights. The only way they can do so is by providing legal aid to victims of violations.

Moreover, the Proclamation only anticipates cases where a right has actually been violated and does not include cases of threats of violation. As such, individuals and entities would have to face the risk of violating and suffering the consequences of legislation, which might be dire, before asserting their

¹⁰³ Hailegebriel indicated in this regard that the decision not to challenge the law is partly attributable to a ‘state of fear’. He said that a constitutional challenge will not be seen by the government as a mere legal issue – Interview with Debebe Hailegebriel (n 67 above).

¹⁰⁴ However, despite the fact that success is unlikely, Hailegebriel and Gobena indicated that there is value in challenging the constitutionality of the law - Interview with Debebe Hailegebriel (n 67 above), and Amedie Gobena (n 68 above).

¹⁰⁵ Ginsburg and Moustafa observe that authoritarian regimes can use standing rules to constrain judicial activism without directly impinging on judicial autonomy and independence – Ginsburg and Moustafa (n 7 above) 14 & 19. For a detailed discussion on the standing rules governing constitutional adjudication in Ethiopia and the impact on the role of CSOs in constitutional litigation, see A Abebe ‘Towards more liberal standing rules for the enforcement of constitutional human rights in Ethiopia’ (2010) 10 *African Human Rights Law Journal* 407 observing that standing to institute constitutional cases in Ethiopia is still governed by strict and archaic rules which do not take into account the interest at stake and the individual circumstances of the victims and recommending the liberalisation of standing rules to ensure that the constitutional guarantees can be enforced via, inter alia, public interest litigation.

¹⁰⁶ Council of Constitutional Inquiry Establishment Proclamation no 250/2001, article 23 (1).

constitutional rights. For instance, in the Ethiopian Anti-Terrorism Law, there is a provision which criminalises publishing anything *likely* to encourage terrorism.¹⁰⁷ This provision imposes unreasonable restrictions on freedom of expression and the press and, hence, might be challenged as unconstitutional. Yet, under the current procedure, only those who have already been charged or convicted under the same provision may challenge the Anti-Terrorism Law. CSOs, individuals or publishers may not dispute the constitutionality of this provision without subjecting themselves to a potential criminal prosecution. This unreasonably restricts access to the Council and, hence, access to constitutional justice. Therefore, the strict standing rules constrain the resort of CSOs to strategic constitutional review to effect legal and policy changes.

However, there are several ways through which CSOs can circumvent the strict standing rules. The first is to use their legal aid schemes to identify and represent victims of violations. The Federal Courts Advocates Licensing and Registration Proclamation also anticipates a possibility where an individual can obtain a Special Advocacy License which enables the license-holder to defend the general rights and interests of society.¹⁰⁸ CSOs can apply for the Special Advocacy License.¹⁰⁹ However, the Ministry of Justice has not issued the necessary directives relating to the issuance of Special Advocacy License, the type and quality of services to be rendered through the license, and code of conduct of the license-holders. As a result, no CSO has so far been issued with the Special Advocacy License.¹¹⁰

In order to ensure the effective enforcement of environmental standards and in recognition of the broad, indiscriminate and boundless impacts of environmental pollution, the Environmental Pollution Control Proclamation establishes a separate standing law regime. It sanctions the right of ‘any person’ to lodge a complainant in the Environmental Protection Authority (Authority) ‘against any person allegedly causing actual or potential damage to the environment’ without the need to show any vested interest.¹¹¹ A similar broad standing right exists to access the courts ‘when the Authority or regional environmental agency fails to give a decision within 30 days or when the person who has lodged the

¹⁰⁷ Ethiopian Anti-Terrorism Proclamation no 652/2009, article 6 which provides that the crime of terrorism is committed by anyone who ‘publishes or causes the publication of a statement that is *likely* to be understood by those addressed as a direct or indirect encouragement or other inducement for the commission or preparation or instigation of an act of terrorism’ (emphasis mine).

¹⁰⁸ The Federal Courts Advocates Licensing and Registration Proclamation 199/2000, article 10.

