

Chapter 3: The constitutional review system in Ethiopia and its potential to ensure the realisation of human rights

1. Introduction

Chapter 2 concluded that one of the essential preconditions for the success of constitutional review is the existence of an independent constitutional review system. Chapter 2 further provided examples of African states where formally independent constitutional adjudicators have, despite various challenges, delivered on their share of responsibilities in ensuring the realisation of human rights and contributed to the transition towards constitutional democracy. Given the constitutional guarantee of justiciable rights and the supremacy of the Constitution in Ethiopia, the necessary normative framework for the constitutional adjudication of human rights has been laid down.

This Chapter presents the institutional and procedural arrangements anchoring the constitutional review system in Ethiopia. It critically analyses the constitutional review system through the prism of the effective protection of constitutional rights against legislative and executive encroachment. The power to interpret the Ethiopian Constitution is vested in the House of Federation (HoF). The Council of Constitutional Inquiry (Council) determines whether there is a constitutional issue that needs resolution, and, if so, provides recommendations to the HoF. It is argued that the Ethiopian judiciary is constitutionally excluded from invalidating legislative and executive action or inaction that contravenes the Constitution. Despite some scholarly works that argue otherwise, the role of Ethiopian courts is limited to referring cases that raise constitutional issues to the Council.

After considering the independence and competence of the organs in charge of constitutional review, this Chapter concludes that the constitutional review system in Ethiopia cannot ensure the effective protection of constitutional rights. By granting the power of constitutional review to an entity that is designed to be part of and work in harmony with the political actors in government, the Constitution has failed the very purpose of establishing a constitutional review system, which is independently protecting human rights and other constraints on political power. To ensure that constitutional review can play its share of responsibilities in ensuring the realisation of constitutional rights, the Chapter recommends that the constitutional review system should be overhauled. It concludes by exploring the possible institutional models for constitutional review Ethiopia may adopt, given its historical and legal contexts. However, it does not prescribe any model as the best one as that would be putting the cart before the

horse. The possible institutional alternatives should mainly be discussed in detail once a decision to restructure the constitutional review system has been taken.

2. Who guards the Ethiopian Constitution?

Two constitutional issues have evoked considerable scholarly work in Ethiopia, namely, the ethnic-based federalism and the constitutional adjudication system. Many writers have considered whether the Constitution has left any room for the judicial interpretation of the Constitution. This section presents the debates surrounding the determination of the entity that is empowered to interpret the Ethiopian Constitution. It also explores whether the Constitution anticipates the possibility of seeking advisory opinions on constitutional issues. It concludes that the Ethiopian constitutional review system is unique as it grants the power of constitutional review to a purely political entity, the HoF, and that ordinary courts are virtually excluded from declaring legislative or executive action unconstitutional. This Chapter also identifies and critically analyses the policy justifications that prompted the Ethiopian institutional choice for constitutional review. The desire to ensure the supremacy of ethnic groups and the counter-majoritarian difficulty arising from empowering courts to adjudicate constitutional disputes provided the principal foundations for the Ethiopian institutional choice. It is argued that these policy justifications do not adequately justify entrusting a political entity with the power to ensure the protection of human rights.

According to the Ethiopian Constitution, all judicial power is vested in independent courts which are subject only to the law.¹ Following the federal structure, the Constitution establishes two parallel judicial systems: at the federal level, which hierarchically consists of the Federal First Instance Court, Federal High Court and the Federal Supreme Court; and at the state (regional) level consisting of State First Instance (Woreda) Courts, State High (Zonal) Courts, and Regional Supreme Courts.² The Cassation Division of the Federal Supreme Court can receive complaints alleging basic errors of law against any decision of a lower court – including the decisions of regional courts.³ The Cassation Division of the Federal Supreme Court, therefore, has the ultimate say on the interpretation of laws other than the Constitution.

¹ FDRE Constitution, articles 78 and 79.

² Note also that the Constitution authorises the adjudication of personal and family disputes in accordance with customary and religious laws upon the consent of both or all parties to the dispute – FDRE Constitution, article 34(5). Consequently, shari'a courts have been established all over the country.

³ FDRE Constitution, article 80(3)(a). State Supreme Courts also have cassation benches which consider appeals against decisions of all courts claiming basic errors of law in relation to state matters.

However, the power of interpreting the Constitution lies with the HoF which consists of representatives of the various ethnic groups.⁴ The Constitution either does not consider the adjudication of constitutional disputes a judicial role, or has made an insidious exception to the judicial power of courts. The granting of the power of interpreting the Constitution to the HoF is intended to reinforce, and a direct implication of, the conferring of sovereignty on ethnic groups. Since members of the HoF are not legal technocrats, the Constitution establishes the Council of Constitutional Inquiry (Council), composed predominantly of legal experts, to assist the HoF in determining whether there is need for constitutional interpretation and, if so, to provide recommendations to the HoF for final decision.⁵

The Constitution provides that ‘all constitutional disputes’ shall be decided by the HoF.⁶ The jurisdiction of the HoF extends to contentions on the constitutionality of federal or state laws.⁷ Despite the clear constitutional provisions empowering the HoF and the Council to interpret the Constitution and adjudicate all constitutional disputes, there has been substantial scholarly divergence on whether ordinary courts have the power to interpret the Constitution and invalidate unconstitutional measures.

Fiseha has particularly strongly argued that it is only the determination of the constitutionality of primary statutes that has been exclusively reserved to the HoF.⁸ He bases his argument on article 84(2) of the Constitution which, in providing for the process to be followed in resolving constitutional issues that arise in court proceedings, refers to issues involving the constitutionality of ‘any federal or state law’. The Amharic version is even clearer and refers to laws made by federal and regional ‘legislative’ organs. Similarly, Donovan argues that the drafters of the Constitution only had the intention to take away from ordinary courts the power to invalidate primary legislation – federal and state primary statutes – as unconstitutional.⁹ Both Fiseha and Donovan reinforce their arguments for a residual power of judicial review with the constitutional duty of courts to obey and enforce the Constitution, as every small measure of enforcement unavoidably involves some kind of interpretation.¹⁰ Idris similarly concludes that ‘any petition on the unconstitutionality of an administrative act or a decision or a custom

⁴ FDRE Constitution, article 62(1).

⁵ FDRE Constitution, articles 62(2) & 82 – 84.

⁶ FDRE Constitution, article 83(1).

⁷ FDRE Constitution, article 84(2).

⁸ A Fiseha ‘Constitutional interpretation: The respective role of the courts and the House of Federation’ in A Fiseha and T Regassa (eds) *Courts and the Constitution: Proceedings of the symposium on the role of courts in the enforcement of the Constitution, June 2000* (2001) 6 – 26; A Fiseha ‘Federalism and the adjudication of constitutional issues: The Ethiopian experience’ (2005) *Netherlands International Law Review* 1.

⁹ D Donovan ‘Levelling the playing field: The judicial duty to protect and enforce the constitutional rights of accused persons unrepresented by counsel’ (2002) 1 *Ethiopian Law Review* 31.

¹⁰ FDRE Constitution, articles 9(2) & 13(1).

is within the judicial jurisdiction of an ordinary court'.¹¹ According to Taddese, constitutional challenges against a government decision or directive other than primary statutes may be entertained by ordinary courts.¹² Regassa also argues that judicial review is an inherent business of courts as is implied, in the Ethiopian case, in the vesting of all judicial power in the courts.¹³

The above authors conclude that Ethiopian courts have the residual power to consider the constitutionality of measures other than primary statutes – both federal and regional – such as cases that involve alleged violation of constitutional rights by the executive.¹⁴ More ambitiously, Bulto argues that judicial referral of constitutional issues to the Council is 'discretionary as opposed to mandatory'.¹⁵ Bulto also argues that courts even have the power to declare primary statutes unconstitutional with *inter partes* effect but without nullifying such laws. Besselink similarly concludes that the HoF and the Council only have the final and authoritative, but not the exclusive, power of determining the constitutionality of laws.¹⁶

However, 'law', the constitutionality of which may only be considered by the Council and the HoF, has been officially defined very broadly to include not only proclamations issued by the federal or state legislative organs (primary statutes) but also government regulations and directives and international agreements.¹⁷ Some scholars consider this definition as an unconstitutional encroachment upon the implied residual jurisdiction of ordinary courts to consider the constitutionality, for instance, of directives, regulations, and other executive decisions.¹⁸

¹¹ I Idris 'Constitutional adjudication under the 1994 FDRE (Federal Democratic Republic of Ethiopia) Constitution' (2002) 1 *Ethiopian Law Review* 62, 71.

¹² M Tadesse Ye'ethiopia *hig'ena fitih getsitawoch [The features of law and justice in Ethiopia]* (2006) 144.

¹³ FDRE Constitution, article 9(1). See T Regassa 'Courts and the human rights norms in Ethiopia' in Fiseha and Regassa (n 8 above) 116. The argument here, it should be noted, is what led the US Supreme Court to arrogate the power of judicial review to itself in *Marbury v Madison*, although the US Constitution did not explicitly confer such power on the courts.

¹⁴ Fiseha (2005) (n 8 above) 21.

¹⁵ T Bulto 'Judicial referral of constitutional disputes in Ethiopia: From practice to theory' (2011) 19 *African Journal of International and Comparative Law* 99, 101. Bulto argues that '[t]he interpretation of the constitution has been apportioned between the regular judiciary as a principal organ to adjudicate constitutional issues, and the CCI/HoF which have been given the residual powers to interpret the constitution without rendering a final decision on questions of fact' – 105 – 106.

¹⁶ L Besselink 'The protection of human rights in federal systems – the case of Ethiopia' in B Yimam *et al* (eds) *Proceedings of the 14th International Conference of Ethiopian Studies* Vol. 3 (2002) 1372 – 1379.

¹⁷ Consolidation of the House of the Federation and the definition of its powers and responsibilities Proclamation no 251/2001, article 2(2). Note that there is a difference in the definition of 'law' in this proclamation and the Council of Constitutional Inquiry Proclamation no 250/2001. The latter does not include directives issued by state or federal administrative institutions – Proclamation no 250/2001, article 2(5).

¹⁸ See, for instance, Fiseha (2005) (n 8 above) 20; Fiseha (2001) (n 8 above).

