WHO INTERPRETS THE CONSTIUTION: A DESCRIPTIVE AND NORMATIVE DISCOURSE ON THE ETHIOPIAN APPROACH TO CONSTITUTIONAL REVIEW

A DISSERTATION SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY OF PRETORIA, IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTERS OF LAW (LLM HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA)

BY

YONATAN TESFAYE FISSEHA

PREPARED UNDER THE SUPERVISION OF

PROFESSOR JR DE VILLE

AT THE

FACULTY OF LAW, THE UNIVERSITY OF WESTERN CAPE, CAPE TOWN SOUTH AFRICA

1 NOVEMBER 2004

DECLARATION

I, Yonatan Tesfaye Fisseha, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary information used has been duly acknowledged in this dissertation.

Student: Yonatan Tesfaye Fisseha

Signature: _____

Date: _____

Supervisor: Prof. JR De Ville

Signature: _____

Date: _____

This dissertation is dedicated to my parents, Ato Tesfaye Fisseha and W/o Elsa Tesfay. I owe it to you.

ACKNOWLEDGMENT

The most important contribution to this dissertation came from my supervisor, professor JR De ville, who tirelessly read the drafts and provide helpful comments. The dissertation benefited a lot from his important criticisms, both in terms of content and form. Working with him has also been fun.

My sincere gratitude to the Centre for Human Rights, University of Pretoria for the opportunity it accorded me to participate in this challenging programme. I am also grateful to the staff of the Community Law Centre for providing supportive environment during my stay in the University of Western Cape. Special thanks goes to Trudi Fortuin and Jill Classen.

Several of my colleagues and friends helped me in collecting materials and providing information. I am grateful to Ato Menberetshehay Tadesse, Vice President of the Ethiopian Federal Supreme Court, for availing all the resources that came in handy for my research. I thank my friend Birhane, who is responsible for the collection of most of the important materials I received from Home. Thanks must also go to my friend Wongelawit for sending important material from home, not to mention the interesting e-mails that kept me de-stressed.

My best friend, Woldekidan, I have once again been able to rely on you. Despite my never-ending demands you have kept on making sure that I get what I ask for. You have once again proved me that the friendship I have with you is of great value.

Thanks must also go to my Nigerian friend Folusho Degrata Shado for the nice times we had and for being there whenever I needed your help throughout the challenging academic year. To my family, all my friends and colleagues, classmates whom I could not mention due to the constraint of space, I am truly grateful.

TABLE OF CONTENTS

CHAPTER ONE: INTRODUCTION

1.1 Background to the study

The Ethiopian Constitution, in a 'creative stroke', provides the power to "interpret"[1] the Constitution to the House of Federation (the House), which is referred to by some writers as the "Upper House" or "Second Chamber" of the bicameral parliament. The Constitution also establishes the Council of Constitutional Inquiry (the Council), a body composed of members of the judiciary, legal experts appointed by the House of Peoples' Representatives and three persons designated by the House from among its members, to examine constitutional issues and submit its recommendations to the House for a final decision. This is, of course, very different from a number of other more well-known legal systems which vest the power of constitutional review either in general courts or in constitutional courts set up exclusively for constitutional matters.

The formal way through which issues of constitutional interpretation take place is via the Council. Issues of constitutional interpretation are referred to the Council by a court or "the interested party"[2] to a dispute. The Council, after examining the constitutional issue, can either remand the case to the competent court after it has found no need for constitutional interpretation, or submit its findings on constitutional interpretation to the House. The House, after deliberating on the suggestions of the Council, can either accept or reject the recommendations of the Council. It should be noted that a party not satisfied with the order of the Council to remand the case to the competent court for lack of grounds of constitutional interpretation, may appeal against the order to the House.

1.2 Statement of the problem

As indicated above, the House has the final and ultimate power to interpret the Constitution. However, the role of the courts in the interpretation of the Constitution is still far from settled. The function, relation and co-existence of the courts and other organs of state need to be spelled out clearly. The extent to which and the circumstances under which the judiciary should defer to other institutions, and especially to the House, need to be ascertained. The difficulty lies in determining where the role of the court ends and that of the other institutions (especially the Council and House) begins.

---

1 The Ethiopian Constitution uses the terms 'constitutional interpretation' and 'constitutional disputes'. Nowhere in the Constitution does one finds the terms constitutional review or judicial review (i.e. the power to invalidate legislation for constitutionality). The concept of constitutional review is, however, recognized by the constitution, as it is obvious from the reading of article 84(2) of the Constitution.

2 The term 'interested party' is taken to mean any person or body (i.e. an interested group, a human rights NGO, an association, a federal or regional agency) directly affected by the impugned legislation. For further discussion see M.Abebe Who is the Interested Party to initiate a challenge to the constitutionality of laws in Ethiopia (1999) 1 *The Law Student Bulletin* 9-12.

The problem has a normative component as well. The Ethiopian approach to constitutional review, one may argue, is a response to the counter-majoritarian dilemma.[3] By excluding the involvement of ordinary or special courts from the business of constitutional review the government has made it impossible for the court to "usurp legislative power". A question, however, remains whether this really represents an adequate response to the counter-majoritarian dilemma.

This research paper investigates both the descriptive and normative component of the problem. As the title of the study and the discussion in the preceding paragraphs suggest, it asks who interprets the constitution and who should do so. While the first part sets out to investigate the structure and institutions of constitutional review in Ethiopia, the second part evaluates the legitimacy of the system.

1.3 Focus and objective of the study

First, this study proposes to explore the process of constitutional interpretation and constitutional review in Ethiopia and determine the role of the courts. It examines the different suggestions made by different authors and officials regarding the respective role and function of the courts and the House in interpreting the constitution and exercising the power of constitutional review. Secondly, it seeks to inquire, for the purpose of meeting the other objective of this study, the counter-majoritarian problem which focuses on the relationship between judicial review and democracy. Thirdly, the dissertation will inquire into the legitimacy of the Ethiopian approach to constitutional review. In this regard it seeks to determine whether the approach represents an adequate response to the counter-majoritarian problem. It also goes beyond that and seeks to determine whether Ethiopia has adopted an institution that is well suited, competent and impartial to discharge the task of constitutional interpretation and constitutional review.

1.4 Hypothesis

It is the thesis of this study that the courts, despite the growing view that they are entitled to interpret the constitution, have neither the power to exercise constitutional review nor the power to interpret the provisions of the Constitution, tasks all left for the House. The thesis argues that the Ethiopian approach to constitutional review seems to represent a response to the counter-majoritarian dilemma and solve the problems it raises. A close examination, however, reveals that the system not only fails to represent an adequate response to the counter- majoritarian dilemma but also lacks "characteristics that make it a good part of a well designed constitutional system".

---

[3] The counter-majoritarian problem, as it shall be discussed in chapter three in greater detail, refers to the problem of having unelected and unaccountable judges invalidate the acts of elected and accountable representatives of the people. It is also referred as the counter-majoritarian dilemma or difficulty.

1.5 Significance of the study

Identifying the proper locus of constitutional interpretation and constitutional review engages an ongoing controversial debate. The legitimacy of constitutional review and the case for democracy and popular participation in the making of important decisions inform the whole debate around the issue. This controversy has gained its momentum in a country like Ethiopia where a different system of constitutional review is adopted. The relevance of this topic is, thus, to contribute to this academic debate. But note must be taken here that the issue of constitutional review entails an implication way beyond the academic debate as it has practical consequences.

Determining who reviews legislation, and who should do so has important implications in evaluating the level and effectiveness of protection provided for human rights. It is often argued that an American model of review, where the judiciary exercises the controlling power, provides the best guarantee for the protection of fundamental human rights. Thus, any departure from this American model raises some questions. In the case of Ethiopia, identifying the proper organ/s for constitutional review, specifically determining where the role of the courts ends and that of the House begins, sets the ground for further enquiry on the relevance of a constitutional review system adopted by a nation for the protection of human rights. This is very important for Ethiopia as the Constitution provides for an extensive bill of rights.[4]

Resolving this issue is also important for a proper understanding of the constitutional governance of a nation. Constitutionalism has increasingly found acceptance in a significant number of countries around the world, more specifically among countries that have adopted a written constitution. Limited government has also become the acceptable expression of constitutionalism. The kind of review system adopted by a country sheds light on the constitutional governance of the nation under consideration. Hence, identifying and examining the constitutional review system adopted in Ethiopia will help us understand and explain the constitutional system. This in turn, will help us to look at what the Ethiopian system, as a novel approach to the matter, has to offer, positively or negatively, to the rest of the world in terms of constitutional governance.

1.6 Literature review

The subject of constitutional review has evoked a considerable amount of comment in academic literature. Many have written on the democratic or undemocratic nature of constitutional review. So far only a few articles have discussed the Ethiopian approach to constitutional interpretation and constitutional review.

Tsegaye Regassa in his article, *Courts and the Human rights norms in Ethiopia*[5], argues that courts have the power to interpret the Constitution. He relies on what he calls “the normal

---

4 The Constitution has allocated a full chapter on human rights and another one on ‘democratic rights’.

5 R Tsegaye Courts and the Human rights norms in Ethiopia in F Assefa (ed) *Proceedings of the symposium on*

(sometimes he refers to it as “inherent”) judicial business of courts” and argues that the power of the courts includes refusing to apply an Act of parliament on the ground that it is not compatible with the Constitution.

Many others[6] advocate for a role of courts in interpreting the Constitution based on the constitutional commitment of the courts to respect and enforce the fundamental rights and freedoms set forth in Chapter two and three of the Constitution.[7] However, those who argue along this line do not accept the conclusion that the courts can invalidate an Act of parliament. They rather limit the power of courts to an exposition of the provisions of the Constitution.

Getachew Assefa in his article, *interpreting the Constitution: The role of the Courts and the Council of constitutional Inquiry* has also briefly touched upon the matter. He, however, was too careful to take sides in the matter. In his conclusion, he still seems to suggest that the Ethiopian system is free from the kind of problems that a constitutional review system through the courts brings about.[8] He obviously was referring to the counter-majoritarian dilemma.

1.7 Methodology

This research paper shall adopt a critical analytic approach. As this approach suggests, a desk-oriented research is the methodology that shall be employed in this study. Library sources are the main sources. Internet research shall be used. Minutes of the Ethiopian Constitutional Assembly shall be discussed.

1.8 Limitations of the Study

Two disclaimers are in order. The thesis, first, focuses on the political question of constitutional interpretation and constitutional review. It only strives to determine the organ responsible for constitutional interpretation and constitutional review and to evaluate the legitimacy of that institution. To that extent, it does not deal with the theory and different methods of constitutional interpretation and other related constitutional issues. It may, however, discuss some of the methods of constitutional interpretation but only when it is relevant to make a point to the main thesis of this study. Second, in so far as the discussion on constitutional review and democracy is concerned, this is not an original thesis. It is not original in a sense that it doesn’t strive to give

---

the role of the courts in the enforcement of the Constitution (2000) 108.

6 F Assefa Constitutional interpretation: the respective role of courts and the House of Federation in Assefa (note 5 above) 6. IÓ ›}[Ñ<ÑU uS”u[G¾ Åc KÇ™‹ eMÖ“ ¾k[u ÖpLÃ õ`É u*ƒ* ÁM}S 1994(An Amharic document on the interpretation of the Constitution by Menberetsheay Tadesse.)

7 Article 13 of the Constitution states that all federal and state legislative, executive and judicial organs have the responsibility and duty to respect fundamental rights and freedoms recognized by the Constitution.

8 A Getachew *interpreting the Constitution: The role of the Courts and the Council of Constitutional Inquiry,* Paper presented on constitutional interpretation workshop, Addis Ababa, Ethiopia Hotel (2001).

complete conclusions and to resolve current debate on the topic. The aim is rather to undertake an informed examination of the matter and, in the process, develop a coherent set of ideas to be applied when analyzing the Ethiopian case.

1.9 Overview of the chapters

An overview of chapters that follow might be helpful. Chapter two focuses on the descriptive aspect of this study. In this chapter, the proper organ/s involved in constitutional review in Ethiopia shall be identified. More importantly the role of the courts shall be clearly spelt out.

Chapter three, by way of providing a background for chapter four, discusses the counter-majoritarian difficulty. It shall in particular examine the relationship between judicial review and democracy. This shall be done with a view to develop a sort of theoretical framework for chapter four. It is in light of this framework that the Ethiopian approach shall be evaluated.

Chapter four is primarily concerned with the normative dimension of this study. It questions whether the Ethiopian approach represents a response to the counter-majoritarian dilemma. It further goes on to evaluate the approach in a principled way. It shall ask whether the Ethiopian approach "as an institution has characteristics that make it a good part of a well-designed constitutional system".

Chapter five, the final chapter, shall conclude the discussion. It shall present the summary of the discussion and observations with the necessary recommendations.

CHAPTER TWO: A DESCRIPTIVE DISCOURSE ON THE ETHIOPIAN APPROACH TO CONSTITUTIONAL REVIEW

2.1 General

Constitutional review, the power to determine the constitutionality and, therefore, the validity of the acts of the legislature,[9] takes various forms. This depends on various factors, among which are the dis/trust of the judiciary, the differing applications of the notions of separation of powers and the legal tradition of the country. Irrespective of these differences, however, most countries in the world have been practising some form of constitutional review.[10]

The subject of constitutional review, however, gained considerable attention only after 1803 when the American Supreme Court in *Marbury v. Madison* asserted its power to review the conformity of legislation with the constitution and to disregard a law held to be unconstitutional.[11] Since then it is not uncommon to find ordinary courts empowered to control the compatibility of legislation and executive acts with the terms of the constitution. This is what is often referred as centralized or diffuse systems of constitutional review. In such a system, of which America is a good example, constitutional review is a power exercised by all courts.

A number of European countries, in which constitutional review of legislation was a virtually unknown phenomenon till the end of World War II,[12] have, by and large, adopted a different model of constitutional review. In most of the European countries the power of constitutional review is assigned to a single organ of state. This may be either a supreme court or a special court created for that particular purpose. This system is called a concentrated system of constitutional review.[13]

---

9 The term constitutional review in this study is used interchangeably with judicial review. Judicial review, in this study, refers to the act of reviewing the constitutionality of statutes or legislation.