¹⁰⁹ S Yeshanew ‘The justiciability of human rights in the Federal Democratic Republic of Ethiopia’ (2008) 8 *African Human Rights Law Journal* 273, 291 observing that ‘NGOs that advocate a respect for human rights in the country may also be issued with such a licence’

¹¹⁰ Yeshanew (n 109 above) 292.

¹¹¹ Environmental Control Proclamation no 300/2002, article 11 (1).

complaint is dissatisfied with the decision [of the Authority]’.¹¹² The right to a clean and healthy environment stands as a notable exception regarding the recognition of public interest litigation in Ethiopia.¹¹³ This liberal standing rule is, however, only applicable to courts and the Environmental Protection Authority (EPA). There is no similar generous right to access the Council or the HoF concerning the enforcement of the right to a clean and healthy environment as recognised in the Constitution.¹¹⁴ Hence, only those who have direct interest in a case may challenge the constitutionality of a law or government decision for alleged incompatibility with the constitutional right to a clean and healthy environment.

Also *amicus curiae* procedures can help CSOs to intervene in and influence constitutional adjudication. The Ethiopian Constitution does not have any provision addressing *amicus curiae* submissions. Nevertheless, the Proclamations consolidating the HoF and the Council anticipate procedures whereby the Council or the HoF may be engaged in ‘gathering professional opinions’ on the issue under determination. The Council or the HoF may ‘call upon pertinent institutions, professionals, and contending parties to give their opinions’ on the issues under consideration.¹¹⁵ A pertinent federal or state government institution, particularly the institutions which consult the government in adopting laws, may also be required to explain controversies over relevant constitutional issues.¹¹⁶ This procedure of hearing a wide variety of individuals or groups is particularly necessary as the decisions of the HoF have binding effects on similar cases in the future.¹¹⁷

The power to select the institutions or professionals that may submit their views regarding a disputed constitutional issue lies solely with the Council and the HoF. The HoF or the Council may also make

¹¹² Proclamation no 300/2002, article 11(2), the appeal should be lodged within 60 days from the date the decision was given or the deadline for decision has elapsed.

¹¹³ Action Professionals’ Association for the People (APAP) instituted the first public interest litigation based on this provision against the Environmental Protection Authority. The issue dropped down to be on whether the EPA can be sued based on article 11. The Court held that article 11 of the Environmental Pollution Control Proclamation does not grant standing for suits against the EPA; the law only allows action against polluters and potential polluters which the EPA was established to control – *Action Professionals’ Association for the People (APAP) v Ethiopian Environmental Authority*, case no 64902, Federal First Instance Court (31 October 2006) (on file with author).

¹¹⁴ Note, however, that courts and the EPA may engage in incidental constitutional interpretation in ensuring compliance with the pollution laws

¹¹⁵ Council of Constitutional Inquiry Establishment Proclamation no 250/2001, article 27; Consolidation of the House of Federation and the Definition of its Powers and responsibilities Proclamation no 251/2001, article 10. The House has collected views of experts on some occasions. Note that the HoF and the Council are not bound to hold oral hearings. The HoF may only hear the parties when it deems it necessary.

¹¹⁶ Proclamation no 250/2001, article 26; Proclamation no 251/2001, articles 9(2 & 3).

¹¹⁷ See L Re ‘The *amicus curiae* brief: Access to the courts for public interest associations’ (1983-1984) 14 *Melbourne University Law Review* 522, 533 observing that ‘as the major purpose of the *amicus* brief is to ensure that a precedent is sound, the use of the brief is of particular importance in courts where a decision is likely to constitute a precedent’.

general calls for contribution from a wider audience. There is no right to stand as *amicus curiae*.¹¹⁸ The laws are not clear on whether the institutions or professionals may apply to stand as *amicus* in a particular case. Since no procedure concerning unsolicited applications for *amicus* intervention exists, it can be argued that *amicus* intervention is possible only when the HoF or the Council of its own motion solicits for applications. This understanding may, however, narrow down the opportunities for the HoF to benefit from the expertise of individual professionals and institutions particularly regarding issues of human rights. Moreover, the institutions or individuals may wish to present issues and arguments that were not anticipated by the Council or the HoF. Hence, these provisions should be understood as allowing professionals and institutions to apply to be joined as *amicus curiae* in cases that relate to their expertise. This is important as the professionals and institutions are better suited to determine the relevance of their expertise to a particular case. Despite the possibility of intervening as *amicus curiae*, the practice of *amicus curiae* intervention in ordinary courts is largely unknown in Ethiopian legal practice.