The scholars who argue that Ethiopian courts have the power to decide the constitutionality of all acts and omissions except that of primary statutes seem to rely almost exclusively on article 84(2) of the Constitution, which appears to only refer to legislative enactments. They disregard article 83(1) which simply says that ‘all constitutional disputes’ shall be decided by the HoF. Similarly, article 62(1) clearly provides that the HoF has ‘the power to interpret the Constitution’.¹⁹ ‘All constitutional disputes’ includes any constitutional issue, whether legislative, executive or judicial, as long as the final determination of the meaning of a constitutional provision is necessary. The consideration of the constitutionality of primary legislation is but part of the broader spectrum of constitutional disputes.²⁰

Most importantly, it is articles 62 and 83 of the Constitution that determine the substantive issue relating to the organ that has the power to interpret the Constitution. Article 84 is intended to outline the power relationships between the Council and the HoF and the procedure that should be followed to address constitutional disputes that arise in judicial proceedings. Hence, whenever there is a case that can only be resolved after determining a constitutional issue, courts have no choice but to refer the constitutional issue to the Council.²¹ Granting exclusive constitutional review power to the HoF was clearly the intention of the Constituent Assembly that adopted the Constitution.²² In an exhaustive and excellent article that analysed not only the intention of the drafters but also all the major publications on constitutional adjudication in Ethiopia, Assefa concludes that the ‘HoF commands all the powers to

¹⁹ Some authors have attempted to distinguish between ‘constitutional interpretation’ and ‘constitutional disputes’ to understand the exact role of courts, and the Council and the HoF. However, it is only when there is a constitutional dispute of some sort that constitutional interpretation becomes necessary. The two phrases should, therefore, be understood to refer to issues that require the determination of the meaning of a constitutional provision or provisions. Assefa espoused similar views after considering the minutes of the Constituent Assembly – G Assefa ‘All about words: Discovering the intention of the makers of the Ethiopian Constitution on the scope and meaning of constitutional interpretation’ (2010) 24 *Journal of Ethiopian Law* 139, 166. See also A Fiseha ‘Some reflections on the role of the judiciary in Ethiopia’ (2011) 14 *Recht in Afrika* 1, 5 observing that such a distinction is of no practical significance as both powers belong to the same entity, the HoF.

²⁰ Assefa similarly observes that ‘so long as there is a constitutional dispute or a question of constitutionality that needs resolution, it has to be submitted to the CCI\HoF whether the question is clear or simple or complicated’ – Assefa (n 19 above) 165.

²¹ See also M Haile ‘Comparing human rights in two Ethiopian constitutions: The Emperor’s and the “Republic’s” – *cucullus non facit monachum*’ (2005) 13 *Cardozo Journal of International and Comparative Law* 1, 55 concluding that ‘regular courts have no power to decide constitutional issues’. Courts do not have the discretion to refer a constitutional issue to the Council, as Bulto submitted (n 15 above) 101. If courts are convinced that resolving a constitutional issue is necessary to resolve a non-constitutional case before them, they have no choice but to refer the constitutional issue to the Council. Courts have discretion only in determining whether (1) there is a constitutional issue and (2) whether resolving such issue is necessary to resolve the dispute before them. Even in cases where a court decides that there is no constitutional issue, the parties are allowed to refer the case to the Council within 90 days after the court has rendered the decision. Bulto is right though in observing that ‘there must be a strong justification for direct invocation of constitutional provisions’ (112). Not every mundane and peripheral constitutional issue has to be resolved by the Council and the HoF. The power to decide whether or not there is a constitutional issue serves a filtering purpose to ensure that only unavoidable constitutional issues reach the Council. For a detailed discussion of the role of ordinary courts in constitutional interpretation, see Chapter 5.

²² For a thorough analysis of all the major publications relating to constitutional adjudication in Ethiopia and a discussion of the debates surrounding constitutional adjudication see Assefa (19 above) 157 – 162.

interpret the Constitution or decide on all constitutional disputes’ and that there was no desire to divide these powers between the courts and the HoF.²³

The argument that courts have a residual power to adjudicate constitutional issues not involving the constitutionality of legislative acts is an academic wishful-thinking based on a selective reading of the provisions of the Constitution. Even if one assumes that there is actually a residual power, Fessha convincingly argues that constitutional review may not be understood as an inherent judicial power at least in the Ethiopian context where historically ‘declaring a law void for its repugnancy to the Constitution has never been considered as the normal business of the courts’.²⁴ Haile similarly observes that the absence of a clear provision granting residual power to courts only creates a lacuna and does not necessarily imply that courts will arrogate that residual power, if any, to themselves.²⁵ In any case, the proclamations enacted to give effect to the constitutional provision on constitutional adjudication have dispelled any disillusionment by defining law broadly to include virtually any dispute that necessarily requires constitutional interpretation.

In sum, in Ethiopia, the power to adjudicate all constitutional disputes including, but not limited to, the constitutionality of primary statutes lies with the HoF and the Council. The HoF and the Council have exclusive jurisdiction in invalidating unconstitutional laws and executive decisions. The role of courts is limited to referring cases to the Council whenever a pending case cannot be resolved without first determining the constitutionality of the law based on which it is to be decided.²⁶ Hence, the HoF, not independent courts, is the guardian of the Ethiopian Constitution. This has created a judiciary with a

²³ Assefa (n 19 above) 169.

²⁴ Y Fessha ‘Who interprets the Constitution: A descriptive and normative discourse on the Ethiopian approach to constitutional review’, unpublished LL.M thesis, University of Pretoria, 2004 16. Fessha further indicated that constitutional review is not the role of courts in, for instance, France, England, New Zealand and several other countries. Note, however, that during the Emperor’s regime, the law that regulated the provisional federation of Eritrea with Ethiopia provided that ‘[a] final determination by a Federal Court that any legislation or administrative, executive, or judicial order ... is invalid in terms of conformity with Our [the Ethiopian] Constitution or the Federal Act [of Ethiopia and Eritrea], shall have as a consequence that such legislation, order, decree, judgment ... shall be held throughout Our Empire as null and void and unenforceable and inapplicable by any official or courts of Our Empire’ – see the 1953 Federation (between Ethiopia and Eritrea) Proclamation cited in Haile (n 21 above) 46. The relevance of this Proclamation, which at least theoretically introduced constitutional review procedures, was cut short after the unilateral decision of the Emperor to dissolve the Federation in 1962 and to incorporate Eritrea as part of His monarchical rule.

²⁵ Haile (n 21 above) 55.

²⁶ However, this does not mean that courts have absolutely no role in ensuring the realisation of constitutional rights. Indeed, there are several ways through which courts can discharge their constitutional duty to obey and ensure the observance of the Constitution. This section only argues that if and when a constitutional issue that is necessary to resolve a pending case arises in ordinary litigation, courts have to refer the constitutional issue to the Council. For a discussion on the role of courts in constitutional interpretation in individual cases, see Chapter 5.

trifling role in the interpretation and implementation of the Constitution and state policies.²⁷ Within the Ethiopian context, the judiciary is largely designed to serve the policy choices of the government of the day by unquestionably giving effect to the laws enacted by the political organs. There should not be any confusion between *what ought to be* – that the judiciary or another independent body should have the final say on constitutional issues – and *what is* – that the power of constitutional review lies with the HoF and the Council. This is true to legislative acts as well as administrative acts or omissions or custom so long as the issue is the alleged contradiction of law or other measures with the Constitution.²⁸

3. The process of constitutional review

The Ethiopian Constitution only explicitly addresses instances where constitutional issues arise in judicial proceedings.²⁹ The Proclamation enacted to constitute the Council in addition recognises constitutional complaint procedures where constitutional cases may be directly referred to the Council by individual victims of violations.³⁰

If a constitutional issue arises in judicial proceedings, and if the court is convinced that there is need for constitutional interpretation in deciding the case, it must refer the issue to the Council. The court may refer the case to the Council either on its own motion or at the behest of any party to the proceeding. It is only the constitutional issue that must be referred to the Council. Constitutional interpretation is, therefore, incidental to the determination of the case pending before the court.³¹ The constitutional review system in Ethiopia is centralised and largely abstract. Nevertheless, the requirement that a court may only refer a constitutional issue so long as it is necessary to resolve a pending dispute concretises the incidental and largely abstract nature of constitutional review. It is likely that any constitutional determination will particularly consider the facts in the case pending before the courts.³²

²⁷ Tadesse, former Vice President of the Federal Supreme Court, similarly observes that the role of Ethiopian courts in the constitutional adjudication procedure is peripheral and negligible –Tadesse (n 12 above) 162.

²⁸ This means that if the issue is the contravention of administrative acts or custom with general principles of administrative law or primary statutes, then it is for the courts to determine whether there is indeed any contradiction. This is administrative judicial review, which should be distinguished from constitutional review. The latter involves the determination of the constitutionality of any act or omission.

²⁹ FDRE Constitution, article 84(2) & (3).

³⁰ Proclamation no 250/2001, articles 21 – 23.

³¹ See A Mulatu ‘Who is ‘the interested party’ to initiate a challenge to the constitutionality of laws in Ethiopia (Under the 1994 FDRE Constitution) (1999) *The Law Student Bulletin* 2, 3 & 4.

³² Pasquino similarly observes in the Italian context that ‘it is evident, reading the sentences of the Italian Court, that the judgment about the constitutionality of the statute is made, very often, considering the problems that appear in the concrete application of the legislative norm, also considering the specific case the ordinary judge had in front of her when she sent the preliminary question’ – P Pasquino ‘The new constitutional adjudication in France: The reform of the referral to the French Constitutional Council in light of the Italian model’ 18 http://www.astrid-online.it/Dossier--R2/Studi--ric/Pasquino_New-Constitutional-adjudication-France.pdf (accessed 6 December 2011).

Constitutional cases arising outside courts may only be submitted by individuals to the Council if they relate to the fundamental rights and freedoms provisions of the Constitution.³³ In such cases, any person aggrieved by any law or a final decision of any government institution or official may approach the Council for the interpretation of the fundamental rights provisions of the Constitution. Before submitting a case to the Council, the person must exhaust all the available remedies within the government institution that has the power with due hierarchy to consider it. It should also be emphasised that only issues relating to the Ethiopian Bill of Rights may be referred to the Council by individuals.