10 Today close to 100 countries have some form of constitutional review. see MI Aboul – Enein The emergence of constitutional courts and the protection of individual and human rights: A comparative study in AO Sherif and E Cotran (eds) *The role of the judiciary in the protection f human rights* (1997) 284.

11 Marbury v Madison (Supreme Court of U.S 1803 5U S. (1(Granch) 137, 2, L.Ed.60 in D Kommers and J Finn *American Constitutional law: essays, cases and commentary notes* (2000) 25.

12 Until the post world war II period only a few European constitutions, most notably the 1920 Austrian constitution, recognized constitutional review. It was not introduced in France until the institution of the *Conseil Constitutionnel* in the 1958 constitution. For further discussion see C.Sampford and K Preston *Introducing the constitution: Theories and principles and institution* (1996) 22-25.

13 M Cappilleti *Judicial review in comparative perspective* (1989)136-146. In Great Britain and some other countries, where the doctrine of parliamentary sovereignty has long been regarded as the most fundamental element of the constitution, no organ has legal authority to invalidate statutes on the ground that they are not in conformity with the constitution (the unwritten constitution) or some fundamental moral or legal principles. In Britain, the legislative authority of parliament is supreme, and the function of the court, in this system, is merely to give effect to these laws. In the words of Dicey, the legislature "has the right to make or unmake any law whatever" and no person, body or court outside Parliament "is recognized by the law of

In France, where it is considered that "constitutional review through an action in the courts would conflict too much with the traditions of French public life", constitutional review is exercised by a body other than a court. It is the *Conseil Constitutionnel*, a political body, which exercises constitutional review.[14] The *Conseil Constitutionnel* challenges the constitutionality of a law only before it is promulgated by parliament. Hence why some authors refer to the system as a preventive system of constitutional review.[15]

A brief examination of the legal history of Ethiopia reveals that constitutional review, as one writer commented, "does not have a gratifying history".[16] To begin with, the 1931 Constitution, the first written constitution, did not include a specific provision on constitutional adjudication. One may even argue that such conception of constitutionalism was not possible during that period. This mainly has to do with the fact that the Constitution, in the first place, was designed to enhance both change and stability in favour of the monarchy rather than impose a limit on government.[17] It especially achieved this by "effectively removing the church from the forefront of Constitutional power play".[18] As a result, the powers of the Emperor were not subject to any strict kind of review and his authority could not be contested.[19]

England as having a right to override or set aside the legislation of parliament". In the most quoted statement of Bagehot, "[t]here is nothing the British Parliament can not do except transform a man into a woman and a woman into a man." Walter Bagehot as quoted in Y Meny and A Knap Government *and Politics in Western Europe* (1998) 317. See also generally J Goldsworthy *The Sovereignty of Parliament: History and philosophy* (1999). With the introduction of the Human Rights Act 1998 in Britain, the courts, if satisfied that primary legislation is incompatible with a right recognized by the European Convention of Human Rights, can make a declaration of incompatibility. The declaration of incompatibility, however, does not, in itself, affect the validity of the challenged legislation. For further discussion see PP Craig *Administrative law* (2003) 570-571.

14 The institution of constitutional review in France is often wrongly described as another "European Model". This is partly because of the fact that the *Conseil Constitutionnel* deals only with constitutional questions. However, the *Conseil Constitutionnel* is a political body composed of members appointed by three politicians: The President of the Republic, the National Assembly and the Senate. Its whole structure is essentially political. Moreover, in contrast to the other systems of constitutional review, the *Conseil Constitutionnel* does not deal with constitutionality of law as a result of "a challenge in the ordinary courts by way of defence". Examination of Bills before promulgation is typically the only way envisaged for dealing with questions of constitutionality. See generally J Bell *French constitutional law* (2001) 1-27.

15 A Brewer-Carias *Judicial review in comparative law* (1985) 257.

16 Assefa (note 6 above) 18.

17 N Fasil *Constitution for a nation of nations: The Ethiopian prospect* (1997) 21. Tradition and religion were the only limits on the power of the monarch, Emperor HalieSilassie. The introduction of the constitution, by centralizing government power in the hands of the Emperor, limited the influence of both religion and tradition.

18 As above.

19 CN Paul and C Clapham Ethiopian constitutional development (1967)287 as cited in Assefa (note 6 above) 18.

Neither was there a practice of Constitutional review after the introduction of the 1955 Revised Constitution. This is despite the fact that the Constitution contains a supremacy clause under article 122. According to this provision, the Constitution,

> "together with those international treaties conventions and obligations to which Ethiopia [is] a party, shall be the supreme law of the Empire, and all future legislation, decrees, orders, judgments, decisions and acts inconsistent therewith shall be null and void".

No specific organ, however, was empowered to exercise the power of constitutional review and thus declare legislation, decrees, orders, judgments, decisions and acts, which are unconstitutional, null and void. Based on this provision, one may advance an argument, as some do,[20] that constitutional review was possible under the 1955 Revised Constitution. Theoretically, this is not completely implausible. The fact that the Constitution did not explicitly empower a specific organ to exercise the power of constitutional review does not exclude such a possibility. As the history of constitutional review in America demonstrates, a court may exercise constitutional review without explicit authorization of the Constitution. This may also be the reason why some even hold that the 1955 Revised Constitution followed the American system of judicial review. The above construction, however, does not take account of the power structure envisaged by the Constitution. Under a Constitution that recognizes the "indisputability" of the power of the Emperor and grants him a legislative power (in addition to the fact that he appoints all members of the Senate in the two chamber parliament), it is almost impossible to foresee constitutional review. As George Krzeczunowicz has rightly pointed it out, the power of the Emperor to quash any decision rendered by the courts would make the exercise of constiutional review pointless.[21] The fact that some argue that the 1955 Revised Constitution had envisaged an American system of constitutional review can possibly be explained by the fact that the Constitution was drafted by three American legal scholars. The belief therefore is that the Constitution reflects the American experience.[22]

The advent of the 1987 Constitution, on the other hand, has brought with it the designation of an institution that exercises the power of constitutional review. The Constitution consisted of express clauses on the interpretation of the Constitution and determination of the constitutionality of legislative acts. It was the State Council, a political body, which was entrusted with the control of constitutionality. It is reported that no significant case was brought before it.[23]

---

20 A Meaza Ethiopia: Process of democratization and development in A An-narim(ed) *Human Rights under African Constitutions* (2003) 30.

21 G Krzeczunowicz Hierarchy of Laws (1984) 1(1) *Journal of Ethiopian Law* 111-117.

22 I Ibrahim Constitutional adjudication under the 1994 FDRE Constitution (2002) 1(1) *Ethiopian Law Review* 63.

23 Assefa (note 7 above) 19.

The present Constitution, however, provides detailed provisions on constitutional interpretation. It has also established the institutional framework necessary to discharge this function. We shall now examine constitutional interpretation and constitutional review under the present Constitution. Before that, however, a few words on the general features of the present Constitution are in order.

2.2 Brief background on the present Ethiopian Constitution

The 1994 Constitution of the Federal Democratic Republic of Ethiopia (the Constitution), which was adopted on December 8, 1994 and entered into force as of August 21, 1995, ushers in a new Constitutional arrangement.[24] As one writer has commented, it is a clear departure from all previous constitutions.[25] As the name indicates, the Constitution establishes a federal form of government. Following the American example, it establishes equal, autonomous and coordinated federal units, thus, providing for a two - tier government.

In contrast to a presidential form, the Constitution opts for a parliamentary form of government. In this regard, it provides for a two-chamber parliament: the House of Peoples' Representatives and the House.[26] It also provides for a one-chamber state council at state level. The House of Peoples' Representatives, which is elected every five years by universal suffrage, is "the highest authority of the Federal government", and the State Council is "the highest organ of state authority".[27] The other assembly, the House, "which is composed of representatives of Nations, nationalities and peoples", has specific powers, including the ultimate power to interpret the Constitution" and to decide on other matters of grave constitutional concern such as the right to secession.[28]

One of the salient features of the Constitution is its emphasis on ethnicity. This is underlined by the Constitution when it states that "all sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia".[29] "The preamble of the Constitution does not open with the familiar "we the people", but rather with "we, the Nation, Nationalities and Peoples' of Ethiopia". The states that consist of the federation are also delimited on the bass of ethnicity. This is why Ethiopian federalism is often referred as ethnic federalism.[30]

---

24 The 1931 the 1955 constitutions, both issued during the period of Emperor HaileSelassie I, established and consolidated a monarchical form of government. The 1987 Constitution, which was issued during the reign of Mengistu Hailemariam, on the other hand, provided for a republican form of government with a single party system and a unitary government.

25 "The state it envisages and the government it establishes are different both in form and content." Fasil (note16 above) 49.

26 Article 53 of the Constitution.

27 Article 50 of the Constitution.

28 See articles 61-68 of the Constitution.

29 Article 8 of the Constitution.

30 See generally JM Cohen Ethnic Federalism in Ethiopia (1995) 2 *Northeast African Studies* 2.

The fact that a substantive part of the text of the Constitution is devoted to fundamental rights and freedoms is another important feature of the Constitution. Nearly a quarter of the provisions of the Constitution deal with fundamental rights and freedoms.[31] Categorizing these fundamental rights and freedoms as human rights and democratic rights, the Constitution has provided for an extensive list of enforceable rights.[32] This already vast list of rights is further enriched by subjecting them to interpretation "in a manner conforming to the principles of the Universal Declaration of Human Rights, international covenants on human rights and international instruments adopted by Ethiopia".[33]

With this as a background, we now proceed to discuss constitutional review and constitutional interpretation under the present Constitution. The aim of this discussion is to explain the institutional structure adopted by the Constitution for constitutional interpretation and specifically for constitutional review. Establishing the role of the House and the courts is a specific objective of this section.

2.3 Constitutional review under the present Constitution

The FDRE Constitution deals with the issue of constitutional review under Article 83.[34]

> Article 83 interpretation of the Constitution
> 1. All Constitutional disputes shall be decided by the House of Federation.
> 2. The House of Federation shall, within thirty days of receipt, decide a constitutional dispute submitted to it by the Council of Constitutional inquiry.

As the reading of this article indicates, it does not tell us much about constitutional review. It only declares that the House decides on all constitutional disputes. But what is a constitutional dispute? Is it equated with a ruling on the constitutionality of laws or does it only refer to the expounding of the provisions of the constitution or to both? A reading of some other provisions of the constitution may shed light on the meaning of this term.

Article 62 of the Constitution which provides for the powers and functions of the House states, under sub article one, that the "[House] has the power to interpret the constitution". This is what article 84, the other relevant article which deals with the power of the Council has to offer:[35]

---

31 Fasil (note 17 above) 57.

32 See articles 13-44 of the Constitution.

33 Article 13(2) of the Constitution.

34 It is important to note right from the beginning that the title of this article is interpretation of the constitution and not constitutional review or judicial review.

35 A discussion of the power of the Council indirectly indicates the power of the House as the Council serves as

1) The Council of Constitutional Inquiry shall have the power to investigate constitutional disputes. Should the Council, upon consideration of the matter, find it necessary to interpret the Constitution, it shall submit its recommendations thereon to the House of Federation.
2) Where any Federal law is contested as being unconstitutional and such a dispute is submitted to it by any court or interested party, the Council shall consider the matter and submit it to the House of Federation for a final decision.
3) When an issue of constitutional interpretation arises in the courts, the Council shall
   A. Remand the case to the concerned court if it finds that there is no need for constitutional interpretation; the interested party, if dissatisfied with the decisions of the Council, may appeal to the House of Federation
   B. submit its recommendations to the House of Federation for a final decision if it believes that there is a need for constitutional interpretation

The meaning and implications of these articles have been the subject of controversy and debate. The Chief Justice of the Federal Supreme Court (FSC) on one occasion stated that "the power to interpret the Constitution is equated with the power to declare federal or state law as unconstitutional and therefore null and void".[36] Thus, according to him, the act of invalidating legislation for unconstitutionality is what the phrase 'Constitutional interpretation' is meant to signify in the Ethiopian Constitution.[37] The import of this argument is that it is only the power to enquire into the constitutionality of legislation that the Constitution has entrusted to the House. The Constitution, as a result, does not identify a single organ that is responsible for constitutional interpretation. In the absence of any law or provision that excludes the courts from the business of constitutional interpretation, they conclude, the courts still have the power to expound the provisions of the Constitution through interpretation, short of invalidating legislation for unconstitutionality.

A careful reading of the provisions of the Constitution, however, does not warrant the conclusion that the Constitution, in referring to constitutional interpretation, only refers to the power to determine the constitutionality of legislation. The Constitution does not equate constitutional interpretation with the act of invalidating legislation. In order to demonstrate this one needs to determine what "constitutional dispute" is since article 83 of the Constitution and, by implication, article 84(1) of the Constitution[38] state that all constitutional

---

an advisory organ of the House.

36 Kemal Bedri Key note address in Assefa (note 5 above).

37 Donovan, an American scholar, has also argued that the act of interpretation, which the drafters had in mind when they assigned the power of constitutional interpretation to the House was the act of declaring a federal or state legislative provision invalid as violative of the Ethiopian Constitution. See DA Donovan Levelling the Playing field: the Judicial duty to protect and enforce the constitutional rights of accused persons unrepresented by counsel (2002) 1(1) *Ethiopian Law Review* 31.

38 Any power entrusted to the Council is a power given to the House as the former is merely an advisor of the

disputes shall be decided by the House. Once we determine what constitutional dispute is, we can, then, easily identify the role of each organ in constitutional interpretation and constitutional review.

An apparent feature of a constitutional dispute, that one identifies easily, is the determination of constitutionality or what we call constitutional review. This is the power of invalidating a legislative act, which is considered to be contradictory to the Constitution. This is also what the Constitution in article 84 (2) refers to when it makes mention of the "unconstitutionality of a federal or state law". This is the first aspect of a constitutional dispute. A constitutional dispute, however, should not necessarily involve the issue of unconstitutionality of legislation. What makes a dispute a constitutional dispute is the mere fact that the dispute involves constitutionally recognized rights. The determining factor is that a claim is made based on the provisions of the Constitution or that provisions of the Constitution are in one way or another implicated in a case brought before the court. Resolving such a dispute may not require more than expounding the provisions of the Constitution. At the most, what would be required of the responsible organ under such circumstances is to determine the scope and application of the constitutional rights to the operative facts of the case. It would not require of them to declare the legislative act unconstitutional.