7. Opposition political parties and constitutional review

Constitutional litigation has become a battle ground for disputes between political actors. Constitutional adjudicators provide secondary forums for minority opposition political parties to challenge government decisions and advance their political agenda. The case examples from Ghana, Uganda and Malawi discussed in Chapter 2 indicate that opposition political groups can be major actors in constitutional review not only to defend their own direct interests but also to challenge laws and other decisions that violate constitutional provisions.

In Ethiopia, political parties hardly resort to constitutional review to challenge laws and other government measures. Constitutional review is not part of their strategies to ensure the implementation of their policies and challenge laws and other decisions that they consider are unconstitutional. The only instance where opposition political parties seek judicial redress is during elections against alleged rigging of votes or other violations of electoral laws. One major exception has been the challenge against the 2005 emergency declaration by the Prime Minister which suspended the right to assembly and demonstration in and around Addis Ababa. The challenge was initially brought by the Coalition for Unity and Democracy (CUD) – then the main opposition political party – in the Federal First Instance Court

¹¹⁸ This is in line with internationally applicable rules that permission to participate as a friend of the court has always been a matter of grace of the courts rather than a right – see S Krislov 'The *amicus curiae* brief: From friendship to advocacy' (1962-1963) 72 *Yale Law Journal* 694, 695.

based on alleged violation of the Proclamation regulating peaceful demonstration and public political meetings.¹¹⁹ The CUD explicitly pleaded the Court not to refer the case to the Council. Despite CUD's plea, the Court referred the case to the Council. The Council delivered its rulings after the lapse of the emergency period.¹²⁰ It ruled that there was no constitutional dispute as the dispute was on whether there was an emergency situation that justified the suspension of the rights. According to the Council, this determination was a factual dispute that the Constitution empowered the Prime Minister and the Council of Ministers to do. Anyone who challenges the existence of an emergency situation should, therefore, prove it. CUD did not prove the absence of an emergency situation and the banning of assemblies and demonstrations was, therefore, not unconstitutional.

Except this case, opposition political parties have not relied on the constitutional adjudication process to challenge the constitutionality of any law or practice. One would expect opposition political parties to, for instance, intervene to challenge the CSO Law. Given that several members of opposition parties are currently under investigation based on the Anti-Terrorism Proclamation, one would expect the parties to challenge the constitutionality of the Law.¹²¹ Challenging the CSO and Anti-Terrorism Laws on behalf of CSOs and the media may also demonstrate the commitment of opposition parties to freedom of expression and association. It can also support the media and CSOs which have refrained from challenging the constitutionality of the laws partly due to fear of reprisal. To act jointly against illegal pressures on CSOs and the media is in line with the policy statements, for instance, of the Forum for Democratic Dialogue in Ethiopia (Medrek), the biggest opposition group in the country.¹²² Failure to win the constitutional case will not have any direct impact on the activities of such political parties and the possibility of reprisal against opposition parties in the form of de-registration is also unlikely.

The fact that constitutional review has not been an attractive venture for political opposition groups can be explained by the lack of a reliable and independent constitutional adjudication system.¹²³ The plea of

¹¹⁹ Proclamation to Establish the Procedure for Peaceful Demonstration and Public Political Meeting no 3/1991.

¹²⁰ Emergency declaration case, Council of Constitutional Inquiry (14 June 2004) (on file with author).

¹²¹ Only since March 2011, more than 114 individuals, most of whom are members of opposition groups and journalists, have been arrested under the Anti-Terrorism Law. Many more have fled the country after being charged with terrorism – Amnesty International 'Dismantling dissent: Intensified crackdown on free speech in Ethiopia' (2011) http://www.ethiomeia.com/broad/dismantling_dissent_in_ethiopia.pdf Accessed on 10 January 2012.

¹²² See 'Statement on the initiation of 'Forum for Democratic Dialogue in Ethiopia'' (24 June 2008) para 12.3 <http://www.tecolahagos.com/UEDF.pdf> (accessed 5 July 2011).