Once a constitutional issue has been presented to the Council, it considers whether there is a need for constitutional interpretation. If there is need to interpret the Constitution, it will provide recommendations to the HoF for final decision.³⁴ The HoF has to decide the case in 30 days from the date it received the recommendations of the Council.³⁵ The HoF is not bound by the recommendations of the Council. If, for various reasons, the Council is convinced that there is no need to interpret the Constitution, it rejects the case.³⁶ If the constitutional issue was referred to the Council by a court, the Council remands the case to the court that referred the constitutional issue. In cases where the Council rejects a constitutional complaint, the parties have the right to appeal to the HoF.³⁷ If the HoF accepts the appeal, it may refer the case back to the Council for recommendation or proceed with the case by itself – since there is no guideline as to whether the HoF may refer the case back to the Council or will proceed with it, the decision is open to the discretion of the HoF.

It should be noted that the Council does not have any duty to hold oral hearings. Oral hearings are purely discretionary. Moreover, even if the Council decides to hold oral proceedings, the hearings need not be public.³⁸ Whether or not proceedings will be transparent is determined by the Council. The Council may invite professionals or institutions to provide their views on constitutional issues. Government organs also have the duty to explain controversial constitutional issues, if called upon to do so by the Council or the HoF.

³³ Proclamation no 250/2001, article 23.

³⁴ FDRE Constitution, article 84(3)(a).

³⁵ Proclamation no 251/2001, article 13.

³⁶ FDRE Constitution, article 84(3)(b).

³⁷ Proclamation no 251/2001, article 5(2).

³⁸ Proclamation no 250/2001, article 29.

4. The jurisdiction of the HoF to provide advisory or ‘consultative’ opinions

The Ethiopian Constitution does not establish procedures for seeking advisory or consultative opinion on constitutional issues. However, the Proclamation for the Consolidation of the HoF provides that ‘the House shall not be obliged to render a consultancy service on constitutional interpretation’.³⁹ The *a contrario* reading of this provision implies that the HoF may, when it so wishes, provide advisory or consultative or guiding opinion on constitutional issues. The HoF may decide to give an opinion on a law before or after its enactment. The HoF delivered, upon the request of the Office of the Prime Minister, an advisory opinion on whether the federal government could enact a family code.⁴⁰ In another case, the HoF provided an interpretation of the Constitution upon the request of the *Silte* people to assist regional states in their effort to address demands for internal self-determination within the regional states – an issue which has not been expressly addressed by the Constitution.⁴¹

Rendering consultancy or advisory service is discretionary. As such, no one has the right to demand elaboration on any constitutional issue. The HoF has the right to choose in which cases it may give advisory or consultative opinion. The decision to provide consultancy service in the two cases discussed above was propelled by the importance of and urgency underlying the issues. Nevertheless, there is no clear standard based on which the HoF may decide to provide advisory opinion on constitutional matters. Moreover, there is nothing in the law that defines the status of consultancy opinions. It is, for instance, not clear whether a consultative opinion is binding on all parties that sought the opinion as well as on future cases. However, given the HoF follows similar procedures in relation to all cases involving constitutional interpretation, including advisory opinions, the opinions of the HoF should have a binding effect. Indeed, the Proclamation for the Consolidation of the HoF provides that the final decisions of the HoF on constitutional interpretation are binding on all future cases.⁴² This should include the effects of advisory opinions, as well.

The issue of standing to request consultative or advisory opinion is determined by the HoF itself on a case-by-case basis as part of the discretionary assessment. From the cases discussed above, it seems that the HoF will accept requests for advisory opinion from anyone so long as the issue raises serious

³⁹ Proclamation no 251/2001, article 4(2).

⁴⁰ Constitutional issue regarding the promulgation of family code, House of Federation (April 2000) (on file with author). According to the Constitution, the power to enact family laws falls within the jurisdiction of regional states. The Federal Government was allowed to enact a family code for residents of the autonomous cities of Addis Ababa and Dire Dawa.

⁴¹ Constitutional issue regarding resolution of claims of identity, House of Federation (April 2001) (on file with author).

⁴² Proclamation no 251/2001, article 11.

constitutional issues that need urgent determination. Due to the broad impact and politically intrusive nature of consultative or advisory opinions, the entities that may apply for review before the enactment of a law should be limited.⁴³

Furthermore, the Proclamation constituting the Council provides that cases that may not be handled by regular courts and which require constitutional interpretation may be submitted to the Council by at least one-third of the members of the federal parliament or state legislative councils, or the federal or regional executive bodies.⁴⁴ This provision, besides anticipating the existence of disputes which may not be handled by courts, opens up a vista of opportunities for the Council to engage in abstract or advisory review.⁴⁵ This is so because there is no clear requirement that the dispute be based on a law or regulation which is in force, or be a concrete dispute. Hence, the entities listed in this provision may even possibly take a bill to the Council for constitutional determination before the bill is enacted. This provision also allows the submission of cases on the constitutionality of measures, such as policies and practices, which have not been expressly catered for in other provisions.⁴⁶

5. Analysis of the suitability of the Ethiopian constitutional review system to the protection of human rights

The previous section outlined the institutional and procedural designs for constitutional review in Ethiopia. This section critically assesses the theoretical and practical implications of the constitutional review system through the prism of the effective protection of human rights. It concludes that the constitutional review system cannot ensure the independent and effective protection of individual rights. The system is designed to serve as a justificatory and apologist institution for the exercise of political power.

5.1. Implications for independence and impartiality

One of the main features of modern constitutional democratic states is the recognition of human rights and the establishment of an independent constitutional adjudicator empowered to resolve

⁴³ In the case of South Africa, for instance, only the President of the Republic (against federal bills) and the Premiers of the Provinces (against provincial bills) have the standing in prior control to challenge a bill for constitutionality – Constitution of the Republic of South Africa Act no 108 of 1996, sections 79 and 21.

⁴⁴ Proclamation no 250/2001, article 23(4).

⁴⁵ However, there is no indication as to what kind of cases may not be handled by courts. This provision might as well be creating its own version of the political question doctrine. Cases concerning, for instance, policies or foreign relations may fall in this category.

⁴⁶ The HoF has, for instance, developed guidelines on who may raise a claim regarding identity and who may decide on questions related to the right to self-determination based upon recommendations from the Council – Constitutional issue regarding claims of identity (n 41 above).

constitutional disputes. It was argued in Chapter 2 that any organ in charge of constitutional interpretation must be structurally independent and safeguarded particularly against any form of political influence or manipulation. The effectiveness of constitutional review depends on whether it is the work of an independent body. The HoF is composed of representatives of ethnic groups, at least one for every group and one more for every one million members of each group. The members of the HoF are appointed by the regional legislative councils. The fact that members of the HoF are representatives of ethnic groups makes it a purely political entity. Because political entities are dominated by and sympathetic towards the winning political group, their independence is questionable at best. Fiss observes that political organs are inherently inclined to registering the preferences of the people and 'are not ideologically committed or institutionally suited to search for the meaning of constitutional values'.⁴⁷

Since the HoF is a political body, there is absolutely no requirement, in the Constitution or any other law, that the members be independent from political influence in determining the constitutionality of any legislative or executive measures. Even if there was such a requirement, given that the members represent certain ethnic groups and are members of political parties, it will be a paradox to require them to be independent enough to ignore the interest of the ethnic group they represent or the political party they belong to while deciding constitutional issues. There are conceptual and practical contradictions in requiring the independence of the members of the HoF in determining constitutional issues. Therefore, as a political organ under the influence of the legislature and executive, the HoF cannot be expected to decide politically sensitive issues independently.⁴⁸ In fact, the possibility that the HoF might almost exclusively be composed of members of a single political group is very real. The members of the HoF are nominated by the party controlling the majority in the regional legislative councils. It is almost inevitable that the winning party will not appoint members of other parties to the HoF. Hence, the HoF is more likely to be an extension of the winning political party than either the HPR or the regional legislative councils. That is why since the adoption of the Constitution, the HoF has been composed only of members of the EPRDF or its affiliates, even when the opposition had won some seats in the HPR.

⁴⁷ M Fiss 'The forms of justice' (1980) 93 *Harvard Law Review* 1, 9 – 10.

⁴⁸ Fiseha notes that the basic question is '[h]ow could the HoF, a political body, adjudicate constitutional issues in an impartial manner?' – Fiseha (n 19 above) 5. See also T Twibell 'Ethiopian constitutional law: The structure of the Ethiopian government and the new Constitution's ability to overcome Ethiopia's problems' (1999) 21 *Loyola of Los Angeles International and Comparative Law Review* 399, 447; and Haile (n 21 above) 59.

Unfortunately, there is not even a constitutional or legal requirement that the members of the Council, the advisory organ to the HoF largely consisting of legal experts, be independent and impartial while adjudicating constitutional issues.⁴⁹ Nor is there a requirement that members of the Council should act in their private capacities. The Federal Judicial Administration Council, which plays a major role in the nomination process of federal judges, does not have any role in the appointment process of the members of the Council. This is true even in relation to the President and Vice President of the Federal Supreme Court as the Constitution makes a clear exception concerning the appointment of judges to these two positions. Unlike all other federal judges, the President and Vice President are exclusively nominated by the Prime Minister and appointed by the HPR without any official role for the Federal Judicial Administration Council.⁵⁰ The appointment process of all the members of the Council is,