The Ethiopian constitution, in agreement with the above explanation of constitutional dispute, recognizes that not all cases of constitutional dispute entail the need to determine the constitutionality of legislation. This is clear from article 84(1) which empowers the House to receive matters that give rise to issues that involve constitutional interpretation. Here the Constitution, by simply referring to the interpretation of the constitution (without mentioning anything about issues of constitutionality), has made it clear that it acknowledges that constitutional interpretation may not always be about determining the constitutionality of legislation. That is also why it specifically deals with the issue of constitutional review under another specific provision, article 84(2), and does not lump it together with article 84(1), which generally discusses constitutional interpretation. Had the Constitution, like the Chief Justice argued equated constitutional interpretation with the act of determining the constitutionality of legislation, it would not have been necessary to deal with the latter under a separate provision (i.e. article 84(2)).

Thus, a constitutional dispute, in the context of the Ethiopian constitution, has two aspects: the general task of interpreting the Constitution with a view to ascertaining the meaning, content and scope of a constitutional provision (article 84(1)) and the more specific task of determining the constitutionality of "federal or state law" (article 84(2)). Thus, in contrast to

latter on matters of constitutional interpretation and constitutional review.

the conclusions of the Chief Justice, the Constitution does not equate constitutional interpretation with the act of determining the constitutionality of legislation. In fact, it recognizes that not all cases of constitutional dispute involve issues of constitutionality. It acknowledges that the process of interpreting the Constitution does not always lead to what the Chief Justice referred to as the end product (a declaration of unconstitutionality).

Once this is made clear, the argument that courts have the power to interpret the constitution falls away. It becomes obvious that the House has both the general power of interpreting the Constitution and the specific function of invalidating legislation that is unconstitutional. This is so because the Constitution, under article 84(1) and (2), provides to the House both the power to decide on matters where it is necessary to interpret the Constitution and cases where the constitutionality of any federal or state law is contested.

The House, in discharging its duty of constitutional adjudication, is assisted by the Council, an advisory body, whose main function is to examine constitutional issues and submit its findings to the House. This is a body of mostly legal experts of high standing, headed by the Chief Justice of the FSC.[39] Its list of members include the vice president of the FSC, six legal experts appointed by the President of the Republic on recommendation by the House of Peoples' Representatives and three other persons designated by the House from among its members.

Where issues of constitutional interpretation arise, the matter is first referred to the Council by a court or 'the interested party'. The Council, upon receiving the matter, should deliberate upon it and submit its recommendations to the House if it believes that the issues raised involve constitutional interpretation. If the Council, on the other hand, believes that there is no need for constitutional interpretation, it can remand the case to the concerned court. In this regard it should be noted that the findings of the Council are mere recommendations and the House is at liberty to adopt or reject the recommendations of the Council. The Council, as we indicated earlier is thus an institution with an advisory capacity. The House, on the other hand, is the body that is entrusted with the function of providing the ultimate and final decision both on constitutional interpretation and more specifically on the constitutionality of legislation.

This concentration of power in the House has provoked debates regarding the role of courts in constitutional interpretation. Does it mean that there is no role left for the courts as far as

[39] See article 83-84 of the Constitution.

constitutional interpretation is concerned other than referring to the Council matters that require the interpretation of the Constitution? We now turn to deal with this issue.

2.3.1 The role of the courts

Notwithstanding the consensus on the ultimate power of the House to interpret the Constitution and rule on the constitutionality of legislation, there is an argument that has been going on for a while now to the effect that the courts still have the power to interpret the Constitution and refuse to apply legislation on the ground that it is not in conformity with the Constitution. Some of them rely on what they call "the normal (sometimes they call it "inherent") judicial business of courts" and argue that the power of the courts includes refusing to apply an Act of parliament on the ground that it is not compatible with the Constitution. Others advance their argument based on the premise that the courts have the duty to enforce the Constitution. However, those who argue along these lines do not accept the conclusion that the courts can invalidate an Act of parliament. They rather limit the power of courts to espousing the provisions of the Constitution.

In the following paragraphs, we shall examine these positions. The purpose of this exercise is to identify the role of the courts, if there is any, in constitutional interpretation and constitutional review in Ethiopia. We shall start the discussion by elucidating the argument from "the inherent judicial task", which according to this writer, is not defensible under the Ethiopian legal system.

2.3.1.1 Constitutional review: 'The normal business of courts'?

According to some Ethiopian academics, declaring a law invalid is the "inherent" judicial task of the courts. These academics start from the premise that it is the usual normal business of courts to find and declare the law. When a court nullifies legislation on the ground that it is unconstitutional, it is applying the existing law as opposed to a non-existing or repealed law.[40] The court, in other words, is declaring what the law is. The "normal business of courts" thus includes the act of invalidating legislation for unconstitutionality. Based on this, they argue that the courts should proceed to resolve constitutional disputes without referring them to the Council. To substantiate their argument, they forward two reasons. First, all judicial power (including finding, interpreting, and declaring the law) belongs to courts. In relation to this, a reference is made to article 79(1) of the Constitution, which vests all judicial powers, both at Federal and State level, in the courts. Second, all laws, practices and decisions in contradiction with the Constitution, which are nullified *ab*

[40] Tsegaye (note 5 above) 116.

initio by the Constitution, need no interpretation. What they need is mere application, which in this case is a mere declaration of repeal.[41]

The first line of argument which relies on the so called "inherent judicial task" bears a resemblance to the arguments advanced by Chief Justice Marshall in the most celebrated case of *Marbury v Madison*. In that case the court, despite the absence of explicit constitutional authorization to do so, refused to apply an Act of a coordinate branch of government. By doing so, it assumed for itself the power of judicial review. In Marshall's opinion, a written Constitution is a law and it is "the province and duty of the judicial department to say what the law is".[42] Thus, judicial power, according to him, includes reviewing Acts of the legislature.

The problem with this line of argument is its reliance on the so-called "inherent judicial task", a concept that does not necessarily apply in Ethiopia. It assumes that finding, interpreting and declaring a law is an "inherent judicial power", which in the Ethiopian case is vested in the courts. It, however, is not clear if judicial power necessarily includes reviewing Acts of the legislature. A brief survey of the different legal systems would show that this is not always the case. France, for instance, could be a good example. In France, Constitutional control of legislation has always been entrusted specifically to political non-judicial bodies. There is a long-standing distrust of the judges, who were perceived as being the 'bitterest enemies of even the slightest liberal reform".[43] Giving the judiciary a controlling power has always been considered as something that 'conflicts too much with the traditions of French public life'.[44]This, in fact, was the main reason for denying courts the power of constitutional review and establishing the *Conseil Constitutionnel* in 1958.

As it is also stated in the beginning of this chapter, in the United Kingdom, where parliamentary sovereignty is "the dominant characteristic of [the] political institutions", judging statutes to be invalid for violating either moral or legal principles of any kind is not the "normal business of courts". Courts have no legal authority to invalidate statutes on the ground that they are contrary to fundamental moral or legal principles.[45] Understanding judicial power as including the exercise of the power of constitutional review has always been considered dangerous as it would amount to "a massive transfer of political power from parliament to judges".[46] The same is also true for New Zealand.[47]

---

41 As above.

42 Marbury v Madison (note 11 above).

43 Bell (note 14 above) 2o.

44 "It is neither in the spirit of a parliamentary regime nor in the French tradition to give the courts…the right to examine the validity of a *loi*." See As above, 27.

45 Goldsworthy (note 13 above) 1-3.

46 Craig (note 13 above).

47 See above.

One may not even be sure whether this (i.e. the inherent judicial task and considering the constitution as any other ordinary but supreme law) is not Marshall's invention. During the early days of America, the Constitution was understood to be a political instrument different in kind from ordinary law.[48] Enforcing the Constitution was accordingly understood to be an extraordinary political act. In refusing to execute particular laws, judges [back then] relied on a variety of justifications, all of which were closer to outdated English precedent than subsequent American doctrine, which extended judicial power to include the power of constitutional review.[49] It was only after Chief Justice Marshall that the written Constitution started to be considered as any other law that falls within the ambit of judicial authority.[50]

As indicated earlier, this development is, however, not matched by corresponding developments in other legal systems. The situation, for example, is quite different in Ethiopia. As our brief review of the history of constitutional review earlier in this chapter indicated, declaring a law void for its repugnancy to the constitution has never been considered as the normal business of the courts. Either it had never been recognized as such or, when it did, it was explicitly given not to the courts but to another political body. It is therefore difficult to accept in Ethiopian context the argument that judicial power includes the power of refusing to apply legislation on the ground that it is incompatible with the Constitution.

The academics, in making a case for the role of the courts in constitutional review by courts, also relied on the argument that the courts, in refusing to give effect to legislation on ground of incompatibility, need not engage in interpretation. This is so because legislation, which is in conflict with the Constitution, is nullified *ab intio* by the Constitution. What is required from the courts is mere application, which in this case is mere declaration of repeal. It is true that provisions of the Constitution, which contradict the Constitution, are of no effect right from the beginning and not when the court declares them so.[51] "The declaration is merely a descriptive of a pre-existing state of affairs."[52] In an interesting remark by Ackermann J:

> The court's order does not invalidate the law; it merely declares it to be invalid. A pre-existing law which [for instance] was inconsistent with the provisions of the constitution become invalid the moment the relevant provisions of the constitution came into effect…the test for invalidity is an objective one.[53]

---

48 S Snowsis *Judicial Review and the law of the Constitution (*1990) 1.

49 As above.

50 As above see 2-4.

51 Article 9 of the Constitution states that any law which contravenes the Constitution shall be of no effect.

52 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 94.

53 *Ferreira v Levin No* 1996 (1) SA 984 (CC) para 27.

However, making such a distinction in the present context would only be simplifying the matter as interpretation and declaration cannot be divorced from one another. It is, of course, the Constitution that nullifies them *ab initio*. This, however, does not mean that interpretation is not needed. Any institution which is competent to make this decisive declaration need to necessarily engage itself in constitutional interpretation. A declaration of unconstitutionality requires of a court to examine the impugned provisions of law against the rights recognized by the Constitution. It needs to determine whether the impugned provision infringes the rights and whether such infringement is justified by the limitations recognized by the Constitution. In fact, it is when the court exercises its power of constitutional review that it needs to undertake a vigorous and careful interpretation of the Constitution. Enquiring into the constitutionality of legislation is always 'a question of much delicacy'.[54]

As the foregoing discussion suggests, any argument to empower the courts with a constitutional review power cannot base itself on a claim that engaging in such exercise is the normal judicial business of courts. This would be an erroneous application of an American principle in a country that has a different legal tradition. It would also entail being naïve as to the existence of the various legal systems that construe judicial power quite differently and stand quite in contrast to the American judicial system.

2.3.1.2 The duty to enforce the Constitution and constitutional interpretation

A number of Ethiopian academics and officials of the judiciary, though on a different basis, still maintain the argument that Ethiopian courts have the power to interpret the Constitution. The argument is that this power stems from the constitutional commitment to respect and enforce the fundamental rights and freedoms set forth in chapters two and three of the Constitution.[55]

The basic premise of this argument is that 'enforcement presupposes interpretation'. In the words of Assefa Fissha:

> The judiciary's role in 'respecting and enforcing' fundamental rights and freedoms is clearly enshrined in Article 13 and this role of 'respecting and enforcing' fundamental rights and freedoms is illusionary unless the judiciary is, in one way or another, involved in interpreting the scope and limitation of those rights and freedoms for [sic] which it is duty bound to 'respect and enforce'.[56]

---

54 Snowsis (note 48 above) 131.

55 See Assefa (note 6 above), 13; Tsegaye (note 5 above) 111. Article 13(1) of the Constitution reads: "All Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this chapter".

56 Assefa (note 6 above) 14.

The court, it is argued, is faced with this "unavoidable duty" of interpreting the Constitution both in civil and criminal cases.[57] The following issues are often raised to illustrate that constitutional interpretation is a necessary corollary to adjudication of criminal cases:

> Was the respondent granted a sufficient hearing before his driver's license was revoked? Did the entry into the burglar's house require a search warrant? Does hearsay violate the right of confrontation? …Has the defendant's detention for seventeen consecutive days violated the right of speedy hearing? Was the zoning ordinance that shut down the loud speakers at the local cathedral a violation of free speech,[religion] and separation of church and state?[58]

Therefore, to the extent that the courts enforce the rights and freedoms enshrined in the Constitution, they exercise the power of interpreting the Constitution. To this extent, they conclude, the courts have the power to state what the constitutional law is.[59]

It is, however, not clear whether all enforcements of rights under chapter three of the Constitution presuppose interpretation. Of course, most often courts are required to interpret the law in order to determine the meaning of the applicable law and apply it to the operative facts of the case brought before them. It is seldom that courts mechanically apply a pre-existing rule. This, however, does not mean that there are no cases where the courts cannot enforce a provision of the Constitution by simply applying it, without going into the business of interpretation. However few they might be, it is submitted, there are still cases where the courts can enforce the provisions of the Constitution without interpretation.

It is also because not every enforcement of a provision of a constitution, or any law for that matter, requires interpretation that it is sometimes said that one should apply the law when its meaning is clear. When the language of a constitution provides a plain, clear meaning, the plain meaning of the language is to be applied and there is no room for judicial construction.[60] In such cases, it is submitted, the judiciary is left with little to do other than strictly and literally to apply and enforce the provisions of the Constitution.[61]

Of course, there is a view that says a court cannot give meaning to a provision of a constitution, 'however plain', without engaging in the work of interpretation. According to this view, all legal meaning is fundamentally a matter of context and interpretation.[62] The

---

57 M Wills *Draft Materials on the Ethiopian Constitution* (1999) 29 as cited in Assefa (note 6 above) 15.

58 As above.

59 Assefa (note 6 above) 14.

60 C Antieau *Constitutional construction (*1982) 3.

61 As above.

62 S Sugunasirl Contextualism: The Supreme Court's new standard of judicial analysis and accountability, 22 *Dalhousie Law Journal* 126, 26.

proponents of this view also believe that words only take on their real meaning when placed in context. In the words of De Ville, interpretation is a "mode of existence rather than a methodology".[63] According to him, we are always interpreting.