¹²³ Gidada and Gudina indicated that the reluctance of CSOs and opposition groups to resort to constitutional adjudication is due to the absence of an independent constitutional adjudicator which results in lack of trust. Interview with Negasso Gidada, Former President of FDRE, Chair, Unity for Democracy and Justice Party (UDJ), 5 October 2011, Addis Ababa, Ethiopia; Interview

the CUD to the Federal First Instance Court not to refer the matter to the Council speaks volumes about the fact that political parties distrust and, as a result, avoid resorting to the constitutional adjudication system. In the absence of an independent and reliable constitutional arbiter which increases the likelihood of losing a case, constitutional review will merely legitimise unconstitutional government behaviour. Hailu Arraya used an age old adage to describe the constitutional adjudication system in Ethiopia: '*Abatu dagna, liju kemagna*' – roughly, 'the father is the umpire, and the son the mugger'.¹²⁴ The belief that constitutional review will not result in the invalidation of government decisions has kept opposition political parties away from the constitutional adjudication system.

Two opposition party leaders, Gudina and Arraya, also pointed out that their political parties do not have the necessary knowledge, expertise, and experience to make use of the constitutional adjudication system.¹²⁵ Arraya further indicated that even if they choose to litigate, lawyers are reluctant to take their cases because those lawyers who represented members of the CUD during the 2005 elections were subsequently arrested. Lack of able and willing lawyers to take up constitutional challenges constrains resort to constitutional review. Lack of resources further compounds reliance on constitutional litigation.¹²⁶ Moreover, the strict rules of standing are likely to serve as bulwarks against any case to challenge the CSO Law by opposition political parties as the CSO Law is not applicable to them. Challenging the CSO Law may also give government another reason to confirm its conveniently assumed unified identity of opposition political parties and CSOs working on human rights and good governance issues, which partly motivated the adoption of the restrictive CSO Law.¹²⁷ This perception of the government can prove to be politically costly for CSOs as well as opposition political parties.

Despite their distrust, none of the political parties has explicitly and consistently called for constitutional reform to grant the power of constitutional adjudication to the regular courts or another independent body.¹²⁸ The parties do not also have any explicit agenda and plan to reform the constitutional

with Merera Gudina, Chair, Oromo Peoples' Congress, and Assistant Professor, Addis Ababa University, 23 September 2011, Addis Ababa, Ethiopia.

¹²⁴ Interview with Hailu Araaya, Deputy Chairperson, UDJ, 29 September 2011, Addis Ababa, Ethiopia. He deplored the existence of a vicious circle.

¹²⁵ Interview with Hailu Araaya (n 124 above); Interview with Gudina (n 123 above).

¹²⁶ Epp (1998) (n 5 above) 8 observing that 'the effectiveness of rights advocates in these [litigation] endeavours is likely to be conditioned by their knowledge and resource capabilities'.

¹²⁷ Amedie Gobena indicated that the government does not recognise the neutrality of CSOs – interview with Amedie Gobena (n 68 above).

¹²⁸ Perhaps the only exception is Seeye Abraha, one of the most prominent opposition leaders, who raised the issue of independent constitutional adjudication system in his book *Nestsanet ena dagn'net be'Ethiopia* [Freedom and justice in

adjudication system if they take power.¹²⁹ The issue of constitutional adjudication has never really been at the forefront of political debates amongst politicians. It appears that opposition political parties consider calls for reform of the constitutional adjudication system as a waste of time and effort. Also, such calls may be politically costly as the ruling party can accuse opposition political parties of attempting to take power away from ethnic groups represented in the HoF, an allegation that can easily be sensationalised to justify harassment, as the ruling party has done on several occasions.¹³⁰

8. Why CSOs, human rights advocates and opposition parties should resort to constitutional review

So far Ethiopian CSOs, human rights advocates and opposition parties have not actively resorted to constitutional review. Constitutional review has largely been ignored. They have simply not seen the potential merits of challenging laws, policies and other government measures through constitutional review. Even though the prospect of success of a constitutional challenge is low, owing to the dependent constitutional adjudication system, there are at least two advantages of resorting to constitutional litigation even under the current realities.