⁴⁹ The Council is composed of 11 members: the President and Vice President of the Federal Supreme Court, six legal experts 'with proven competence and high moral standing' appointed by the President of the Republic upon recommendation of the HPR, and three others nominated by the HoF from among its members. See FDRE Constitution, articles 82 – 84. The constitutional review system in Ethiopia is similar with the French system in the sense that they are both non-judicial. In both countries, the power of constitutional review does not belong to ordinary courts or a full-fledged constitutional court. The Constitutional Council of Inquiry (and not the HoF, which is a political organ) may also be compared with the Constitutional Council of France. However, there are fundamental differences between the two Councils. First, there is no requirement that members of the Council of Constitutional Inquiry should be independent and non-partisan. Although there are no requirements of age or professional legal training, membership in the French Constitutional Council is incompatible with elected or other government positions – article 57 of the 1958 French Constitution, and the Institutional Act of the Constitutional Council, Ordinance 58-1067 of 7 November 1958 (as amended), section 4. In contrast, even members of the elected bodies and advisors of the Prime Minister have been and continue to be members of the Council of Constitutional Inquiry. There is no limitation on who can become a member of the Council of Constitutional Inquiry. Secondly, even if the members of the Council of Constitutional Inquiry were independent, it merely has advisory/recommendatory responsibilities. In contrast, the French Constitutional Council has the final say on constitutional issues. Unlike the House of Federation, which has the final say on constitutional issues in Ethiopia, the French Constitutional Council is more like a constitutional court than a political organ, especially after the 2008 constitutional reforms – the Constitutional Law on the Modernisation of the Institutions of the Fifth Republic (July 2008). The reform has addressed one of the most glaring limitations in the French constitutional review system, the limited access to the Constitutional Council, and introduced *a posteriori* constitutional review. Now the *Conseil d'Etat* or the *Cour de Cassation* can refer constitutional issues that arise in judicial proceedings to the Constitutional Council – see article 61(1) of the French Constitution (added after the 2008 reform). For a discussion of the reforms relevant to constitutional adjudication, see Pasquino (n 32 above) and D Lewin 'Continental European legislative and judicial trends: Developments in France: Old news and recent news' (29 September 2010) <http://www.gccapitalideas.com/2010/09/29/continental-european-legislative-and-judicial-trends-developments-in-france-old-news-and-recent-news/> (accessed 9 October 2012). Dyevre concludes that the 2008 reforms have 'brought the French model closer to the institutional configuration of other European constitutional courts' – see A Dyevre 'France: Patterns of argumentation in Constitutional Council Opinions' (2012) Max Planck Institute for Comparative Public Law and International Law http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2026396 (accessed 9 October 2012). For a discussion of the French Constitutional review system prior to the 2008 reforms, see J Beardsley 'Constitutional review in France' (1975) 1975 *The Supreme Court Review* 189; and L Aucoin 'Judicial review in France: Access of the individual under French and European Community Law in the aftermath of France's rejection of bicentennial reform' (1992) 15 *Boston College International and Comparative Law Review* 443. In sum, while both the Ethiopian and the French constitutional review systems may be characterised as non-judicial, the differences between the two are more fundamental than their similarities.

⁵⁰ FDRE Constitution, articles 80(1&2). All other federal judges are selected by the Federal Judicial Administration Council, nominated by the Prime Minister and appointed by the HPR.

therefore, purely political and does not provide procedural safeguards against partisan judicial appointments.⁵¹ There is no limit on who can become a member of the Council of Constitutional Inquiry.

The purely political process of appointment breeds, especially in the absence of any legal duty to be independent, dependency and partiality among the members of the Council. As a result of the absence of a requirement to be independent, in 2012, the special advisor to the Prime Minister, a former Minister, the General Prosecutor of the Customs and Revenue Authority, two members of the HPR, and one member of the EPRDF are among the 11 members of the Council; three other members of the Council are from among the members of the HoF. Besides the President and Vice President of the Supreme Court, therefore, the nine other members of the Council are active politicians and members of the ruling party. How can anyone expect these members to decide cases against the position of their superiors in the party or state apparatus?

Moreover, there are no rules governing security of tenure and possible reappointment of the members of the Council.⁵² Nor are there term limits. Members may be reappointed without limit. This can create a situation where the ruling party can influence decisions by, for instance, promising reappointment. It can also create a prospect of reappointment for those who flank with the position of the ruling party. The special advisor of the Prime Minister, for instance, has been a member of the Council since its establishment. The requirement of independence is compromised where there is reasonable belief that another activity might interfere with the independence or impartiality of the individual. Furthermore, the members of the Council, except the President and Vice President, stay in office only as long as the office of the nominators last. Hence, the three members of the Council, who are nominated by the HoF, last only as long as the HoF which nominated them lasts (for five years), and the six members nominated

⁵¹ Principle 10 of the Basic Principles on the Independence of the Judiciary (1985) requires that '[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives'. See also the African Commission on Human and Peoples' Rights 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (2001), Principle A (4) (h). The Special Rapporteur on the Independence of Judges and Lawyers expressed concern that 'the involvement of the legislature in judicial appointments risks their politicization' – A/HRC/11/41 (2009) para 2. The Special Rapporteur also expressed concern over instances where the executive branch has a decisive say in the selection and appointment of judges – para 26. Drawing from the jurisprudence of the UN Human Rights Committee, the Special Rapporteur recommended the establishment of an independent authority in charge of the selection of judges – para 27.

⁵² C Epp *The rights revolution: Lawyers, activists, and supreme courts in comparative perspective* (1998) 11 observing that 'courts are structurally independent to the extent that the job security and salaries of their judges, and the decision-making process, are insulated from political manipulation'. The lack of security does not apply to the President and Vice president of the Federal Supreme Court as they are protected by the Constitution as members of the judiciary.

by the President of the Republic, last six years just as the President can.⁵³ This means that the winners of each election actually constitute their own constitutional adjudicators. Quite simply, constitutional adjudication in Ethiopia cannot survive the organ, let alone the government or ruling political party, which appointed the members.

The members of the Council, except the President and Vice President, may also be removed by the body that nominated them 'subject to good causes'.⁵⁴ In the absence of any procedural safeguards, this can obviously force the members of the Council to succumb to the nominating bodies. As such, if the Council rules that a law enacted by the HPR is unconstitutional, there is little that stands in the way of the HPR from removing the members it nominated. The 'good cause' standard is far below the standard established for the removal of ordinary judges.⁵⁵ So far no law or executive action has been invalidated by the Council. Hence, problems related to dismissal have not arisen. In fact, most of the members of the Council have been members for at least two terms. Had the members of the Council disappointed the political organs by deciding against their wishes in sensitive issues, there would have been a good chance of them not serving for more than one term.

The members of the HoF are not precluded from holding positions in the legislative or executive organs at the regional or federal level thereby creating an inherent danger of conflicts of interest. More generally, 'there is nothing in the Constitution or in the subsequent laws that prohibits a member of the HoF from engaging in any activity that might interfere with the independence or impartiality of a member or the HoF generally'.⁵⁶ The only exception is that a member of the HoF cannot simultaneously hold a seat in the HPR.⁵⁷ In fact, although the Constitution and the subordinate laws do not explicitly sanction it, the President and Vice President of each regional state are by default members of the HoF. Members of the HoF can and have also been members of regional legislative councils, regional

⁵³ The term of the HoF is five years; and the term of the President of the Republic is six years and a person may not serve more than two terms as President – articles 67(2) & 70(4) respectively of the FDRE Constitution.

⁵⁴ Proclamation no 250/2001, article 8(1). The decision to remove a member should be supported by the HoF – article 8(2).

⁵⁵ See FDRE Constitution, article 79(4): No judge shall be removed from his duties before he reaches the retirement age determined by law except under the following conditions:

- (a) When the Judicial Administration Council decides to remove him for violation of disciplinary rules or on grounds of gross incompetence or inefficiency; or
- (b) When the Judicial Administration Council decides that a judge can no longer carry out his responsibilities on account of illness; and
- (c) When the House of Peoples' Representatives or the concerned State Council approves by a majority vote the decisions of the Judicial Administration Council.

⁵⁶ Y Fessha 'Judicial review and democracy: A normative discourse on the (novel) Ethiopian approach to constitutional review' (2006) 14 *African Journal of International and Comparative Law* 53, 78.

⁵⁷ FDRE Constitution, article 68.

executives and even federal executive organs.⁵⁸ This creates problems of credibility as the HoF is required to look into the constitutionality of the legislative and executive acts not only of federal but also regional governments.

There is also no requirement that members of a particular region or ethnic group should recuse themselves in relation to constitutional decisions in which their region or ethnic group has stake, or in which a member had a role or has previously participated in discussions concerning the impugned law or action. This obviously compromises the impartiality of the members of the HoF in deciding issues against government offices in which one or more members have direct membership interest.⁵⁹ The same problem haunts the Council. Members of the HPR, cabinet ministers, and active members of the ruling party have been and are still members of the Council.

In sum, the HoF completely lacks independence from the ruling party and the executive branch of government.⁶⁰ Bulto notes that the HoF does not 'depict a semblance of the impartiality that is the defining characteristic of the regular courts'.⁶¹ The HoF and the Council, as political organs, cannot feel comfortable and are reluctant to rule against another organ of government.⁶² The fact that members of the HoF also retain positions within the executive makes it incapable of effectively controlling the executive. In short, the HoF and the Council, under their current form and organisation, cannot serve as independent and impartial forums for constitutional adjudication. Under the current institutional arrangement, '[f]undamental rights and freedoms may lose out to political considerations favoring the ruling party and the executive'.⁶³

There is also empirical proof of the lack of independence of the Council and the HoF. Despite the adoption of some of the most restrictive laws since the Constitution entered into force, no law has so far been invalidated by the Council or HoF. Only in two instances did the Council find a need for

⁵⁸ See, for instance, Bulto (n 15 above) 122. See also Fessha (n 56 above) 77 – 78 indicating that a Federal Minister was at the same time serving as Deputy Speaker of the House.

⁵⁹ In fact, this apparent lack of impartiality and independence has created a situation whereby parties to disputes avoid invoking constitutional issues for fear of referral to the Council – see Fessha (n 56 above); S Yeshanew 'The justiciability of human rights in the Federal Democratic Republic of Ethiopia', (2008) 8 *African Human Rights Law Journal* 273, 282.

⁶⁰ Haile (n 21 above) 52 – 53; K Wigger 'Ethiopia: A dichotomy of despair and hope' (1998) 5 *Tulsa Journal of Comparative and International Law* 389, 401.

⁶¹ Bulto (n 15 above) 122.

⁶² C Mgbako *et al* 'Silencing the Ethiopian courts: Non-judicial constitutional review and its impact on human rights protection' (2008) 32 *Fordham International Law Journal* 259, 288 noting that a political organ is not the best entity to resolve sensitive political issues that raise constitutional questions.

⁶³ Mgbako (n 62 above) 285.

constitutional interpretation. In the first case,⁶⁴ a woman was subjected to the jurisdiction of Shari'a Courts despite her refusal to consent to it. The Council, later confirmed by the HoF, ruled that the compulsory subjection of the woman to the jurisdiction of Shari'a Courts against her consent violated article 34(5) of the Constitution, which subjects the jurisdiction of religious and customary courts to the consent of all parties to the case. In the second case,⁶⁵ the Electoral Board refused to accept applications for candidacy from individuals, most of whom were members of the biggest ethnic groups, who did not speak the local vernacular of the electoral districts habituated by smaller ethnic groups in which they were to stand for election. The Council held that the decision of the Board constituted discrimination on the basis of language in violation of article 38 of the Constitution. Other than these two cases, some of the most controversial, and in my view clearly unconstitutional, cases submitted to the Council have been rejected. Although one expects the Council, which is composed primarily of lawyers, to be more welcoming and sympathetic toward human rights issues, the decisions in politically sensitive cases reveal an apologist and justificatory pattern in its reasoning.