This theory of interpretation, which denies the existence of a 'nonpositional' interpreter under all circumstances, entails the view that all texts are indeterminate. This, however, is difficult to accept in a country like Ethiopia, which follows the civil law tradition where detailed rules are enacted and judges are expected to strictly apply them without engaging in interpretation. In Ethiopia, as may also be the case in many other civil law countries, the legislature enacts laws which are detailed, explicit and clear. Under such circumstances, however unreasonable the law may sound, the judges are expected to apply it consistently.

Many of the provisions of the Ethiopian Constitution, especially those that the courts are expected to invoke in their daily functioning, are stated in an explicit and clear manner. This becomes clear when one looks closely at some of the provisions of chapter three of the Constitution. Article 19, for instance, provides for the rights of persons arrested. One of the important stipulations of this article is that persons arrested have the right to be brought before a court within 48 hours of their arrest. This is a very important principle of any criminal justice system that courts need to enforce vigorously. It lies at the heart of the duty of a state to protect citizens from any arbitrary and unlawful pre-trial arrest or detention. However, the application of this article needs no interpretation. It only requires a judge to ascertain the time of arrest and thus computes the time that went on before the arrested person is presented before the court.[64]

Article 21, which provides for the rights of persons held in custody and convicted prisoners, is another good example. Under sub article 2, it states that "all persons shall have the opportunity to communicate with and to be visited by their spouses or partners, close relatives, friends, religious councillors, medical doctors and their legal counsel". If a detainee or a prisoner presents a claim before the court alleging that he was denied contact with any of these individuals, the court need only to invoke the provisions of this article and order the defendant to comply with the constitutional provision. To do so, the court again need not

---

63 JR de Ville Constitutional *and Statutory interpretation* (2000) 3.

64 Of course, there is another element of this same stipulation that may require the courts to engage in interpretation. The Constitution states that the court, when calculating the 48 hours, should not include the time reasonably required for the journey from the place of arrest to the court. On a case-by-case basis the court may decide "the time reasonably required for the journey". This obviously may require the court to interpret what the constitution meant when it refers to the "reasonableness" of the time. This, however, is only in cases where people may have to travel a long distance before they reach a nearby court. For obvious reasons, this does not apply in most of the towns where there is always a court, which is not too far from the police station.

engage itself in interpreting the Constitution. It only needs to mechanically apply this specific provision of the Constitution to the facts of the case. The same also goes for article 23, which provides for the prohibition of double jeopardy and article 32, which decrees freedom of movement.[65]

The implication of this argument is that the courts are expected to enforce the provisions of chapter two of the Constitution only to the extent that it does not engage them in interpretation. However, "if issues of Constitutional interpretation arise in the courts"[the words of the Constitution itself] in the process of enforcing the Constitution, the courts should refer the matter to the Council.[66]They should restrain from giving meaning to the provisions of the Constitution and resolve the constitutional dispute. Under such circumstances, they are expected to defer to the interpretation of the House.

Such understanding of the position of the Constitution in regard to constitutional review is also important if the provisions of the Constitution itself are to be considered as consistent and not contradicting each other. To the extent possible, provisions of the Constitution must be read in conformity. This is often referred as the 'unity of the constitution' or "harmonious interpretation of the Constitution". [67]

Reading the Constitution as allowing courts to interpret the Constitution in the course of enforcement gives the impression that the provisions of the Constitution are inconsistent with each other. This is because, as already mentioned, the Constitution, under article 84, provides the House with the power to interpret the Constitution, in addition to the specific task of determining the constitutionality of legislative acts. On the other hand, if the argument is valid that the courts are only allowed to enforce the Constitution to the extent that it does not require interpretation, the provisions of the Constitution will be rendered consistent. The Constitution will then be read as having categorically assigned a role for each organ (i.e. the House, the Council and the courts).

---

65 Donovan stated that the language used in the sections of the Constitution detailing the rights of Ethiopian citizens caught up in the criminal justice system are written in the familiar language of the everyday functioning of the courts. See Donovan (note 37 above) 31-34.

66 Article 84(3) proceeds with the assumption that the courts refer a case to the Council when issues of Constitutional interpretation arises in the former. This obviously suggests that courts are expected to refer the matter to the council in the event deciding the matter at hand requires interpretation of the Constitution.

67 N Steytler *Constitutional criminal Procedure: A commentary on the Constitution of the Republic of South Africa*, *1996* (1998) 17.

2.4 Conclusion

As the foregoing discussion suggests, the ultimate authority to interpret the constitution is vested in the House. This includes the power to declare legislative acts and executives acts invalid when it finds them to be repugnant to the constitution. The House fulfil this task with the expert help of the Council, which provides the House with a recommendation.

The discussion has also demonstrated that the courts have neither the power to give an exposition of the provisions of the constitution nor the power to exercise constitutional review. The line among academics that attempt to endow courts with the power to interpret the constitution can only be a pious wish. They seem to use any loopholes that are available to enable the courts to involve themselves in constitutional interpretation and constitutional review.

CHAPTER THREE: THE COUNTER- MAJORITARIAN PROBLEM

3.1 Introduction

The discussion on the descriptive aspect of the Ethiopian approach to constitutional review has revealed that the Constitution has excluded the courts from the business of constitutional interpretation, including from the specific task of constitutional review. By excluding the involvement of courts from the business of constitutional review, the Constitution has made it impossible for the courts to 'usurp legislative power'. It seems to have avoided the main challenge that legal systems, which have decided to hand cases of constitutional review to courts (either to ordinary courts as in America, or to special courts as it is the case in South Africa and most of the west European countries) have to cope with: the undermining effect of judicial review over democracy. In other words, it seems to represent a response to the counter-majoritarian problem, the problem of allowing unelected judges to invalidate the acts of elected officials on the ground that it is unconstitutional.

When examining the Ethiopian approach closely, one cannot help but still wonder if it, indeed, represents a response to the counter-majoritarian dilemma. This is an issue left for the next chapter. This, however, presupposes the need to discuss the counter-majoritarian difficulty. Its relationship with democracy and the problem it poses need to be spelled out clearly. We also need to see if there is any possibility of eliminating the counter-majoritarian problem without depriving the courts the power to interpret the Constitution and review legislation for constitutionality. In this regard, we shall examine the attempts made so far to reconcile judicial review and democracy. These, we shall do, in the following pages of this chapter.

3.2 The counter-majoritarian dilemma and democracy

Proponents of extra-judicial constitutional interpretation (i.e. those who want to take the power of constitutional review away from the courts) argue that judicial review is undemocratic. It is so because it permits unelected judges, who are accountable to nobody, to nullify the acts of democratically elected legislatures who are accountable to the public. They point out that when a supreme court or a constitutional court declares a statute unconstitutional, it is overturning what appears to be the popular will. When judges reject the products of majoritarian democracy, they argue, they engage in counter-majoritarian law making. Hence, the counter-majoritarian problem.

The counter-majoritarian problem finds its roots in the broader structural theory about popular sovereignty and majoritarian governance. A theory which is based on the premise that important decisions like the power of constitutional review should not be uncoupled from the electorate or a body that represents the electorate.[68] It is based on this theory that constitutional scholars question

[68] TW Ruger "A question which convulses a nation" the early Republic's greatest debate about the judicial review

the legitimacy of judicial review: why should a majority of justices appointed for life be permitted to outlaw as unconstitutional the acts of elected officials or of officers controlled by elected officials? In the words of Alexander Bickel, who for the first time labelled this question as the 'counter-majoritarian difficulty,:

> [t]he root difficulty is that judicial review is a counter-majoritarian force….when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representatives of the actual people of the here and now; it exercises control, not in behalf [sic] of the prevailing majority, but against it. That without mystic overtones is what actually happens. . [I]t is the reason the charge can be made that judicial review is undemocratic. [69]

The counter-majoritarian problem has given rise to a considerable amount of literature that some have even started to wonder if this has become an "obsession" that has gripped the minds of constitutional theorists. The centrality of this dilemma to constitutional theory can hardly be overstated.[70] Some of the most important works in constitutional jurisprudence are attempts to resolve or dissipate the counter-majoritarian problem.[71]

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

The definition of democracy is a matter of deep controversy. Political science theorists diverge greatly about what democracy means and no theory can claim a 'goes-without-saying' status. As pointed out by Ronald Dworkin, there is no consensus as to which kinds of arrangements or combination of arrangements as far as representation, election or allocations of power are concerned provide the best available version of democracy.[72] The particular conception of

---

power (2004) *Harvard Law Review* 857.

69 A Bickel The least dangerous branch: The supreme court at the bar of politics 16-1791962) as cited in J Perry *The constitution in the Courts: Law or Politics?* (1994) 16.

70 A Farber and S Sherry Desperately *seeking certainty: The misguided quest for constitutional foundations* (2002) 144.

71 RJ Lipkin Constitutional *revolutions: pragmatism and the role of judicial review in American constitutionalism* (2000) 8.

72 R Dworkin Freedom's *Law: The Moral Reading of the American Constitution (*1996) 15.

democracy to which a constitutional theorist adheres determines and often explains his or her position on the counter-majoritarian problem.

Any majoritarian version of democracy understands democracy in procedural terms. According to this position, the outcome of important matters should be determined according to the will of the majority of citizens or their representatives.[73] Any law that the government legislates and policies it adopts should be the ones that have received the blessing of the majority.[74] Democracy is thus primarily seen as a means of arranging and managing representative government in which the core principle is the rule of the people, often equated with the rule of the majority. This, many believe, provides the very essence of democracy.

For these theorists, who explain democracy in procedural terms, policy choices must be made by those representative of and accountable to the electorate.[75] Judges are supposed to follow these choices of the majority. They should not be allowed to reject the products of majoritarian democracy. Allowing a judge to do so would be to effectively transform such a judge into "a philosopher king, sitting in judgments on the wisdom and morality of all society's social policy choices".[76] Any government that allows judges to thwart the acts of the legislature, they conclude, has lost the essential characteristics of a democratic system.

For others, however, democracy is not content-independent. They see democracy as "a regime characterized by certain ends and values towards whose realization a certain political group aim and works".[77] There are fundamental values to the 'democratic enterprise' which cannot be amended or destroyed by the majority government. As a result, they argue, the political majority has no 'exclusive claim' on the meaning of democracy and the Constitution.[78]

Based on this understanding of democracy, they contend that an effective democratic society implies the existence of institutional limitations on the power of the majority government. The desire to ensure that the majoritarian branches adhere to the limitations imposed by the constitution calls for some form of institutional constraint. This, they contend, can best be achieved by the judiciary - an institution that is free from majoritarian pressure.[79] According to them, the judiciary is best suited to interpret the constitution and to protect its principles.

---

73 Dworkin (note 72 above) 16.

74 B Brian *Democracy and power: Essays in political theory (*1991) 25.

75 MH Redish *The constitution as political structure* (1995) 8.

76 As above.

77 N Bobbio *Democracy and Dictatorship* (1989) 157.

78 E Chemerinsky The vanishing Constitution (1998) *Harvard Law Review* 76-77.

79 Redish (note 75 above).

The problem with this understanding of democracy is that it does not really help us much in determining the appropriate institution for constitutional review. One may find no problem with the assertion that there are fundamental values, which a government may not encroach upon. This, however, does not tell us how these values that characterize a democratic regime are to be protected against the decisions of the legislature. The fact that democracy is not content - independent and that there are rights that should have primacy does not suggest that the judiciary provides the best limitation on governmental power.

More importantly, the fact that the judiciary is the most competent organ to discharge the task of constitutional interpretation and constitutional review does not make it any more legitimate for a theorist who challenges judicial review based on its counter-majoritarian character. The counter-majoritarian problem is not about institutional competence or level of expertise. As indicated earlier, it is about popular sovereignty and majoritarian governance. The claim is that the institution of judicial review allows the imposition of the values of the judges over and above that of the people or, to be more specific, their representatives. Thus, even if there are fundamental values that need to be respected at all times, one cannot help but still wonder why we should succumb to the view of a few appointed and unaccountable judges rather than to the collective judgments of elected legislatures to identify and determine the contents and scope of these basic values.

The reality is that democracy is currently considered to be "the sum of current practices of representative government".[80] As rightly pointed out by Hiebert, in the contemporary world democracy is discussed not as an ideal. It is not, for example, discussed as a social and economic environment that best enables citizens to express their diverse views and pursue different courses of action in their private and public lives.[81] It is not the normative component that defines democracy. What matters is the process. It is, for example, the process that legitimises a decision as democratic. Democracy is thus discussed as the actual practices and institutions of those polities through which the process is observed. Under such circumstances, the institution of judicial review is undemocratic in so far as it deviates from the democratic principle of leaving the outcome of important matters to the decisions of a body that represents the electorate.

From a democratic point of view, the court's role in the interpretation of a constitution can only be appreciated if they are considered as enforcers of "old majoritarian values". As explained by Robert Jackson,

---

80 LJ Hiebert *Limiting rights: the dilemma of judicial review* (1996) 116.

81 As above.

> The court is almost never a contemporary institution….The Judiciary is thus the check of the preceding generation on the present one; a check of conservative legal philosophy upon a dynamic people, and nearly always the check of a rejected regime on the one in being.[82]

The fact that the courts are enforcers of old majoritarian values, however, does not make them less problematic from a democratic point of view. Rather, the fact that prior majorities control present majorities is by itself a counter-majoritarian process.[83]

As the foregoing discussion suggests, judicial review and democracy are in obvious tension. Being cognizant of this fact, many constitutional theorists have attempted to reconcile judicial review and democracy by drawing and redrawing the limits of judicial power. Most of the suggestions focus on how the courts should interpret the constitution from a democratic perspective. We shall now turn to examine two such attempts.