First, although winning a constitutional case is unlikely, it is not impossible, particularly on issues that do not affect or threaten the core interest of the regime. For instance, in one case the Federal High Court and the Federal Supreme Court invalidated the decision of the National Electoral Board which prohibited CSOs from observing the 2005 elections.¹³¹ The decision to ban CSOs was motivated by political considerations; yet the courts invalidated the decision. Although the case did not involve a constitutional issue, it shows that favourable decisions, although improbable, are not impossible. Of course, there is a possibility that a favourable constitutional decision may simply be ignored. However, given that the ruling political group dominates the House of Federation as well as the Council of Constitutional Inquiry, it is unlikely that the government will refuse to comply with a constitutional

Ethiopia] (2010) 241 – 242 pointing out that, given that the constitutionality of laws made by politicians is determined by other politicians in the House of Federation, it is unlikely that any law that serves their interest would be declared unconstitutional. He suggests that the power of constitutional interpretation should be granted to the courts. Seeye was a direct victim of the law which denied bail to all persons accused of corruption which was later declared valid by the Council of Constitutional Inquiry. The law was referred to as ‘Seeye’s Law’ – see footnote 68 and the accompanying text in Chapter 3.

¹²⁹ Negasso Gidada, however, indicated that Forum for Democratic Dialogue Party, a coalition of the major opposition parties in Ethiopia, has adopted the reform of the constitutional adjudication system as one of its agenda – Interview with Negasso Gidada (n 123 above).

¹³⁰ During the 2005 elections, the government conveniently compared the opposition parties with the Interhamwe which orchestrated the Rwandan genocide against the Tutsi accusing them of inciting violence against smaller ethnic groups, especially the Tigres.

¹³¹ See (n 101 above) and the accompanying text.

decision. If the government does not have any intention to comply with the decisions, it will make sure that the constitutional adjudicators simply reject the case. In other words, the main challenge in Ethiopia is not non-compliance with potential favourable constitutional decisions, but getting the decision. Favourable decisions are unlikely, but, once obtained, the possibility of compliance is quite high. The high likelihood of implementation of a favourable constitutional decision is perhaps the only advantage of any politicised constitutional review system.

Moreover, non-compliance with a favourable court decision does not imply the failure of litigation as a strategy. Court victories, even when ignored, can have enormous indirect or ancillary benefits. Lobel observes that 'litigation may serve to legitimate a political movement, to publicize the issues raised by that movement, and perhaps to spur political action'.¹³² Positive rights pronouncements and the increased publicity that accompanies constitutional decisions have the radiating effect of legitimising a cause, building a constituency and group identity, shaping the opinion of the elite and the public, enhancing the bargaining power of a subordinated group,¹³³ provoking 'mass conversation'¹³⁴ and generally providing 'a favorable environment for the social movement's broader reform campaign'.¹³⁵

Second, losing cases have been shown to have the indirect advantages that accrue from winning court cases.¹³⁶ Even judicial defeats can help to 'stake out an identity in a competitive social movement' and 'contribute to mobilization and fundraising by inspiring outrage' thereby enhancing reform agenda.¹³⁷ Judicial defeat can also encourage resort to alternative strategies and prompt other state actors to act in a specific way. The prospect of losing a constitutional case should, therefore, not completely inhibit resort to constitutional review.

In addition to the two advantages, resorting to the constitutional adjudication system is a necessary precondition before a case can be admitted before international tribunals. The principle of exhaustion of local remedies requires that a complainant should first seek remedies within the domestic system. Ethiopia is a party to the African Charter on Human and Peoples' Rights. As a result, the African

¹³² J Lobel 'Losers, fools and prophets: Justice as struggle' (1994-1995) 80 *Cornell Law Review* 1331, 1332. See also M McCann *Rights at work: Pay equality reform and the politics of legal mobilization* (1994) 10.

¹³³ McCann (n 95 above) 144 & 145.

¹³⁴ L Guinier 'Courting the people: Demosprudence and the law/politics divide' (2009) 89 *Boston University Law Review* 539, 550 observing that 'judicial actors can inspire or provoke 'mass conversation''.