In one case,⁶⁶ the Council ruled that a law that completely excluded the right to bail in corruption cases did not violate the right to bail. Following a split within the Central Committee of the ruling EPRDF party over the handling of the 1998-2000 Ethio-Eritrean War, the winning faction, which included the Prime Minister, enacted anti-corruption laws.⁶⁷ The laws provided the basis for the arrest and prosecution of most of the opposing faction, which included the former Defence Minister, Seeye Abraha. This was, however, not the end. When the First Instance Court, later confirmed by the High Court, ruled that the accused should be released on bail, security forces prevented the release of Seeye Abraha. In less than two working days after the order of the Court to release the accused on bail, the Parliament rushed to enact a law that deprived bail to all persons accused of corruption offences.⁶⁸ A subsequent

⁶⁴ *Kedija Beshir case*, House of Federation (May 2004) – the House of Federation of the Federal Democratic Republic of Ethiopia (July 2008) 1 *Journal of Constitutional Decisions* 35 – 41.

⁶⁵ *Benishangul Gumuz case*, House of Federation (12 March 2003) House of Federation (2008) 1 *Journal of Constitutional Decisions* 14 – 34 (*Benishangul Gumuz Case*).

⁶⁶ The case concerning the constitutionality of the law that excluded bail in corruption offences, Council of Constitutional Inquiry (2004) (on file with author). The case was submitted directly to the Council by the victim.

⁶⁷ Federal Ethics and Anti-Corruption Commission Establishment Proclamation no 235/2001, and Anti-Corruption Special Procedure and Rules of Evidence Proclamation no 236/2001.

⁶⁸ Many refer to the law which denied the right to bail to persons accused of corruption offences as 'Seeye's Law'. The provision which denied bail to persons accused of corruption was enacted by an amendment to a law adopted two weeks earlier. The amendment was clearly intended to reverse the court decision freeing Seeye Abraha. For a detailed discussion of the drama that unfolded following the end of the Ethio-Eritrean war, including the dubious process of law-making, see E Belai 'Disabling a political rival in the name of fighting corruption in Ethiopia: The case of Prime Minister vs Ex-Defense Minister Seeye Abraha' (August 2004) http://www.fettan.com/Documents/case_against_siye_abreha.pdf (accessed 27 November 2011). After serving its purpose, the law was subsequently revised. Under the current law, persons accused of corruption offences punishable with

constitutional challenge against the law was rejected by the Council, which ruled that Parliament has the power to determine not only the conditions under which bail may be refused but also to completely preclude bail in relation to certain offences. Quite surprisingly, the Council did not consider whether the application of the law on the accused persons violated the constitutional prohibition of the retroactive application of criminal law.

In another case,⁶⁹ the Coalition for Unity and Democracy (CUD) challenged in a federal court the decision of the Prime Minister to suspend the right to assembly and demonstration in and around Addis Ababa for one month following the 2005 elections. CUD argued that the suspension was contrary to a proclamation governing peaceful demonstrations (and not the Constitution). The applicants did not rely on the Constitution because they did not want the case to be referred to the Council. However, despite the objection of the CUD, the Court ruled that there was a constitutional issue involved and referred the matter to the Council to determine whether the declaration of emergency by the Prime Minister to suspend the right to assembly and demonstration was in line with the Constitution. The Constitution clearly authorises only the Cabinet of Ministers, not the Prime Minister, to declare a state of emergency, subject to subsequent approval by the HPR.⁷⁰ Rather than merely applying the procedure that governs the declaration of emergencies provided in the Constitution, the Council was searching for other provisions from which it could imply the 'power' of the Prime Minister to actually surpass the explicit constitutional provision.⁷¹ The Council should have simply declared that the Council of Ministers, not the Prime Minister alone, can declare a state of emergency and declare the declaration of emergency unconstitutional.⁷²

In a case concerning the constitutionality of a Cabinet Regulation allowing the dismissal of employees at the absolute discretion of the Director of the Customs and Revenue Authority without judicial review,⁷³ the Council was again visibly searching for justification. The petition challenged the judicial ouster clause

not more than 10 years have the right to be released on bail, except when the person is likely to abscond or tamper with evidence.

⁶⁹ Emergency declaration case, Council of Constitutional Inquiry (14 June 2005) (on file with author).

⁷⁰ FDRE Constitution, article 93.

⁷¹ It should also be noted that despite the fact that the case was a clear instance of derogation from rights, the Council was discussing the requirements applicable to limitation of rights.

⁷² Referring to the failure of the Council to enforce the constitutional procedure of declaring a state of emergency, Legesse notes that the Council has failed to tackle even 'the most flagrant constitutional violations' – Interview with Dr Yared Legesse, Legal Practitioner and Lecturer at the Addis Ababa University, on 23 September 2011, Addis Ababa, Ethiopia.

⁷³ Constitutional case on the validity of ouster clauses, Council of Constitutional Inquiry (10 February 2009) (on file with author). The constitutional issue was referred to the Council by the Civil Service Administrative Tribunal.

in the Regulation which prevented the employees of the Authority from applying for judicial review in cases of dismissal without justification or explanation. Article 37 of the Constitution guarantees the right of everyone to bring justiciable matters to a court or another tribunal exercising judicial power. The Council ruled that in a parliamentary form of government, the legislature has the discretion to limit the jurisdiction of courts, and, hence, jurisdictional ouster clauses do not violate the constitutional right of access to justice. According to the Council, whether or not a matter is justiciable is determined by laws enacted by Parliament. The inclusion of ouster clauses makes an issue non-justiciable. Despite its constitutional status, according to the ruling in this case, the right to access to courts can be abridged at a stroke of legislation.⁷⁴

These cases are perhaps the most significant constitutional rights cases the Council has had to decide so far. Unfortunately, the decisions of the Council merely endeavour to justify or explain the discretionary behaviour of the political actors. Given the cases set binding precedents, any future challenge against ouster clauses or parliamentary discretion will likely fail. Although the reasoning and approach of the Council in constitutional interpretation has been shallow, simplistic and unsystematic, one can clearly see that the Council engages in justifying government action rather than reviewing it critically. As an organ under the control of the political organs, the priority of the Council, it appears, has been to arrive at politically correct interpretations of the Constitution.⁷⁵ The fact that the members of the Council other than the President and Vice President are appointed by each electoral winner partly explains the justificatory approach. Although outcomes may not provide conclusive or sufficient evidence of dependence, the outcomes in all the controversial cases reflect, especially when seen in the context of the institutional dependence of the Council and the sensitivity of the facts of the cases, the lack of independence. If one cannot be confident in the potential of the Council, which is at least formally composed of legal experts, to rule against the political organs, it is naive to expect the HoF, a purely political organ, to constrain government power.

⁷⁴ Interestingly, the Director of the Customs and Revenue Authority, whose powers the petition challenged, was one of the members of the Council who decided the case.

⁷⁵ The justificatory approach of the Council can be compared to the 'executive-mindedness' particularly of the highest court during apartheid South Africa. Several authors criticised courts during apartheid for being timid and for being executive-minded in their judgments by endorsing broad executive discretion, ignoring human rights, and narrowly understating basic principles of administrative justice – see for instance H Corder 'From despair to deference: Same difference?' in G Huscroft and M Taggart (eds) *Inside and outside Canadian administrative law: Essays in honour of David Mullan* (2006) 330.

5.2. Competence and composition of the HoF and the Council

Another major problem with the constitutional review system in Ethiopia is the fact that the HoF is unsuited to follow a principled, coherent, reasoned and detailed approach to constitutional interpretation primarily due to its size and regular change of membership. Currently, the HoF has 135 members.⁷⁶ The large size of the HoF precludes any possibility of engaging in complex arguments that constitutional interpretation inherently requires.⁷⁷ One possible way to circumvent the problem of the size of the HoF is by establishing smaller committees, as the HoF does in relation to other issues, that do the initial constitutional analysis to enable a small group of experts to deliberate on technical and complex constitutional issues.⁷⁸ However, as Fessha observes, such a smaller committee will be superfluous in the presence of the Council, which does the preliminary constitutional analysis, and given that the HoF appoints three members of the Council from among its own members.⁷⁹ Most importantly, the final decision can only be taken by the HoF as a whole and not by any committee. As a large political organ, the HoF is likely to decide from the perspective of what is practical in the short term, which often coincides with what the government wants, rather than in a principled way in accordance with constitutional parameters of government action or inaction.

The competence of members of majoritarian political institutions to engage in complex constitutional issues is questionable.⁸⁰ Bickel observes that ‘courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess’.⁸¹ In the Ethiopian context, Bulto questioned the ability of the members of the HoF to engage in complex constitutional adjudication.⁸² Gudina similarly pointed out that the power of constitutional adjudication should be granted to competent

⁷⁶ There are currently 76 ethnic groups each of which has at least one seat in the HoF.

⁷⁷ See generally A Mikva ‘How well does Congress support and defend the Constitution?’ (1983) 61 *North Carolina Law Review* 587 concluding that majoritarian organs tend to fill the perceived needs of the moment and that the large size of the US Senate makes the process of effectively engaging in complex arguments difficult; in large institutional arrangements, 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.

⁷⁸ This idea of a smaller committee has been given legal expression under article 18(1) of Proclamation 251/2001 which authorises the HoF to establish a committee drawn from its members to consider recommendations from and appeal against the decisions of the Council.

⁷⁹ Fessha (n 56 above) 75.

⁸⁰ K Whittington ‘Legislative sanctions and the strategic environment of judicial review’ (2003) 3 *International Journal of Constitutional Law* 446, 452 observing that legislators lack the expertise necessary to deconstruct the content and implications of complex constitutional rules. Perry similarly observes that in politically heterogeneous societies ‘a [legislative] regime in which incumbency is (inevitably?) a fundamental value seems often ill suited ... to a truly deliberative, dialogic specification of the indeterminate constitutional norms’ – M Perry *The Constitution in the courts: Law or politics?* (1994) 107.

⁸¹ A Bickel *The least dangerous branch: The Supreme Court at the bar of politics* (1986) 25.