3.3 Resolving the counter-majoritarian dilemma through originalism

It has been argued by a number of constitutional theorists that courts should interpret constitutional provisions according to their original meaning. Originalism, as a method of constitutional interpretation, contends that constitutional meaning is derived from the original intentions of the authors or the ratifiers of the constitution and its amendments.[84] According to this approach, the meaning of a constitutional provision as understood by those who represented the people in the constitutional process (at the time the provision was constitutionalized) should be privileged.[85]

It is argued that a reference by a contemporary judge to the "original" understanding of a particular constitutional provision at the time of its ratification results in a minimalist judicial role.[86] This it does by providing little or no opportunity for a judge's own "subjectivity".[87] A properly understood and followed originalist approach to constitutional interpretation brings about a relatively small or passive judicial role in constitutional adjudication, a constitutional adjudication that is more "legal" than "political".[88] It is thus generally argued that an originalist approach to constitutional

---

82 Judges, unlike elected representatives, who are subjected to periodic elections and are sensitive to public appeal, are often conservative. Most often, they do not react in the same way that members of the other two branches of governments do. This is mainly attributed to the fact that they are defenders of 'old majoritarian values' as opposed to those of the majority currently in power. R Jackson The struggle for Judicial supremacy (1941) as quoted in RK Carr *The Supreme Court and judicial Review* (1970) 35 see also Lipkin (note 73 above).

83 Seidman calls it "the intergenerational difficulty". He relates it to the right to self-determination. According to him, allowing courts to enforce old majoritarian values interferes with the right of people alive to govern themselves. See LM Seidman *Our unsettled constitution* (2001) 16.

84 Lipkin (note 71 above) 13.

85 Perry (note 69 above) 32.

86 Farber et al (note 70 above) 11.

87 Perry (note 69 above) 54.

88 As above.

interpretation limits the power of judicial review, thereby eliminating the counter-majoritarian problem.

The problem with this argument is that it assumes that the meaning of a provision as understood by the framers of the particular provision is a "determinate" one. As pointed out by Perry and many others, "there is often more than one plausible conclusion to the inquiry into the original meaning of a constitutional provision, more than one conclusion an originalist judge can plausibly reach".[89] A simple reference to the works of "committed and competent scholars" reveals the sharp disagreement that prevails on the historical meaning of most of the important provisions of the constitution.[90] To the extent that the historical record fails to point to a single answer to questions, the historical inquiry constitutive of the originalist approach is often indeterminate. This makes it difficult to capture the original meaning. Hence, the inescapable conclusion that more than one reading of original meaning is plausible and that judges can reasonably disagree about which reading more likely than not captures the original meaning.

It is furthermore not certain that an originalist approach to constitutional interpretation limits the influence of subjective values. Chemerinsky has said the following in this regard:

> [E]ven on its own terms originalist interpretation cannot exclude the justices' own values from the decision making process. Historiographers persuasively argued that the process of historical examination is inevitably interpretive and influenced by the values of the historian. Reading constitutional history for original intent cannot be value-neutral because of the subjective process of deciding whose intent counts (the drafters? the ratifiers? which ones?) of ascertaining which of their views matter and of determining the intent of a large number of people who often had different objectives.[91]

The problem of following an originalist approach is further problematic because of the fact that it may sometimes result in absurd conclusions or undesirable conclusions which cannot be reconciled with the realities of modern society. A good example is the case of *Brown v Board of Education*, in which the American Supreme Court declared racially segregated schools unconstitutional. Historical evidence strongly suggests that the framers of the American constitution intended to protect only 'formal equality', not 'substantive equality'. In other words, while they wanted blacks to be able to enter into contract or to own property, they never expected blacks to become socially equal with whites.[92] Under such circumstances, an originalist approach

89 As above, 56. See also Lipkin (note 71 above) 13-15.

90 Lipkin (note 71 above) 14.

91 Chemerinsky (note 78 above) 90.

92 Lipkin (note 71 above) 23.

to constitutional interpretation would obviously require us to disavow the decision in the *Brown* case.[93]

A determination of the meaning of a provision of the constitution with reference to the intent of the framers could thus result in undesirable conclusions as it may sometimes require us to be ruled or restrained by values and beliefs which might not be any more appropriate or relevant to the present day.[94] Under such circumstances, the constitution could not govern a country in the modern world. After all, the notion of a living constitution is based on the reality that modern society cannot be governed by the specific views of individuals who in the American case, for instance, lived two centuries ago.[95]

As the foregoing discussion suggests, it is usually impossible to ascertain exactly what the framers of a particular clause intended to protect, thus, depriving the originalist approach of the necessary precision to resolve the counter-majoritarian difficulty.[96] It is therefore not necessarily true that an originalist approach to constitutional interpretation entails a minimalist judicial role and thereby eliminates the counter-majoritarian problem.

3.4 Ely's theory of judicial review: Another attempt to resolve the dilemma of judicial review and democracy

In the most celebrated footnote four of *Carolene products*, the American Supreme Court stated that judicial review is justified when legislation or other governmental action seems to obstruct political representation and accountability by distributing the law's benefits and burdens in ways that show a particular group to have been denied fair representation.[97] Accordingly, the judicial role is especially to reinforce majority rule, for example, by ensuring equal representation in the electoral process, by protecting discrete and insular minorities and by assuring fair process.[98] The court, by focusing on the process can avoid dealing with substantive values, which makes the court's role problematic from a democratic point of view. In fact, as Tribe noted, this permits courts to "perceive

---

93 For a detailed discussion of the fact that the *Brown* case does not muster the constitutionality test in a court that follows an originalist approach see Farber et al (note 70 above) 22-25.

94 As above.

95 For more discussions see D Davis, M Chaskalson and J de Waal, Democracy and constitutionalism: `The role of constitutional interpretation in D van Wyk, J Dugard, B de Villiers and D Davis, *Rights and Constitutionalism: The new South African legal order* (1994) 2.

96 Wyk et al (note 95 above) 12.

97 HL Tribe The puzzling persistence of process-based constitutional theories, (1980) 89*The Yale Law Journal* 1063.

98 See Chemerinsky (note 78 above) 56.

and portray themselves as servants of democracy even as they strike down the actions of supposedly democratic governments".[99]

It was from this famous footnote that Ely derived his theory of judicial review. The theory recognizes the need to reconcile the Court's authority with a representative form of government. He believes that if the court acts as "reinforcer of representation" rather than adjudicator of dispute on substantive values, it can avoid the judicial subjectivity and the inconsistency with democratic theory.[100] In fact, the judiciary will assume a role which is consistent with the democratic assumptions of the Constitution, particularly with its underlying theme of representation. It will safeguard the representative character of the political process. Thus, courts, in interpreting the open-ended provisions of the constitution, should not strive to establish substantive values but rather should restrict themselves to pursuing "procedural" or "participational" goals that open up and make effective the process of representative government and ensure the fair representation of minority interests.[101] This, according to him, prohibits the imposition of substantive outcomes by unelected officials. Judicial review, thus, becomes an "adjunct rather than an adversary of the democratic process".[102]

Ely's theory of judicial review is commended for its emphasis on the democratic nature of the constitution and representation. It does not, however, provide adequate protection to the minority. This mainly has to do with the fact that mere representation in the process does not help "functionally powerless" minority groups much. It is not enough that barriers to participation in the political process have been removed. As indicated by Sunderland, even when barriers to minority participation in the political process have been removed, the majority may vote themselves advantages at the expense of others or refuse to take the minority's interests into account.[103] Equal representation in the sense of one person, one vote does not guarantee equality of treatment.

For the purposes of this study, what is more problematic about Ely's theory of judicial review is that even a judge following his theory of judicial review cannot avoid being involved in making value judgements. According to Ely, the role of the judge under such system is to 'unblock stoppages in the democratic process". In other words, the judge only needs to ensure that minority interests are fairly represented. They need to make sure that the legislators have not interfered with the fair process of popular representation. The problem with this theory is that a judge, for different

---

99 Tribe (note 97 above).

100 HJ Ely *Democracy and distrust: A theory of judicial review* (1980) 87.

101 EG Lynch Review of John Hart Ely's Democracy and Distrust (1980) 80 *Columbia law Review*, 858

102 As above.

103 V L Sunderland *Popular government and the Supreme Court: Securing the public good and private rights* (1996) 168.

reasons, needs to make value judgments in order to determine whether the legislative process is not perverted.

A judge applying an open- textured constitutional provision should give it content by asking what role the courts can most effectively play in a representative democracy.[104] This is partly because there is hardly a consensus as to the sort of democratic process that ought to prevail in a country.[105] The sort of democratic process a country adheres to depend, among other things, on the nature of speech, publication and political associational rights that individuals have against government. More often than not, there is no consensus on the content, contours and limits of these rights. In the absence of such agreement, there is no consensus as to "the democratic process". In such cases, the judge would unavoidably embark on making value judgments and thereby impose his own values.

As it was also noted by Tushnet, the Court, as 'representation-reinforcer', needs to remove obstacles to the assertion of political power if it is to effectively play the role assigned to it by Ely's theory of judicial review. This is not, however, a value-free occupation. Identifying the functional obstacles by itself entails making value judgements. This is so because the task of identifying functional obstacles, as pointed out by Tushnet, permits manipulation and requires the use of subjective values.[106] This, from a democratic point of view, is illegitimate it is the value of the individual justice that serves as a basis to identify the functional obstacles.

The very same reason that allows Ely to reject the system that permits engaging in substantive due process can thus be used to reject any role for the courts to engage in what Ely calls" reinforcing the democratic process". Ely rejected any role for the courts in determining substantive due process because there is no consensus as to the various values that the judiciary has to enforce in substantive due process cases. But as it is also pointed out above there is no consensus as to the sort of democratic process that ought to prevail in a country. This requires the courts to make value judgements. To that extent, a court under Ely's theory of judicial review is not different from a court that is busy with the determination of substantive values. To that extent, Ely's theory of judicial review also fails to reconcile judicial review and democracy.

---

104 Lynch (note 101 above).

105 JM Perry *The Constitution, the courts and human rights* (1982) 79.

106 M Tushnet Darkness on the edge of town: The contribution of John Hart Ely to constitutional theory (1980) 89(6) *The Yale Law Journal* 1045.

3.5 Conclusion

Constitutional texts often provide for a range of choices- choices that require value judgements. Under such circumstances, unelected courts cannot help but interpret and make the law when reviewing the vague and indeterminate constitutional provisions. Given the vagueness of constitutional provisions, this naturally means that the courts will give priority to some values over others. This is obviously unacceptable in a democratic society where elected legislators, accountable through periodic elections, are supposed to make these kinds of choices. Thus, the basic claim that constitutional review by courts is inconsistent with the basic tenet of majority rule in a representative democracy remains unchallenged.

As the foregoing discussion suggests, constitutional theorists have strived to reconcile judicial review and democracy in a variety of ways. Since the suggestions made by these theorists do not relieve the judges from the business of interpretation and hence value judgement, they do not as such entail a minimalist judicial role and thereby eliminate the counter-majoritarian problem. To that extent, they fail to reconcile judicial review and democracy.

Chapter Four

A normative discourse on the Ethiopian approach to constitutional review

4.1 Introduction

In the previous chapter, it is indicated that judicial review and democracy are in obvious tension. Many constitutional theorists have tried to reconcile judicial review and democracy but in vain. It is submitted that the tension between judicial review and democracy is irresolvable.

The Constitution of Ethiopia, it is submitted, has excluded the courts both from the general power of interpreting the Constitution as well as from the specific power of exercising constitutional review. The Constitution, we said, has provided the exclusive authority of interpreting the Constitution to the House, including the power to invalidate legislation for unconstitutionality. By adopting such a novel system, the Constitution, it seems, is attempting to avoid the counter-majoritarian dilemma. By entrusting the important power of constitutional review to a body other than the court, the Constitution seems to at least implicitly endorse the view that the tension between judicial review and democracy is irresolvable, hence its strong commitment to a majoritarian process.

The success of the constitution in avoiding the tension between judicial review and democracy, however, depends on how far the drafters of the Ethiopian Constitution have successfully avoided the counter-majoritarian problem and adopted a system that represents an adequate response to the problem. This, in turn, depends on how successfully the interpretation of the Constitution is made to squarely fall in the hands of a majoritarian body or process. Thus, the first task of this chapter is to look at the structure and composition of the House and find out whether it is a majoritarian House in order to determine whether the system represents a response to the counter-majoritarian problem.

The mere fact that a majoritarian process is adopted, on the other hand, does not make the system an effective part of the constitutional system. It is not enough that it avoids the counter-majoritarian problem. The adopted system should also be institutionally suited and competent to discharge the task of constitutional interpretation and constitutional review. Hence, based on the institutional suitability of the system and the competence of the institution, we need to determine whether the system can effectively play its role in developing and protecting constitutional norms. This shall be the other main focus of this chapter.

In the following pages, we shall first set out the reasons why Ethiopia has adopted such a system and then examine whether it represents a response to the counter-majoritarian problem. Then we shall proceed to examine whether the House is institutionally competent to engage in this important

function of constitutional interpretation and more specifically constitutional review. Finally, we shall turn our focus on the functional role of constitutional review and examine whether the adopted system can be an important element of our constitutional order that helps us to reinforce constitutional norms.

4.2 The Ethiopian approach to constitutional review: A response to the counter-majoritarian dilemma?

The House is often considered as one of the legislative institutions of the federal government. A brief look at the powers and functions of the House, however, reveals that it does not exercise any legislative function. Rather, it suggests that the House functions as an institution that forges and maintains a harmonious relationship between the regional states and the federal state. The Constitution assigns to the House the task of a watchdog of the whole constitutional order or to play a 'heavenly role' on earth.[107] This is reflected in "the few but weighty functions" the Constitution has entrusted to the House.