¹³⁵ Nejaime (n 93 above) 944, 953 – 956; T Keck 'Beyond backlash: Assessing the impact of judicial decisions on LGBT rights' (2009) 43 *Law and Society Review* 151.

¹³⁶ Nejaime (n 93 above) 945 observing that 'litigation loss may, counterintuitively, produce winners', and that litigation loss 'may yield many of the indirect effects that scholars have identified in the context of litigation victory and litigation process'.

¹³⁷ Nejaime (n 93 above) 945.

Commission on Human and Peoples' Rights can be seized of cases against Ethiopia. If CSOs, human rights advocates and opposition groups have any intention of challenging some of the laws, policies and other government measures in the African Commission, it is necessary to first resort to available domestic remedies, including the constitutional review system.¹³⁸

CSOs, human rights advocates and opposition political parties should, therefore, seriously consider resorting to the constitutional adjudication system as part of their strategy to influence and constrain laws, policies and other government decisions.

9. Conclusion

The legal environment in Ethiopia under which CSOs operate has deteriorated. The CSO Law has particularly constrained access to funds of CSOs working on human rights and democracy. This follows and reflects the growing centralist tendencies of the government to control civil space.¹³⁹ The introduction of the CSO Law is founded on a convenient government belief that human rights issues are 'political' activities which should be left to citizens without any foreign involvement including through funding. However, the involvement of CSOs in constitutional rights litigation has been rather limited even prior to the enactment of the CSO Law. The focus of CSOs has been and continues to be human rights education and advocacy. Although CSOs have generally not resorted to strategic constitutional review in the past, the impact of the CSO Law on the possible development of litigation-centred CSOs cannot be underestimated.

The absence of an independent constitutional adjudication system holding any real prospect of success largely explains the lack of trust and, therefore, non-reliance on the system to challenge laws and executive measures that directly affect the existence and interests of CSOs and opposition parties, let alone other issues of relevance to the wider public. Litigants largely avoid resorting to the constitutional review system because the prospect of losing a constitutional case is almost inevitable in relation to matters of interest to the regime. Losing a constitutional case also has the potential to provide symbolic legitimacy to the laws and policy choices of the government. CSOs and opposition parties have,

¹³⁸ Indeed, so far, all the communications in the African Commission against Ethiopia were rejected for failure to exhaust local remedies. See for instance, *Anuak Justice Council v Ethiopia*, communication no 299/05 (25 May 2006) where the Commission held that it is not sufficient to merely allege that domestic remedies will be ineffective. They should be an attempt to exhaust potential remedies. The Commission observed that '[i]f a remedy has the slightest likelihood to be effective, the applicant must pursue it'.

¹³⁹ J Abbink 'Discomfiture of democracy? The 2005 election crisis in Ethiopia and its aftermath' (2006) 105 *Africa Affairs* 173, 197.

therefore, opted for disengagement as far as the constitutional review system is concerned. CSOs have not even challenged the law that directly targets them. The reticence of opposition parties, CSOs and other interest groups towards constitutional review has highly limited the potential that the constitutional adjudication procedure offers in furthering human rights and generally the transition towards constitutional democracy.

This Chapter presented mechanisms, in addition to constitutional review, which can be employed to circumvent the legal restrictions on CSO activities. The role of donor communities in blunting the impacts of the Law is crucial by, *inter alia*, entering into agreements with the government to work on human rights issues and pressuring the government to classify donor money as local fund accessible to all CSOs. A challenge to one can be an opportunity for another. Although the CSO Law has severely crippled the activities of human rights CSOs, including in constitutional review, it creates opportunities for law faculties of educational institutions to fill the gap that has been created. The Law does not apply to academic institutions, since they are considered as public institutions. The effectiveness of academic institutions, of course, depends on the level of academic freedom and the existence of individuals who are able and willing to take a concerted initiative to deliver on important social goals such as the realisation of human rights. Similarly, the Ethiopian Human Rights Commission has the means and moral responsibility to work with CSOs to ensure that the CSO Law does not undermine the realisation of human rights. The Commission, CSOs and all stakeholders should also work towards the repeal of the restrictive provisions of the Law.