⁸² Bulto observes that ‘the competence of the individual HoF members to understand and interpret the Constitution in a manner sensitive to due process guarantees and substantive human rights is ... suspect’ – Bulto (n 15 above) 122; Fessha (n 56 above) 73 *et seq.*

professionals, not politicians.⁸³ He indicated that the HoF does not have qualified lawyers who understand the intricacies in constitutional interpretation. Given that the members of the HoF are political office holders nominated not for their knowledge and experience in constitutional law but for their political affiliations, the lack of competence is unsurprising. The HoF is unsuited for the task of constitutional interpretation and constitutional review.⁸⁴ The Constitution establishes the Council in recognition of the fact that the members of the HoF are not constitutional law experts. The Council is designed to fill the gap in legal competence of the members of the HoF. However, the Council only has recommendatory powers; as such, it can only assist and not take over the role of the HoF. The Council is more of an administrative filter than a true competence-check on the power of the HoF.⁸⁵ In fact, in the *Election Rights* case, one of the only two cases that the Council has referred to the HoF, the HoF did not accept the recommendations of the Council.

The composition of the HoF is another problem. Unlike second legislative chambers in other states, the composition of the HoF does not ensure the equal representation of all ethnic groups, small and large.⁸⁶ Quite to the contrary, the composition of the HoF largely mimics the composition of the HPR. The biggest states have proportionally larger representation both in the HoF and HPR. As such, the HoF cannot effectively control the HPR as they are likely to have similar views, at least on issues that matter to the government. Moreover, the HoF consists of representatives nominated by regional councils. The HoF is practically incapable of controlling both the regional and federal legislative organs. Even the Council has been dominated by individuals who are members of or associated with the ruling party. It was indicated above that nine out of 11 members of the Council hold crucial legislative or executive offices, or are members of or associated with the ruling party. Hence, neither the HoF nor the Council can provide an independent and neutral forum to adjudicate disputes concerning politically sensitive allegations of violation of rights.

Another potential problem is the fact that both the HoF and the Council are ad hoc bodies that meet a few times in a year.⁸⁷ The HoF holds two regular sessions a year.⁸⁸ The Council meets four times a year.⁸⁹

⁸³ Interview with Dr Merera Gudina, Chairperson of the Oromo Peoples' Congress, and Assistant Professor, Addis Ababa University, on 23 September 2011, Addis Ababa, Ethiopia.

⁸⁴ Fessha (n 56 above) 76.

⁸⁵ Twibell (n 48 above) 420.

⁸⁶ The US Senate, for instance, consists of two representatives for each state irrespective of the population size of the State concerned – US Constitution, article 1.

⁸⁷ Given that most international treaty bodies, such as the UN Human Rights Committee and the African Commission on Human and Peoples' Rights, are also ad hoc entities, one can argue that the ad hoc nature of the Council and the HoF is not a real

Both the HoF and the Council may hold extraordinary sessions. In addition to the fact that the HoF is an ad hoc organ, it is also tasked with several other time-consuming functions.⁹⁰ Constitutional adjudication is not a light task to be discharged by an ad hoc body. The absence of a permanent constitutional adjudication body can potentially undermine the value attached to constitutional rights and constitutional adjudicators. After considering the constitutional review system, Twibell observes that ‘one ponders whether the drafters of the [Ethiopian] Constitution anticipated major issues arising in constitutional interpretation’.⁹¹ However, it should be noted that given that the total number of constitutional complaints has been insignificant, so far the ad hoc nature of the Council and the HoF has not been a challenge in practice. As the number of constitutional complaints increases, however, the ad hoc nature of these two organs will prove to be a challenge.

5.3. Implications for the protection of the rights of ethnic groups

The Ethiopian federal structure is drawn along ethnic (referred to in the Constitution as ‘nations, nationalities and peoples’) lines. Undoubtedly, the Constitution underlines the emphasis on and priority to ethnic groups and their attendant rights. The Ethiopian Constitution is probably the only Constitution that starts with ‘We the nations, nationalities and peoples of Ethiopia’ – and not ‘We the people of Ethiopia’. The Constitution makes it clear from the outset that it is a social contract amongst the ethnic groups. Most importantly, the Constitution declares that it is an expression of the supremacy of ethnic groups. As a result, protection of the rights and interests of ethnic groups has permeated almost all the institutional architectures sketched by the Constitution.

One of the main policy justifications for granting the power of constitutional review to the HoF was to ensure that ethnic groups retain the final say on constitutional issues. Nahom notes that the Ethiopian

challenge. However, with increasing work load, the capacity of ad hoc bodies can be stretched. The ad hoc nature of the treaty bodies is one of the factors that contribute to delay in passing final decisions. It is, therefore, submitted that the power of constitutional adjudication should be granted to a permanent organ.

⁸⁸ FDRE Constitution, article 67. Fessha argues that the fact that the HoF can only hold very few sessions in a year ‘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. ... 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’ – Fessha (n 56 above) 76.

⁸⁹ Proclamation no 250/2001, article 13.

⁹⁰ See section 5.5. below.

⁹¹ Twibell (n 48 above) 449.

system of constitutional adjudication emanated from and is consistent with the ‘overriding supremacy’ of the ethnic groups.⁹² Fiseha also observes that

the Constitution is considered as the reflection of the ‘free will and consent’ of the nationalities. It is, in the words of the framers, ‘a political contract’ and, therefore, only the authors that are the nationalities should be the ones to be vested with the power of interpreting the Constitution.⁹³

Idris similarly remarks that constitutional interpretation was considered ‘so essential to the basic interests of the nations, nationalities and peoples of Ethiopia that it could not be entrusted to an organ other than the House of the Federation’.⁹⁴ The Constitution was drafted by representatives of the liberation groups which were fighting for the rights of different ethnic groups. As a result, the drafters primarily attempted to establish institutions and procedures to resolve disputes between and amongst the ethnic groups and their rights. It was agreed that the final say on the exact meaning of the Constitution should be vested in, not the courts but, a body that represents and safeguards the interest of ethnic groups, the HoF. Clearly, one of the main reasons for granting the power of constitutional review to the HoF was to give ethnic groups the final say on the exact meaning of their ‘political contract’, the Constitution.⁹⁵

Given the pluralistic nature of Ethiopian society, excessive reliance on pure majoritarian principles as the basis of political governance may result in the permanent subordination of numerically smaller minorities.⁹⁶ One of the main justifications for the institution of constitutional review is its potential in protecting the rights of minorities such as minority ethnic, religious, and political groups.⁹⁷ In a diverse country such as Ethiopia, there is need to guarantee to smaller minority groups that majoritarian politics

⁹² F Nahom *A constitution for a nation of nations* (1997) 59.

⁹³ Fiseha (2005) (n 8 above) 16.

⁹⁴ Idris (n 11 above) 68.

⁹⁵ A second justification was the counter-majoritarian dilemma, discussed in Chapter 4. A third reason that has been identified is the historical lack of trust in the Ethiopian judiciary. Fiseha observes that the ‘adjudication of cases was considered to be the principal function of the executive’ – A Fiseha (2001) (n 8 above) 17. As a result, the new regime did not trust the judiciary, and, therefore, decided to empower the HoF rather than the courts. This is in line with the observations of Ferejohn and Pasquino that judges in post-authoritarian systems are implicated to some extent in the practice of the previous regime and that political groups and the citizenry in such circumstances have every sociological reason to be suspicious of how those officials would go about their business leading to circumstances of distrust – J Ferejohn and P Pasquino ‘Constitutional adjudication: Lessons from Europe’ (2003-2004) 83 *Texas Law Review* 1671, 1675 – 1676. See also J Ferejohn ‘Constitutional review in the global context (2002-2003) 6 *New York University Journal of Legislation and Public Policy* 49, 51.

⁹⁶ A Lijphart *Democracy in plural societies: A comparative exploration* (1977) 28. Lijphart identifies majoritarianism as particularly dangerous in plural societies as it might entail the permanent exclusion or subordination of minority groups and their interests. Issachnaroff similarly identifies consociational democracy and constitutionalism with strong-form constitutional review as alternative forms of securing the legitimate exercise of political power in what he calls ‘fractured’ societies – S Issachnaroff ‘Constitutionalising democracy in fractured societies’ (2003/2004) 82 *Texas Law Review* 1861.

⁹⁷ R Cover ‘The origins of judicial activism in the protection of minorities’ (1981-1982) 91 *Yale Law Journal* 1287, 1294 *et seq* observing that “‘discrete and insular” minorities are not simply losers in the political arena, they are perpetual losers’.

will not be abused, and if and when abused, it can be reversed.⁹⁸ The Ethiopian Constitution unequivocally claims to have protected equally the rights of all ethnic groups, small and large, in whom sovereignty is vested. The constitutional review system was partly intended to reinforce the equality of ethnic groups. In reality, however, this claim is an empty promise for smaller ethnic groups. The fact that the HoF is a majoritarian entity means that, despite its constitutional right and duty to promote the equality of all ethnic groups, smaller ethnic groups are likely to lose out on areas of conflicting interest to all ethnic groups and particularly in cases of disputes amongst the ethnic groups.⁹⁹ Most importantly, it is only ethnic groups that are represented in the HoF. Religious, political and other minorities are not represented at all. The Ethiopian system of constitutional review, therefore, represents an institutional design deficit that cannot achieve one of the very purposes of establishing the institution of constitutional review – protecting minorities in the democratic process. Currently, the constitutional review system cannot offset the majoritarian composition of the HPR; the system rather reinforces majoritarianism.

However, it should be noted that the interests of ethnic minorities are represented better in the HoF than in the HPR. The two biggest ethnic groups, the Oromo and Amhara, together have a clear majority in the HPR. Because each ethnic group has at least one representative and because there are currently 76 ethnic groups that are represented, the two major groups do not have a clear majority in the HoF. Theoretically, to the extent the smaller ethnic groups act together, the HoF can become a better guardian of the rights and interests of minority groups compared to the HPR. Two examples, however, belie this potential. First, one observes a growing relevance of population size in the governing formula developed by the HoF to determine federal subsidies to regional states which are established on ethnic

⁹⁸ Issachnaroff (n 96 above) 1865 arguing that constitutionalism enforced through judicial review has emerged ‘as a central defining power in [fractured or divided] societies precisely because of the limitations it imposes on democratic choice’ to ensure that the victors or the majority do not ‘devour the [democratic] process’.