The role of the House in maintaining and balancing the relationship among the nation's nationalities and peoples[108] of Ethiopia and the federal state commences with its duty to "promote the equality of the peoples enshrined in the Constitution and enhance their unity based on their mutual consent".[109] This includes the responsibility to seek solutions to misunderstandings that may arise among states.[110] The House furthermore has the function of delimiting the areas of civil law, which are important for the development of one economic unity and, thus, require federal legislation.[111] The only financial function of the House relates to the relationship between the federal and the regional states. It pertains to the determination of the division of funds between federal and state governments on revenues derived from joint tax sources.[112] It is also this same House that is empowered to determine the amount of subsidy the federal government may provide to the states.[113]

The House is also the ultimate defender of the constitutional order in Ethiopia. In this regard, the House can order federal intervention if, in violation of the Constitution, a member state endangers

---

107 Assefa (note 6 above).

108 Article 39 (5) of the Constitution defines "nation nationality or people as " group of people who have or share a large measure of common culture or similar customs, mutual intelligibility of language, belief in common identity or related identities, a common psychological make up, and who inhabits an identifiable, predominantly contiguous territory".

109 Article 62(4) of the Constitution.

110 Article 62(6) of the Constitution.

111 Article 62(8) of the Constitution.

112 Article 62(7) of the Constitution.

113 As above.

the constitutional order.[114] Another important function of the House has to do with the controversial article 39 of the Constitution, which provides the right to self-determination including secession. It is this House, which, in accordance with the Constitution, decides on issues relating to the rights of Nations, Nationalities and Peoples of Ethiopia to self determination, including the right to secession.[115]

The most important function of the House is the interpretation of the Constitution. As indicated earlier, the House, with the expert help of the Council, provides the final and ultimate decision in constitutional disputes. As a reading of the minutes and other relevant documents prepared during the making of the Constitution suggest, this was an important subject of debate during the drafting and ratification of the Constitution in Ethiopia. Many argued that vesting the power of constitutional interpretation in a legislative arm would disrupt the principle of separation of powers.[116]

The "undemocratic nature of the judiciary", according to the drafters of the Constitution, was the main reason why the power of interpreting the Constitution was entrusted to the House rather than to the courts. According to them, the courts should not have the power to interpret a constitution made by the people.[117] This was clearly indicated by the Secretary of the Constitutional Commission when he said the following:

> How can a constitution that has been ratified by the people's assembly be allowed to be changed by professionals who have not been elected by the people. To allow the Courts to do the interpretation is to invite subversion of the democratization process. Since the Constitution is eventually a **political contract of peoples, nations and nationalities**, it would be inappropriate to subject it to the interpretation of judges. It is the direct representatives of the contracting parties that should do the work of interpreting the constitution.[118](Emphasis added)

The drafters of the Constitution, it seems, were convinced by the argument that the judiciary is not the appropriate forum for constitutional interpretation. According to them, un-elected and virtually unaccountable judges should not be allowed to strike down statutes that are the 'fruits of the majoritarian branches'. The fact that they regarded the Constitution as a "political contract" rather than a mere legal document also suggests that the interpretation of the Constitution was considered by them to be a political rather than a judicial function. They therefore vested the power to interpret the Constitution to the House, which is a political body. A question, however, still remains why they chose to entrust this task to the House while the House of Peoples' Representatives is also composed of peoples directly elected by the people.

---

114 Article 62(9) of the Constitution.

115 Article 62 (3) of the Constitution.

116 Meaza (note 19 above).

117 As above.

118 Newsletter of the Constitution Commission No.3.

The explanation for this can be found, according to Andreas Eshete,[119]in the Constitution which vests all sovereign power in the Nations, Nationalities and Peoples of Ethiopia. He makes reference to articles 8 and 61 of the Constitution. Article 8 reads:

> 1. All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia.
> 2. This constitution is an expression of their sovereignty.

Thus, by linking article 8 to article 61, which states that the House is composed of representatives of Nations, Nationalities and Peoples, he contends that the latter is the most legitimate body to interpret the Constitution as it, by implication, is the body in whom all sovereign powers reside and the Constitution is but an expression of their sovereignty. Thus, according to Andreas Eshete, the drafters of the Constitution, by entrusting the task of interpreting the constitution to the House, have given the Constitution back to the people with whom all the sovereign power resides. The drafters, by taking the Constitution away from the courts and entrusting it to the House, have thus successfully avoided the counter-majoritarian problem.

The writer of this study is, however, not sure whether the Constitution has really successfully avoided the counter-majoritarian problem. It is submitted that the mere fact that the Constitution vests sovereign power in the House is not sufficient to suggest that the House is the kind of institution that the proponents of the counter-majoritarian problem had in mind when contemplating to take the Constitution away from the courts and giving it back to the people or their representatives. This mainly has to do with the structure and composition of the House.

The House, as stated above, is composed of representatives of Nations, Nationalities and Peoples of Ethiopia. Each Nation, Nationality and Peoples is represented in the House. According to the Constitution, each Nation, Nationality and Peoples shall be represented in the House by at least one member.[120] Moreover, the same paragraph stipulates that each nation or nationality shall be represented by one additional representative for each one million of its population. Thus, as a result, larger nations have greater representation than smaller ethnic groups.

In this respect, the arrangement makes the House less susceptible to the kind of criticisms often directed against the American Senate, which, like the House, is also an 'upper house'. It is often argued that the Senate is not a majoritarian house. This mainly has to do with the fact that the Senate is elected form states with unequal population sizes. In the Senate, each of the fifty-one states has two representatives, irrespective of the size of the population they represent. This means that Wyoming, the smallest state, has the same voting power as California, the largest

---

119 Comments by Andreas Eshete on the Draft Constitution (22 Nov 1994) p.5

120 Article 61(2) of the Constitution.

state. This has raised the question whether those fifty-one senators representing the smallest states potentially accounting for just over 17 percent of the US population act on behalf of the majority when they enact or block legislation. Based on this analysis some have concluded that it is not clear that the American Supreme Court is less democratic than the Senate.[121]

The drafters of the Ethiopian Constitution have attempted to avoid such criticisms by ensuring that the House is a majoritarian House. This they did by making sure that not only each nationality is represented by one member in the House but also by allowing the presence of one more representative for each one million of the population. Thus, as a result, the population with the largest size ends up having more seats than the others in the House. This may tempt one to conclude that any decisions the House takes represents the will of the majority of the population; thus suggesting that any interpretation of the Constitution by the House is tantamount to an interpretation made by the people themselves. This would have put the Ethiopian Constitution among the ranks of other constitutions that reflect a commitment to the majoritarian process and its basic premise that important decisions like the power to interpret the Constitution and review legislation for constitutionality should not be uncoupled from the electorate or a body that represents the electorate.

The problem with judicial review is, however, also the fact that it permits un-elected judges, who are not accountable to the electorate to nullify the Acts of a democratically elected legislature who is accountable to the people. It is this same fact that renders judicial review a deviant institution in a democratic society. To avoid the counter-majoritarian problem it is therefore not sufficient that the House is composed of representatives of the different Nations, Nationalities and Peoples of Ethiopia. It is also not sufficient that groups with a larger population have more votes than the others. What is equally important is that the representatives sitting in the House should be elected and directly accountable to the public. This is important if the House is to avoid the kind of criticisms often directed against judicial review based on its counter-majoritarian character.

Article 61(3) of the Constitution states that state councils shall elect members of the House. As the reading of the second statement of the same article suggests, election of the members of the House can be either direct or indirect. The decision is left to the councils of member states. Thus, the state councils may decide to hold an election to have the members of the House elected directly by the people or they may themselves elect representatives to the House. Adherence to the first option, that is direct election by the people themselves, makes the House, in fact, a majoritarian body, which is also accountable to the people. This would make the task of interpreting the Constitution fall squarely in the hands of a majoritarian House, enabling the Constitution to successfully avoid the counter-majoritarian problem. It would adequately respond to

[121] For more see Farber et al (note 72 above).

the counter-majoritarian problem which basically claims that the Constitution is taken away from the people and placed in the hands of few unelected and unaccountable professionals or 'elite'.

In practice, the first option has never been adhered to. The state councils have never held elections to have the members of the House directly elected by the people. Rather, following the second option, it is the state councils themselves who have elected representatives to the House. More surprisingly, the members are not elected by the state councils as such. As indicated earlier, the Constitution states that the members of the House should be elected directly by the people themselves or by the state council. In the latter case, it seems, the state councils need to hold an election within their respective councils. The practice, however, is that the state council, rather than conducting an election to elect representatives, merely appoints individuals to represent the state in the House.[122] Under such circumstance, the use of the phrase 'elect representatives', under article 63(3), is a misnomer as the state council merely appoint members to the House. Thus, what we have in the House are not individuals who are elected by the people but appointed by the state councils.

In so far as members of the House are not elected but appointed by the state councils, they are almost in the same position as judges of the Ethiopian courts. Presently all judges are appointed by the House of People's Representatives from a pool of nominees forwarded by the Prime Minister.[123] The Prime Minister, in turn, receives the names of candidates from the Federal Judicial Administration Council.[124] State Court judges are also appointed through a similar process. It is thus clear that judges survive the 'majoritarian process of appointment and confirmation'. Just like judges, members of the House are not elected and, thus, not accountable to the people. The fact that they are appointed by the state councils does not make them any different from judges as the latter are also appointed by the federal or state parliaments. This indicates that as far as the members of the House are appointed by the state councils, the Ethiopian approach to constitutional review cannot escape from the same criticisms that judicial review provokes.

In conclusion, the Ethiopian Constitution, by creating a novel system of constitutional review, attempted to respond to the counter-majoritarian problem. However, as the foregoing discussion

---

122 Interview with Ato Samuel Alemayehu, Registrar of the House of Federation,20-10-2004; ¾›T^ ¡MM U¡` uƒ ¾ðÅ[" U¡` uƒ }¨ŸÄ‹ Sƒ ›ÚÅk ›Ç=e²S"Ò²× 'Nc 1992 (The report states that that the Amhara State Council(one of the nine federal states) has approved the appointment of individuals to represent the region in the House.) The document is in Amharic.

123 Article 81 of the Constitution.

124 The Federal Judicial Administration Council is responsible for the nomination of federal judges. It also determines matters of code of professional conduct and discipline as well as transfer of judges of any federal court. It is composed of members of the Judiciary and the House of Peoples Representatives. See articles 78 and 81 of the Constitution.

reveals, the approach does not represent an adequate response to the counter-majoritarian problem. Its attempt to take the constitution away from an "unelected and unaccountable body" is not successfully accomplished as the Constitution has again found itself in the hands of a federal body, which is composed of individuals who are not elected but rather appointed by the state councils.

4.3 Institutional and functional competence of the House

A close look at the organization of the House and the fact that it is assisted by a body that is composed of individuals representing different interests suggest that the Ethiopian approach may find its justification in constitutional theory that considers a constitution not only as a legal document but also as a political contract. Unlike the disciples of John Marshall who consider the constitution merely as higher law,[125] there are other constitutional theorists who understand the constitution as an instrument different in kind from ordinary law. For them, the "constitution, in addition to serving as a legal document, is also vital politically in the sense that it engineers the whole political order".[126] The constitution is not only a legal document but also a political document. As a result, they regard the enforcement of the constitution as an extra-ordinary political act.

Based on this understanding of the constitution, it is often suggested that issues involving constitutional interpretation should be investigated under a different socio-political context than the often legalistic environment under which ordinary law cases are examined. This means, among other things, that the organ that is entrusted to interpret the constitution should not merely be a collection of legal professionals. It must also have individuals who have substantial experience in the political arena. Some of the members must thus have background in law, others in politics. The members must also be selected by a much more open political process than is the case with ordinary judges.

The House is obviously a political body. Furthermore, the Council, which assists the House in interpreting the Constitution, is composed of individuals with both a legal and political background. As indicated earlier, the Council is composed of the President and Vice President of the FSC, six legal experts appointed by the House of Peoples' Representatives, and three other members designated from the House.[127] The legal professionals provide the House with the necessary legal expertise while the representatives from the political branch ensure that the findings of the Council do not "inject too many norms into the law making process, supplanting legislative considerations

---

125 See the discussion on the "inherent power of the court" in Chapter one of this study.

126 W Murphy J Fleming and B Sotirios *American constitutional interpretation* (1995), 266.

127 Article 82 of the Constitution.

of other arguably more important matters."[128] This, one may argue, makes the House a legitimate institution to interpret the Constitution and review legislation for constitutionality.

The fact that the adopted system is consistent with some principle of constitutional theory is of no use unless the system has also the necessary institutional structure and competence to carry out the task. The institution must also be well suited to discharge the function of interpreting the constitution and more specifically constitutional review. In other words, one also need to see if the House, as an institution for constitutional interpretation, is most suited to discharge this task or how well it has done so far. This relates to the institutional competence of the system or its effectiveness in ensuring the observance of constitutional norms. It also relates to the impartiality of the House. One may also want to see if the House has so far been able to change our "thin constitution" into what one may call "thick constitution".[129] In the following pages, we shall attempt to examine the House from these perspectives. We now proceed to this part of the study by discussing first the institutional competence of the House.

4.3.1 Institutional competence

As already indicated, any matter that requires constitutional interpretation is first referred to the Council, which examines constitutional issues and submits its findings to the House. The House has the power to provide a final decision on constitutional issues. Presently, the House is composed of 118 members representing 58 'ethnic groups'. The presence at a meeting of two-thirds of the members constitutes a quorum. The House, according to article 64 of the Constitution, can only reach a decision upon the approval of the majority of members present and voting.

This decision-making arrangement of the House is, however, problematic. It is true that such decision-making arrangement is the most common way of making a decision in any legislative institution. It is not, however, an appropriate forum to reach a decision on an issue like constitutional interpretation which normally is resolved by a small group of persons - as small as 9 in the case of America or 11 as in the case of South Africa. This mainly has to do with the fact that adjudication of constitutional issues most often involves or requires one to engage in complex arguments. This, however, is not possible in a 'large' gathering like the House. This parliamentarian feature of the House makes "the process of engaging in [such] complex arguments

---

128 M Tushnet "policy distortions and democratic debilitation: Comparative illumination of counter-majoritarian difficulty" (1995) 94 *Michigan Law Review* 2-4.