⁹⁹ Mgbako (n 62 above) 292 concluding that ‘the majoritarian composition of the HoF could lead to the tyranny of the majority in sensitive constitutional disputes between ethnic groups’. Regassa similarly concludes that although the HoF was ‘meant to be a counter-majoritarian institution to balance against the majoritarianism in the HPR and to protect minorities that could be left defenseless in the face of “blunt” democracy, it hardly could serve that role, primarily because it hardly involves in law-making and secondarily because, in its composition, it replicates the situation in the HPR’ – see T Regassa ‘State constitutions in federal Ethiopia: A preliminary observation’ (2004) 2 – 3 <http://camlaw.rutgers.edu/statecon/subpapers/regassa.pdf> (accessed 28 March 2012). More generally, Lijphart observes that ‘in a political system with clearly separate and potentially hostile population segments [such as ethnically plural societies], virtually all decisions are perceived as entailing high stakes, and strict majority rule places a strain on the unity and peace of the system’ – Lijphart (n 96 above) 28.

One can argue that the recognition of the right to secession in article 39 of the Ethiopian Constitution can provide the necessary safeguard against the abuse of population size in the HoF. However, the difficulty in reality of exercising the right to secession coupled with the undesirability of secession militates against using the possibility of secession as the bulwark against majority tyranny. As such, ensuring the protection of minority groups through effective constitutional review arrangements further complements and largely substitutes threats of secession to safeguard the interest of minority ethnic groups.

lines.¹⁰⁰ Moreover, in one of the only two successful constitutional cases, the HoF decided that members of majority groups have the right to stand for elections in areas dominated by the minority groups, even if the candidates did not speak the local vernacular.¹⁰¹

5.4. Implications for the protection of individual rights

The Ethiopian Constitution recognises both individual and group rights. Given the expansive recognition of individual rights, one would expect the drafters to have established a strong and independent constitutional adjudication system to see that the political majorities do not abridge these rights at will. However, the constitutional emphasis is on the rights of ethnic groups, as is manifested in the conferring of supremacy to the ethnic groups. The Constitution serves as an expression of the supremacy of ethnic groups. Although the power of interpretation of the HoF may be justified because it represents ethnic groups and, hence, their group rights, it cannot sufficiently protect individual rights, such as freedom of movement, expression, association, and assembly, that actually constitute a major chunk of the fundamental rights Chapter of the Constitution.¹⁰² There is in fact only one provision, article 39, in the Ethiopian Bill of Rights that provides for the rights of ethnic groups.

The constitutional emphasis on ethnic groups and their rights does not justify the granting of the power of interpreting the fundamental rights Chapter of the Constitution to the HoF. The HoF cannot, as part of the government, be expected to ensure the effective and independent protection of constitutional rights. The main constitutional human rights disputes occur between those in government and those outside government. Indeed, the major human rights abuses that occur in Ethiopia relate to the rights that are central to a free and fair democratic system such as freedom of expression, association and

¹⁰⁰ FDRE Constitution, article 62(7) empowers the HoF to determine the subsidies the federal government may provide to the regional states. The formula approved by the HoF in 2009 adopted population size as a major determinant enabling the 3 largest regions to receive significantly higher amount of the subsidy from the federal government. In 1995, 30% of the federal subsidy depended on population size. From 2004 – 2007, 65% of the federal subsidy depended on population size – see FDRE House of Federation ‘The new federal budget grant distribution formula’ (May 2007) 6 (on file with author); see also M Tesfaye ‘House of Federation approves new budget subsidy formula’ *Ethiopian Review* (19 May 2009) <http://www.ethiopianreview.com/articles/5946> (accessed 16 May 2011).

¹⁰¹ *Benishangule Gumuz* case (n 65 above).

¹⁰² In practice, as well, the rights that are most often violated are individual rights. The current regime does not pose any real danger to the rights and interests of ethnic minorities. Given the clear agenda of the ruling party to advance ethnic based self-determination, and given that the ruling party is dominated by the Tigrayan Peoples’ Liberation Front (TPLF), which represents the minority Tigrayan population, it is unlikely that the ruling party will decide to victimise smaller ethnic groups. Minority groups are overwhelmingly represented within the ruling party structure. In fact, previous Ethiopian head of government, ex-Prime Minister Meles Zenawi, was from a minority ethnic group. The new Prime Minister of Ethiopia, Hailemariam Desalegn, is also from a small minority group, the Welayta. Nevertheless, even the rights of minorities can be in danger of violation. In fact, the construction of large hydro-electric dams (such as Gibe III) and the ‘land grab’ saga have particularly affected the smallest minority ethnic groups.

assembly – rights directly affected by the flurry of recent laws targeting the media, opposition groups, CSOs and human rights advocates. The three most controversial constitutional cases that were discussed above all relate to the individual rights provisions of the Constitution. The drafters of the Ethiopian Constitution should at least have reserved the power of constitutional interpretation of individual rights to an independent constitutional adjudicator, while leaving the right to self-determination and other issues relating to ethnic groups to the determination of the HoF. They could have divided the power of constitutional interpretation between the HoF and the courts. Given that individual rights are primarily designed to protect individuals against political power-holders, retaining the power of constitutional review within the political organs undermines the very purpose of guaranteeing the rights.

5.5. Implications for the constitutionality of measures the HoF takes

Constitutional interpretation is but one of the functions of the HoF. The HoF wields several other decisive functions including:¹⁰³ promoting equality between ethnic groups and consolidating their unity based on mutual consent; deciding issues relating to the right to self-determination of ethnic groups including secession; finding resolutions to disputes or misunderstandings that may arise between the regional states; outlining the division of revenue between the federal and regional government; determining the subsidies by the federal government to regional states; and authorising federal intervention if any regional state, in violation of the Constitution, endangers the constitutional order. The HoF is also involved in constitutional amendment procedures. These are major functions the exercise of which can potentially trigger fierce constitutional battles.

Despite these potentially controversial powers, the current constitutional adjudication system does not establish procedures through which aggrieved parties, which can be individuals, ethnic groups, regional states, and even the federal government, can challenge the decisions of the HoF. Since the HoF is the final arbiter of constitutional issues, there is no way it can neutrally and effectively review its own decisions. In one case, for instance, the ex-President of Ethiopia challenged the joint decision of the Speakers of the HPR and HoF to terminate his benefits as an Ex-President after he decided to run for parliament as an independent candidate.¹⁰⁴ According to article 7 of the Proclamation governing the Administration of the Office of the President, an Ex-President is required to, among others, ‘keep

¹⁰³ FDRE Constitution, article 62.

¹⁰⁴ *Dr Negasso Gidada v Speaker of the House of Federation and Speaker of House of Peoples’ Representatives of Federal Democratic Republic of Ethiopia*, Council of Constitutional Inquiry (December 2004) (on file with author).

himself aloof from any partisan political movement during or after his presidency'.¹⁰⁵ Article 14(b) of the Proclamation authorises the Speakers of the HPR and HoF to terminate the benefits of an Ex-President 'if he fails to discharge his obligations' under the Proclamation. The Speakers may terminate the benefits by themselves or after convening an extraordinary joint session of the two houses. In this particular case, the Speakers terminated the benefits of the Ex-President without convening the joint session.

The Ex-President argued that the termination of benefits violated his freedom of expression and political participation. He named the Speakers of the HPR and HoF as respondents in his complaint to the Council. The Council ruled that the benefits are statutory and not constitutional. As such, the ex-President must fulfil the requirements in the statute if he wishes to continue to receive the benefits. Since, according to the Council, his decision to run in the elections constituted participation in 'partisan political movement', the termination of benefits was justified under the law. The Council did not, however, consider whether the requirements in the legislation violated any constitutional provision. This case clearly exemplifies a paradox whereby the HoF has to potentially determine the constitutionality of its own decisions. The current constitutional review system, therefore, leaves significant exercises of power beyond constitutional review.

6. Conclusion: Which institutional design for Ethiopia?

The drafters of the Ethiopian Constitution believed, it should be noted, in the merits of establishing a system of constitutional review to complement the supremacy of the Constitution. Unlike in most other countries, the overall prioritisation of the rights of ethnic groups and objections based on democratic theory (discussed in the next chapter) motivated the drafters to empower the HoF, a purely political organ, as the guardian of the Constitution. The HoF is designed to be part of the political structure that governs the country at any given time.

One of the main motivations behind establishing a system of constitutional review is the desire to ensure the independent and effective protection of human rights. Given the lack of an independent organ in charge of constitutional review, the Ethiopian system of constitutional review cannot properly restrain the government and protect fundamental rights.¹⁰⁶ The current constitutional review system

¹⁰⁵ Administration of the Federal Democratic Republic of Ethiopia Proclamation no 255/2001.

¹⁰⁶ M Haile 'The new Ethiopian Constitution: Its impact upon unity, human rights and development' (1996-1997) 20 *Suffolk Transnational Law Review* 1, 54 – 55 observing that, due to the absence of an independent system of judicial review, 'the constitution offers no means by which the legislatures and the executives of either the federal or the state governments can be restrained by an appropriate institution'.

represents an institutional and functional design deficit, at least regarding the protection of the human rights provisions of the Constitution. As novel as it might be, the constitutional review system in Ethiopia cannot ensure the effective and independent adjudication of constitutional disputes involving human rights. Because of the fact that the HoF lacks independence and competence, it suffers from a legitimacy deficit. Perceived and real bias on the part of the Council and the HoF undermines their legitimacy.

Given the parliamentary form of government the Ethiopian Constitution establishes, leading to the convergence of legislative and executive powers, the absence of an independent constitutional review system means that the Ethiopian Constitution does not incorporate any kind of institutional checks and balances on the legislature and the executive.¹⁰⁷ There are no multiple veto points to reinforce the supremacy of the Constitution in Ethiopia, as it exists in, for instance, the US where the Senate or the House of Representatives or the President can, in addition to the courts, veto laws that they consider are in violation of the Constitution.¹⁰⁸ Under the Ethiopian constitutional structure, there is no institutional safeguard to preclude the political organs from taking measures in contravention of the Constitution.