129 I adopted this terminology from Mark Tushnet. The usage of these terminologies, however, may not be exactly as envisaged by him. Here 'thin constitution' refers to the document as it is adopted by the constitutional assembly or a referendum: rules stated in general terms. A 'thick constitution', on the other hand, refers to a constitution that is developed as a result of constitutional interpretation. For Tushnet's version of these terminologies see generally, M.Tushnet, *Taking the constitution away from the courts*, (1999).

difficult".[130] Under this kind of institutional arrangement, the urgency of the issues, the reliance of members on others for guidance and the complexity of the problems presented often prevent meaningful constitutional analysis.[131]

Being cognizant of this difficulty, some have suggested that the House should delegate its power of constitutional adjudication to a committee consisting of its own members just as it does with its other activities. The establishment of a committee, it is argued, would provide the House with a small group of experts thus presenting an optimum format to deliberate on the often technical and complex nature of constitutional adjudication. After all, it is further argued, the pressure on parliament and specialized procedures often urges legislatures to establish a variety of committees - standing and ad hoc - for different types of activities including investigations and scrutinizing of the functions of ministries and other agencies of the country.[132] In this regard, reference is made to article 62(10) and (11) of the Constitution, which allows the House to establish permanent and ad hoc committees and to adopt their rules of procedures and to organize their internal administration for such committee.[133]

As noted by Mikva, the most likely place for constitutional dialogue is in a committee; committee sizes and format are most conducive to debate.[134] Thus, establishing an ad hoc or permanent committee might be helpful. This suggestion, however, seems to overlook the existence and role of the Council which provides the House with the 'official competent and authoritative legal advice' on constitutional issues. The role of this organ is to assist the House in the discharge of its constitutional adjudicatory functions. Thus, any establishment of an ad hoc committee within the House for matters involving constitutional interpretation would only be a duplication of effort. There is almost nothing that the establishment of a committee will contribute that cannot be done or provided by the Council. Such a proliferation of mechanisms might also suggest lack of focus of resources and effort. Moreover, one should note that among the eleven members of the council three of them are already designated by the House itself from among its members. For the reasons

---

130 A Mikva "How well does Congress support and defend the Constitution?" (1983) 61 *North Carolina Law Review* 587.

131 As above.

132 Ibrahim (note 22 above) 68.

133 Currently, the House has established three standing committees; each committee of the House has eleven members including the chairperson: The Committee for legal affairs, the committee for state affairs and the committee for revenue administration. The Committee for legal affairs is not involved in anything related to constitutional interpretation. Rather, it is entrusted with identifying civil cases that need to be incorporated in the code. It has also the duty of coming up with issues that require constitutional amendment and present recommendations to the House. The committee also sees to it that the right of the members of the House may not be infringed. Available on <http:// www.ethiopar/english/hofedhofcmt.htm> (accessed on 17-10-2004)

134 Mikva (note 130 above).

stated above, it is submitted that the proposal that suggests that the House should establish a committee should not be accepted.

A related problem is the ability of the members of the House to engage in constitutional adjudication. Constitutional issues often present the most difficult value conflicts in society. It is also true that individuals who decide on the issue of constitutionality are required or expected to have the technical knowledge required to understand the background of every piece of impugned legislation.[135] As the profile of most members of the House reveals, most of them are either members of the executive branch of the state government or the state council. The majority of them, however, do not have the necessary expertise (legal or otherwise) to engage in a detailed discussion of constitutionality. The problem is not only that there are not enough lawyers but also that those who are lawyers do not have the capacity to engage in detailed constitutional analysis.[136] They hardly have the time to keep themselves up to date on recent legal developments. In fact, the situation in the House confirms one common observation about legislative ability - that, generally, members of the legislature are seldom competent to examine the constitutionality of a law. [137]

One may argue that the ability of the members to engage in constitutional adjudication should not be a problem as the Council can provide the House with the necessary legal advice. This would be true, however, only if the House served as the rubber stamp for the findings of the Council. The House, nevertheless, needs to deliberate on the reports of the Council before it decides to adopt or reject its recommendations. This definitely requires the House to engage in complex constitutional debate that obviously presupposes at least a working knowledge of the Constitution and other relevant laws. The finding of the Council aids the House by identifying issues and motivations but it is not a substitute for the judgment of the House. The Council cannot replace but only assist the House.

The ability of the House to engage in a detailed discussion of constitutionality is further curtailed by the fact that the House holds a limited number of annual meetings. According to article 67 of the

---

135 Mikva (note 130 above).

136 cLU Ñ□†¨< ®pU Ó"v□ Kû`LT ›vL*ƒ* ]þ`}` Ò²× IÇ` 1996 (The article discusses the lawmaking capacity of the members of both the House and the House of Peoples' Representatives. The discussion was written in a response to the capacity building program recently launched by the government.) The document is in Amharic.

137 Some attempt to distort this issue by making reference to 'infamous judgments' of courts. The issue, however, is not about making mistakes. The point is not that the legislators are bound to make mistakes. From any one's point of view legislatures and the courts are bound to make constitutional mistakes. Unlike what Tushnet says, the real question is also not "whether in general legislatures or courts make more and more important constitutional mistakes". The question should rather focus on the general ability of the legislature and the court to deal with matters of constitutional interpretation and constitutional review.

Constitution, the House should hold at least two sessions annually. Although the Constitution does not specify for how long each meeting is to be held, in practice, the House has never met for more than ten working days per meeting.[138] This obviously does not give enough time for the House to engage in a detailed discussion of the findings of the Council. Moreover, one should not forget that constitutional interpretation is not the only business of the House. As it was indicated at the beginning of this chapter, the House is also charged with other important tasks - tasks which equally require the attention and time of the House. The House does not hold meetings for the sole purpose of deciding matters of constitutional interpretation. Members of the House are also saddled with a variety of tasks in the regional states and federal government in their legislative and executive capacities. With such tight schedule, it is obvious that the House does not have enough time to engage in the necessary constitutional debate unless we expect it to serve as a rubber stamp for the findings of the Council.

.

It is generally argued that legislatures or institutions like the House are less suited for the task of constitutional interpretation and constitutional review as they are less inclined to consider constitutional values seriously. Fiss has said the following in this regard:

> *Legislatures …….. are not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual, occurrent preferences of the people - what they want and what they believe should be done.*[139]

As the foregoing discussion suggests, the House is neither institutionally suited nor competent to engage in complex constitutional debate which any consideration of the constitutionality of laws or the interpretation of the Constitution requires.

4.3.2 Independence and Impartiality

The scope and meaning of the independence and impartiality of any institution varies as we move from one jurisdiction to another or from one kind of institution to another. The precise contours and limits of these concepts is still a matter that scholars continue to define. For the purpose of this study, however, the terms 'independence' and 'impartiality' simply means that a member of an adjudicating, enforcement or supervisory body should be free from improper influences and bias.[140]

---

138 Interview with Ato Samuel Alemayehu (note 122 above).

139 OM Fiss The Supreme Court, 1978 term, Foreword: the forms of Justice (1979) 93(1) *Harvard Law Review* 7.

140 This is reflected in the various regional and international instruments. See, for example, Article 18 of the Protocol on the establishment of the African court on Human and Peoples rights, article 17 of the American Convention on Human rights and article 21(3) of the European Convention on Human rights and Fundamental Freedoms as amended by protocol 11. See also PH Russell Toward a General Theory of Judicial Independence, in PH Russell and DM O'Brien *Judicial Independence in the age of Democracy* (2001) 8-9.

It is submitted that the application of these principles should not be confined to functionaries called judges or institutions called courts. They should also apply to any institution that at least provides an authoritative settlement of disputes about constitutional or statutory rights and duties.[141] Thus, to the extent that the House exercises its power of constitutional interpretation and more specifically constitutional review, it is engaging itself in some form of judicial or quasi-judicial function, which involves the settlement of disputes about constitutional rights and duties. This suggests that it, at least, needs to comply with some of the most important elements of these principles.

One of the main elements of an independent institution is that its members should serve independently without any improper influence. This is endangered when there is a conflict of interests. A conflict of interests is bound to occur in a situation where a decision-maker has, for example, a personal stake in the outcome of a case. This also happens if the decision maker is engaged in any other activity, which is not compatible with his position or function as decision maker. Incompatibility occurs when there is a reasonable belief that the other activity might interfere with the independence or impartiality of the individual.[142]

As the profile of the members of the House reveals, most members of the House perform functions within their respective regional governments. Most of them work either in the executive or legislative branch of the regional governments. The fact that most members of the House hold certain positions in the executive branch in political capacities while at the same time serving on the House has the potential to undermine the credibility of the latter. This is for the simple reason that there is a conflict of interest, which is naturally generated by the incompatibility of the functions assumed by the members of the House. Under such circumstances, one may argue, members of the House might formally be delegates of the people that elected them or the state council that appointed them. In substance, however, they also represent the executive branch of the government in so far as they, at the same time, serve on the executive branch of the government.

The incompatibility of functions gets particularly problematic when one considers the fact that some members of the House hold certain important positions in the federal government. This problem is further compounded by the fact that these government officials also hold an important position in the House. For example, currently a Minister of trade and industry is at the same time serving as Deputy Speaker of the House. The Minister is obviously an important member of the government and a member of the Cabinet of Ministers. It may seem that if a complaint were submitted to the House against the government challenging the constitutionality of a law initiated by his Ministry or

141 As above.

142 As above.

the Cabinet, he would obviously have a direct stake in the outcome. Such an individual can hardly function as an independent member in discharging his functions.

Some may contend that the fact that they have political positions in the executive branch of the government should not be problematic. For them, what is important is the professionalism and integrity of the members. This, backed by strict rules of procedure or codes of conduct, can ensure that the members of the House discharge their obligations independently and impartially. The point, however, should be made that it is doubtful whether the public would be confident that individual members of the House are able to render decisions which are adverse to their own interests or responsibilities. Moreover, the House should not only assert itself as being independent but should also be perceived by the public as an independent body.

Generally, the House does not have the necessary mechanisms that guarantee its independence and impartiality. First of all, there is nothing in the constitution or in the subsequent laws that prohibits a member of the House from engaging in any activity that might interfere with the independence or impartiality of a member or the House generally. The presence of such provisions would have at least ensured that the members of the House do not engage in activities that conflict with their role as interpreters of the Constitution. Secondly, unlike most judicial systems, including Ethiopia, there is nothing in the rules of procedure of the House or other relevant laws that require a member to abstain from participating in a discussion that concerns the constitutionality of a law which he or she enacted as a minister or member of the federal or state government's executive branch.

What is more disturbing is that these problems appear to be inherent problems of the House that originate from the very composition of the House itself. It is mainly because most members of the House are also members of the executive or legislative branch of the government and the fact that there is nothing that prohibits such simultaneous assumption of office, that such a conflict of interest is bound to happen. Insofar as the situation continues as it is, it is almost impossible to introduce the protective mechanisms mentioned in the above paragraph as doing so will adversely affect the proper functioning of the House. This is because of the fact that almost all members of the House have dual responsibilities. The remedy thus lies in the composition of the House itself.

4.3.3 The "Thin Constitution"

Currently, Ethiopian courts rarely decide cases based on the provisions of the Constitution. There is a general conviction among judges that the courts are not allowed to discuss the provisions of the Constitution when they consider cases. Some judges jokingly argue that they are supposed to follow a hands-off approach when confronted with the Constitution.[143]

[143] This comment has also some political connotations. Some judges believe that the power to interpret the

The reluctance on the part of the judges to make any reference to the provisions of the constitution is reflected in the manner the judges respond to constitutional adjudication.[144] Some judges argue that the courts should not be worried about the constitutionality of a law. They are supposed to apply laws irrespective of their constitutionality. For them, it is only when the law-maker repeals or substitutes the impugned legislation or provision that they cease to apply the law. Others believe that where the issue of the constitutionality of laws arises, the courts are supposed to refer the issue to the Council instead of applying or discussing the impugned law. In its most extreme form, the reluctance to engage in constitutional adjudication has resulted in judges shying away from considering the provisions of the Constitution. [145]

Despite the persistent encouragement by the academics and officials of the judiciary, the courts have generally been unwilling to engage in the interpretation of the constitution let alone constitutional review. It is rare to find, especially at the level of federal and higher state courts, decisions based largely or solely on the provisions of the Constitution. As recent research indicates,[146] neither attorneys representing individuals nor judges rely on the Constitution of Ethiopia to support their arguments. Even in the cases where the parties have made reference to the Constitution, the judges have avoided any engagement in constitutional debate by deciding cases based on statutes. Most often legal battles are fought at the level of statutory rights and obligations.

What is more disturbing is that the courts are not active in referring cases to the Council. As it was once stated by the President of the Supreme Court, who is also the Chairman of the Council, only one case has so far been referred by the courts to the Council, deeming that the issues raised

---

Constitution is taken away from the courts only because the ruling party does not trust the judiciary. Note should be taken here that the present Constitution has not as such taken away the power of interpreting the constitution from the courts. In the Ethiopian legal tradition, the courts have never been entrusted with the power of constitutional review.

144 For more see D Wondwossen The role of courts in the enforcement of constitutional rights of suspects, in Assefa (note 5 above) 40.

145 Some have considered this as unnecessary judicial timidity. For more see M Hassen Philosophical basis for judicial review (1999) as cited in Tsegaye (note 5 above) 115. It is also not uncommon to hear prosecutors and others challenge a decision of a court, which is based on the provision of the constitution, on the ground that judges do not have the power to consider constitutional provisions.

146 M Rakeb The enforcement of human rights in Ethiopia available on<http:// www.telecom.net.et/~apap/research> (accessed 17-10-2004). The research, in the aim of assessing the enforcement of human rights in Ethiopia, collected data from all the federal courts and from one of the biggest regional state, the Amhara State High Court. As it was mentioned at the beginning of this study, the Ethiopian Constitution contains a 'detailed bill of rights'.

involved constitutional interpretation.[147] In that case, the Council ruled that the case did not call for constitutional interpretation. Although it may not be conclusive, the dearth of cases referred to the Council by the courts may reaffirm the conclusion that the courts are most often reluctant to engage in constitutional debate and, thus, opt to settle cases based on statutory laws.

On the other hand, so far only few cases have been entertained by the House mostly as a result of applications made by individuals and other interested parties.[148] It is reported that twenty-three cases have been brought to the attention of the Council so far. Twenty of the cases were dismissed as not warranting constitutional interpretation. Three cases have been decided.[149]

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

What is most disturbing is that the nearly comprehensive bill of rights, which forms a big chunk of the Constitution, has rarely been applied by the courts or the House. This is disturbing, considering the fact that the content of rights develops over time through on-going interpretation of their meaning in the context of concrete cases.[150] It also the utilization of such forums that has proven to be a critical starting point to build a human rights jurisprudence which will help in the effective legitimation of the human rights standards. Unfortunately, however, very few court decisions could be identified that directly or indirectly apply or refer to human rights provisions incorporated in the Constitution.[151] The same is also true with the House, which has decided very few cases in the last ten years.

The seclusion of the Constitution from the adjudication procedures raises the issue of the Constitution's continuing role. It seems that the document has become 'museum material'. The

147 Kemal (note 35 above).

148 Since neither the House nor the Council make their activities public, there is a problem in getting access to information concerning the activities of the House and the Council.

149 Meaza (note 20 above) 37.

150 S Liebenberg The protection of economic and social rights in domestic legal systems' in A.Eide et al (eds) *Economic, Social and cultural rights* (2001) 61.

151 Rakeb (note 34 above).

constitution might still have an important symbolic or 'inspirational' role. Unfortunately, however, it has little or no effect on cases litigated before the courts. The Constitution, as a result, has remained to be that 'thin' document whose terms are stated in very general terms. The fact that the normative content of the rights recognized in the Constitution are less developed is a reflection of their exclusion from adjudication procedures. In other words, the absence of institutions that are suited to engage in complex interactions on the meaning of the provisions of the Constitution have made it impossible to develop a constitutional jurisprudence. Although ten years have passed since the Constitution came into force, Ethiopia has still to come up with a body of constitutional jurisprudence.

4.4 Conclusion

The discussion in this chapter has revealed that the Ethiopian approach to constitutional review does not represent an adequate response to the counter-majoritarian problem. The fact that the power of constitutional review still remains in the hands of members of the House who are not elected but appointed still leaves the counter-majoritarian problem intact.

The discussion has also revealed that the Ethiopian approach to constitutional review suffers from other limitations that make the system all the more problematic. This partly pertains to the institutional competence of the House which refers to its unsuitability for constitutional adjudication and the inability of its members to engage in complex constitutional arguments. This unsuitability of the institution for constitutional adjudication has made it impossible to develop a constitutional jurisprudence. The independence and impartiality of the members of the House is also a big problem.

Chapter Five
Conclusions and Recommendations

5.1 Conclusion

The aim of this study was to examine the normative and descriptive components of the question as to who interprets the constitution in Ethiopia. We ventured on this small project not only to determine the organ responsible for constitutional review in Ethiopia, but also to examine the legitimacy of that institution to engage in this very important function in any constitutional system.

The drafters of the Ethiopian Constitution, being cognizant of the anti-democratic nature of judicial review, sought to adopt a novel system of constitutional review. Rather than entrusting the courts with the power of constitutional interpretation and constitutional review, they opted to give the task to the House, the upper house. The House, a political body, is assisted by the Council whose sole function is to provide the former with the authoritative legal advice on matters of constitutional interpretation.

Upon close scrutiny, however, it becomes clear that the Ethiopian approach to constitutional review has not escaped from the same criticism that is directed against judicial review. It is still vulnerable to the critics who challenge judicial review based on its counter-majoritarian character. This is mainly attributed to the fact that the House is composed of members who, like judges, are appointed and not elected. This, of course, does not put the Ethiopian Constitution in a class of its own as this is the case with most of the countries that have adopted an institution of judicial review.

What is more problematic about the Ethiopian approach to constitutional review is that it does not have characteristics that make it a good part of a well-designed constitutional system. It is not only that the House is not institutionally suited to discharge the task of constitutional interpretation, but it does not have the capacity to engage in the often complex and technical arguments that any examination of the constitutionality of a law or any interpretation of the Constitution, for that matter, entails. The impartiality of the House is also questionable.

The Ethiopian approach to constitutional review is also problematic in that it totally excludes courts from the business of constitutional interpretation. In adopting this approach, there was a failure to consider the multitude of daily cases that are brought before the court that require the interpretation of the Constitution. It failed to appreciate the fact that the constitution does not only deal with lofty ideals and principles but also with many provisions on many mundane matters. Any matter that requires the interpretation of the Constitution now has to be referred to the House through the Council. Not only does this pose a problem to the effective functioning of the courts,

but it also unnecessarily elongates the process for claimants who require an immediate redress to their problem.

Generally, the Ethiopian approach can be commended for the novelty of the system that attempted to avoid the counter-majoritarian problem. However, it is not a commendable system of constitutional review. This is not only because it fails to represent an adequate response to the counter-majoritarian problem but also because it is not institutionally and 'functionally' suited to discharge the task of constitutional interpretation and constitutional review. These institutional and functional problems have made it impossible for the institution to contribute towards effective constitutional governance. The 'under-developed' nature of the Constitution illustrates this fact.

5.2 Recommendations

The writer of this paper is of the view that the present constitutional review system in Ethiopia should not be retained. The task of constitutional interpretation and constitutional review, it is submitted, can be discharged by an institution like the Council. As indicated earlier, the Council is composed of representatives from the two Houses, the judiciary and other legal professionals. The composition of the Council, which more or less reflects the representation of different interests, makes it a good candidate for the task. The presence of elected representatives in the Council mitigates to a certain extent the potential contention that the Council is anti-democratic. The presence of legal professionals, on the other hand, provides the Council with the necessary legal expertise required to adequately enforce constitutional norms.

As indicated earlier, denying courts any role in the interpretation of the constitution is not advisable. The multitude of daily mundane cases that, however small, require the interpretation of the Constitution suggests that the courts must have some sort of adjudicating power on constitutional questions. Courts must, in other words, be given the power to interpret the provisions of the constitution with the final and binding decision still retained by the Council. However, it is proposed that consistent with the Ethiopian tradition of constitutional review, the court should not have the power to enquire into the validity of any legislation. An amendment of the Constitution is, therefore, recommended in the following terms.

- The House should be deprived of the power to interpret the Constitution including the power to annul legislation for unconstitutionality.
- The Council should no longer be an advisory body but a permanent organ entrusted with the sole task of constitutional interpretation including the more specific task of constitutional review.
- The Council shall have the final and ultimate power on the interpretation of the Constitution including the power of determining the constitutionality of legislation.

- The courts should have the power to interpret the constitution. They should not have the power to enquire into or rule on the constitutionality of any legislation.
- The courts should refer matters that require a ruling on the constitutionality of any legislation to the Council. A law must be enacted that provides a system for the referral of matters of constitutional interpretation and constitutional review to the Council.

Word count: 17,879 (excluding bibliography, declaration, acknowledgement and table of content)

Bibliography

Books

Antieau, C (1982) *Constitutional construction* London: Oceana publications Inc.

Barry, B (1991) *Democracy and power, Essays in political theory I* Oxford: Clarendon press.

Bell, J. (2001) French *constitutional law*, Oxford: Clarendon Press.

Bobbio, N (1989) *Democracy and Dictatorship* Cambridge: Polity press.

Brewer-Carias, A (1985) *Judicial review in comparative law* Cambridge: Cambridge University Press.

Cappleti, M (1989) *Judicial review in comparative perspective* Oxford: Clarendon press.

De Ville, J (2000) *Constitutional and Statutory interpretation* Western Cape: Interdoc Consultants Pty Ltd.

Dworkin R (1996) *Freedom's Law: The Moral Reading of the American Constitution* Oxford: Clarendon Press.

Farber, A and Sherry, S (2002) *Desperately seeking certainty: The misguided quest for constitutional foundations* London: The University of Chicago Press.

Fasil, N (1997) *Constitution for a nation of nations: The Ethiopian prospect* New Jersey: Red Sea Press Inc Ltd

Goldsworthy, J (1999) *The Sovereignty of Parliament: History and philosophy* Oxford: Clarendon Press.

Paul, CN and Clapham, C (1967) *Ethiopian constitutional development* Addis Ababa: A.A.U, Faculty of Law.

Kommers, D and Finn J (2000) *American Constitutional law: essays, cases and commentary notes* London: Sweet and Maxwell.

Lipkin, RJ (2000) *Constitutional revolutions: pragmatism and the role of judicial review in American constitutionalism* Durham: Duke University press.

Meny, Y and Knap, A (1998) *Government and Politics in Western Europe* Oxford: Clarendon Press.

Murphy, W Fleming, J and Sotirios, B (1995) *American constitutional interpretation*, (2nd ed) New York: Foundation Press Inc.

P.P Craig (2003) *Administrative law* London: sweet and Maxwell.

Perry, JM (1994) *The constitution in the Courts: Law or Politics?* New York: Oxford University Press.

Carr, R.K (1970) *The Supreme Court and judicial review* Westport: Greenwood Press.

Sampford, C. and Preston, K (1996) *introducing the constitution: Theories and principles and institution*, Freedman press.

Scholler, H (2003) *Notes on Constitutional Interpretation In Ethiopia*, Addis Ababa: Fredric Ebert Stiftung and Federal Supreme Court of Ethiopia.

Snowsis, S (1990) Judicial *Review and the law of the Constitution*, Newhaven: Yale University Press.

Steytler, N (2001) *Constitutional Criminal Procedure: A commentary on the Constitution of the Republic of South Africa, 1996* Durban:Butterworth.

Tushnet, M (1999) *Taking the constitution away from the courts* Princeton: Princeton University Press.

Wills, M (1997) *Draft Materials on the Ethiopian Constitution*, A.A.U, Law Faculty.

Reddish, MH (1995) *The constitution as political structure* Oxford: Clarendon Press.

Seidman, LM (2001) *Our unsettled constitution* Newhaven: Yale University Press.

Chapters from books

Aboul – Enein, MI The emergence of constitutional courts and the protection of individual and human rights: A comparative study in Sherif, AO and Cotran, E (eds) (1997) *The role of the judiciary in the protection f human rights* London: Kluwer Law International.

Assefa, F Constitutional interpretation: the respective role of courts and the House of federation (HOF). In Assefa, A (2001) *Proceeding of the symposium on the role of courts in the enforcement of the constitution* Addis Ababa: Faculty of Law, Ethiopian Civil Service College.

Davis, D., Chaskalson M., and De Waal, J. Democracy and constitutionalism: The role of constitutional interpretation in Van Wyk, D., Dugard, J., De Villiers B and Davis, D (eds) (1994) *Rights and Constitutionalism: The new South African legal order* Cape: Juta and Co Ltd.

Liebenberg, S The protection of economic and social rights in domestic legal systems' in A. Eide et al (eds) (2001) *Economic, Social and cultural rights* London: Kluwer Law International.

Lord Irvine of Lairg Parliamentary sovereignty and judicial independence: Keynote address in Hatchard J. and Slinn P. (eds), *Parliamentary supremacy and judicial independence: A commonwealth approach*, Cavendish publishing limited, (1999).

Meaza, A Ethiopia: Process of democratisation and development in An-narim, AA (ed) (2003) *Human Rights under African Constitutions*, New York: University of Pennsylvania Press, 2003.

Russell, HP Toward a General Theory of Judicial Independence, in Peter H. Russell and David M.O'Brien (eds) (2001), *Judicial Independence in the age of Democracy* Charlottesville: University of Press Virginia, (2001).

Tsegaye, R *Courts and the Human rights norms in Ethiopia*, in Assefa, A (ed) (2001) *Proceeding of the symposium on the role of courts in the enforcement of the Constitution* Addis Ababa: Faculty of Law, Ethiopian Civil Service College.

Articles

Abebe, M Who is the Interested Party to initiate a challenge to the constitutionality of laws in Ethiopia? 1(2) *The Law Student Bulletin*.

Chemerinsky, E The vanishing constitution, (1998) 89 *Harvard Law Review* 90.

Cohen, JM Ethnic Federalism in Ethiopia (1995) 2 *Northeast African Studies* 2.

Ibrahim, I Constitutional adjudication under the 1994 FDRE Constitution (2002) 1 *Ethiopian Law Review* 27.

Krzeczunowicz, G Hierarchy of Laws (1984) 1 *Journal of Ethiopian Law* 111-117.

Mikva, A "How well does Congress support and defend the Constitution?" (1983) 61 *North Carolina Law Review*.

Fiss, OM The Supreme Court, 1978 term, Foreword: the forms of Justice (1979) 93 *Harvard Law review* 7.

Ruger, W.T "A question which convulses a nation" the early Republic's greatest debate about the judicial review power (2004) 125 *Harvard Law Review* 857.

Sugunasirl, S Contextualism: The Supreme Court's new standard of judicial analysis and accountability, 22 *Dalhousie Law Journal* 126.

Tribe, HL The puzzling persistence of process-based constitutional theories, (1980) 89*The Yale Law Journal* 1063

Tushnet, M "policy distortions and democratic debilitation: Comparative illumination of counter-majoritarian difficulty" (1995) 94 Michigan Law Review 2 - 4.

Tushnet M., Darkness on the edge of town: The contribution of John Hart Ely to constitutional theory (1980) 89(6) *The Yale Law Journal* 1065.

Unpublished

Andreas, E *Comments on the draft Constitution* (1994). (Unpublished on file with author)

Discussions at the Constitutional Assembly, (December 1994). (Unpublished on file with author)

Getachew A, *interpreting the Constitution: The role of the Courts and the Council of Inquiry,* Paper presented on constitutional interpretation workshop, Addis Ababa, Ethiopia Hotel, November (2001). (Unpublished on file with author)

Hassen M (1999) *Philosophical basis for judicial review*, unpublished, AAU, Law School, (1999). (Unpublished on file with author)

Internet Sources

Rakeb, M *The enforcement of human rights In Ethiopia* <http://www.telecom.net.et/~apap/RESEARCHPAPERS> (accessed on 17-10-2004).

The House of Federation <http://www.ethiopar.net/english/hofed/hofcmt.htm>

Case law

Ferreira v Levin No 1996 (1) SA 984 (CC) para 27.

Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) para 94.

Marbury v Madison, 5 U.S (1 Cr.)137,177(1803).