The effect of the lack of an independent constitutional adjudication system has been that Ethiopia is yet to develop any meaningful constitutional jurisprudence.¹⁰⁹ The constitutional history of Ethiopia since the adoption of the Constitution has been as if a system of constitutional review did not exist. The constitutional provisions remain as crude today as they were when they were drafted. The peripheral role of the judiciary in the business of constitutional adjudication casts doubt on the existence of the institution of judicial review.¹¹⁰ Experience has shown that constitutional review by independent

¹⁰⁷ The Ethiopian Constitution empowers the legislative and executive organs of government to control the judicial branch in many respects such as through their involvement in the appointment and dismissal of judges and their control of the budget of the judiciary. However, the judiciary does not have any control over the legislative organ and can only serve to enforce the legislative constraints on the executive organ. Simply stated, the Ethiopian Constitution establishes a very powerful – almost limitless – legislative organ. In reality, however, due to the fact that the executive is constituted by and out of the party controlling the majority seats in parliament, the executive is controlled by the highest members of the political group that dominate the parliament and, therefore, exercises enormous control over the legislative organ.

¹⁰⁸ Fallon argues that judicial review should be supported because it provides an additional, and not an alternative, safeguard (veto point) against unconstitutional legislation – R Fallon ‘The core of an uneasy case for judicial review’ (2008) 121 *Harvard Law Review* 1693, 1706 observing that ‘a stronger case for judicial review in morally and politically nonpathological societies rests on the assumption that if either a court or the legislature believes that an action would infringe individual rights, the government should be barred from taking it’. Fallon’s argument for an additional veto point, made in the US context, strengthens the argument for a strong constitutional review system in the Ethiopian context due to the absence of multiple veto points that can expunge unconstitutional laws.

¹⁰⁹ Fessha (n 56 above) 80 – 81.

¹¹⁰ There is only some sort of constitutional review but it is definitely not judicial review as judicial review presupposes some active role of the judiciary or a judicial structure – see J Utter and D Lundsgaard ‘Judicial review in the new nations of Central and Eastern Europe: Some thoughts from a comparative perspective’ (1993) 54 *Ohio State Law Journal* 559, 562 observing that ‘[t]he chief distinguishing characteristic of judicial review is that it is a function performed only by judges’. Finck also observes

adjudicators is the ‘most effective and the most prevalent way to make reality of constitutional guarantees’.¹¹¹ In criticising propositions of ‘popular constitutionalism’, Chemerinsky observes that ‘when we wish to protect the rights of real people in real situations, judicial finality is essential to preserving the freedoms promised by the Constitution’.¹¹²

The emphasis on the rights of ethnic groups does not also justify the granting of the power of constitutional review to the HoF. The Constitution could have reserved only the power of interpreting article 39, which deals with the rights of ethnic groups, to the HoF and left the power of interpreting the other fundamental rights to ordinary courts or a constitutional court. The possibility of dividing the jurisdiction of the HoF and the courts between group and individual rights was not seriously considered during the drafting process.¹¹³

The historical distrust in the judiciary could have been soothed by establishing a separate entity that exists and functions independently and outside the structure of the regular judiciary in the form of a constitutional court. One of the main reasons for establishing new constitutional courts, rather than empowering ordinary courts, in post-authoritarian Europe was the distrust towards the ordinary judiciary and their lack of democratic pedigree.¹¹⁴ In any case, the highest members of the Ethiopian judiciary were appointed by the post-1991 government which adopted the current Constitution. The historical distrust towards the judiciary could, therefore, not have been the real reason for excluding the judiciary from constitutional adjudication.

that one of the preconditions for constitutionalism is the establishment of a judicial means to ensure the supremacy of the constitution – D Finck ‘Judicial review: The United States Supreme Court versus the German Constitutional Court’ (1997) 20 *Boston College International and Comparative Law Review* 123, 125.

¹¹¹ D Howard ‘A Traveller from an Antique Land: The modern renaissance of comparative constitutionalism’ (2009-2010) 50 *Virginia Journal of International Law* 1, 23. Howard observes that ‘the human rights discourse that flowered after World War II subtly but forcefully redefined notions of democracy to mean commitment to constitutional rather than legislative supremacy’.

¹¹² E Chemerinsky ‘In defense of judicial review: A reply to Professor Kramer’ (2004) 92 *California Law Review* 1013, 1018.

¹¹³ Assefa notes that the Constituent Assembly brushed aside the possibility of granting to the HoF the power to only adjudicate constitutional issues involving ethnic groups and leave the adjudication of individual rights to the ordinary courts. Such proposed division was easily rejected due to fears of judicial adventurism – Assefa (n 19 above) 161.

¹¹⁴ F de Andrade ‘Comparative constitutional law: Judicial review’ (2001) 3 *University of Pennsylvania Journal of Constitutional Law* 977, 988 observing that ‘in Europe, where for a long time courts were viewed with great suspicion, the creation of a separate court to review legislation was essential to counterbalance the problem of legitimacy of courts’; see also Ferejohn and Pasquino (n 95 above) 1676. Similarly, one of the reasons for establishing the South African Constitutional Court was the fear that the regular judiciary was infiltrated with individuals trained by, and possibly supporters of, the apartheid regime who might be tempted to filibuster the reforms that the new government might want to introduce. The African National Congress particularly wanted a new court untainted by the past to guard the new Constitution – M Burnham ‘Constitution-making in South Africa’ (1997/1998) *Boston Review* 19 <http://bostonreview.net/BR22.6/Burnham.html> (accessed 13 February 2011). Burnham observes that ‘the creation of a Constitutional Court vested with the power of judicial review represented a symbolic and pragmatic break with the past. The old South African judiciary – operating within a Westminster-style parliamentary system – was deeply committed to the status quo, and could not be trusted to give full meaning to the provisions of the new constitution’.

To ensure the meaningful realisation of constitutional rights, therefore, the Constitution should be amended to empower ordinary courts or to establish an independent constitutional court with the power of constitutional review. In a bid to address the problem of lack of an independent constitutional adjudicator in Ethiopia, Fessha suggests that the Council should be solely entrusted with the task of constitutional review as it represents a fair composition of lawyers and politicians.¹¹⁵

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.

He further recommends that ordinary courts should be granted the power to interpret the Constitution but not the power to review primary statutes for constitutionality. Although one can think of different institutional designs, Fessha's suggestion may be considered, but with the following minimum caveats.

The Council cannot continue to be an ad hoc institution. It should rather be established as a permanent constitutional adjudicator. The appointment procedure of the members of the Council should not be exclusively political. The appointment procedure should be transparent and the Federal Judicial Administration Council should be involved in the nomination of the members of the Council. Most importantly, individuals who are members of legislative or executive organs or political parties or who are otherwise politically active should not be allowed to be appointed to the Council. The three members of the Council that the HoF appoints should not be allowed to be members of the HoF as its members are appointed because of their political affiliation with the political group that wins the elections. Moreover, the Council should be required to publicise all its decisions. Currently, it is only the HoF that is legally required to actively publicise its decisions. In practice, as well, the Council does not publicise its rulings.¹¹⁶

Because the Council will consider the constitutionality of judicial decisions, the President and Vice President of the Federal Supreme Court should not simultaneously be members of the Council and the Supreme Court – otherwise, they will sit in judgment of the constitutionality of their own decisions. The security of tenure of the members of the Council should be legally sanctioned and their terms should

¹¹⁵ Fessha (n 56 above) 49.

¹¹⁶ In fact, my attempt to make copies of all the decisions of the Council during my research visit in Ethiopia in September 2011 ended in vain as the Registrar of the Council informed me that that was not possible.

not lapse with the lapse of the terms of the organ or person that appointed them. In short, all the privileges and benefits of the judicial branch should also be provided to the members of the Council. The Council should be completely overhauled to be constituted as a constitutional court. One possible challenge to empowering the Council as a permanent constitutional adjudicator could be cost implications. It is, therefore, possible to empower only the Federal Supreme Court, or its Cassation Division, which currently has the final say on legislative interpretation, to decide constitutional issues.¹¹⁷

Given the strong historical adherence to parliamentary supremacy, the inapplicability of the principle of *stare decisis* with the attendant risk of inconsistency and even contradiction, and the lack of competent and experienced judges capable of balancing individual and societal interests in the lower courts, the concentrated or centralised system of constitutional review, which incidentally is prevalent in civil law systems,¹¹⁸ provides the best alternative to Ethiopia.¹¹⁹ Establishing a new constitutional court whose members are appointed through a transparent and participatory process is preferable considering the low level of trust the current judiciary enjoys amongst opposition political parties, CSOs, the media and the population at large.¹²⁰ Moreover, given the extremely legalistic approach of the judiciary and judicial training, establishing a new constitutional court manned with personalities capable of engaging in the value determinations that constitutional interpretation often demands will be more appropriate. A transparent process inclusive of all stakeholders including civil society and legal professional associations can contribute to identifying independent, principled and competent judges. As argued in Chapter 4, the counter-majoritarian difficulty can also be mitigated partly through establishing a centralised constitutional court separate from and outside the ordinary judicial structure.

Given the civil law background of the Ethiopian legal and judicial system and the difficulty in applying the principle of judicial precedence, the diffused system of judicial review might not be a perfect match

¹¹⁷ The power of constitutional adjudication in, for instance, many Latin American countries is entrusted only to the supreme courts of the respective countries – P Navia and J Ríos-Figueroa ‘The constitutional adjudication mosaic of Latin America’ (2005) 38 *Comparative Political Studies* 189, 197.

¹¹⁸ In Sub-Saharan Africa, for instance, most, if not all, the civil law countries have established centralised systems of constitutional review – A Mavcic ‘Tabular presentation of constitutional/judicial review around the world’ <http://www.concourts.net/tab/tab1.php?lng=en&stat=1&prt=0&srt=0> (accessed 9 February 2011).

¹¹⁹ In concentrated judicial review systems, the power to review laws and other state measures for constitutionality may only be conducted by a single court, either a constitutional court/council, or the highest court of the state. The concentrated system is common in civil law countries in Europe – V Comella ‘The consequences of centralising constitutional review in a special court: Some thoughts on judicial activism’ (2003-2004) 82 *Texas Law Review* 1705.

¹²⁰ A recent survey showed that the Ethiopian judiciary enjoys very low (25%) level of trust among the population – Gallup Poll ‘Few Ethiopians confident in their institutions’ (January 2008) <http://www.gallup.com/poll/104029/Few-Ethiopians-Confident-Their-Institutions.aspx> (accessed 29 August 2011).

for Ethiopia.¹²¹ Ethiopia can establish either a new constitutional court with members who do not necessarily have to all be lawyers, or empower the Federal Supreme Court as the only and final constitutional arbiter.¹²² Fessha's concern regarding diversification of membership to mitigate the counter-majoritarian implications of judicial review can be addressed through providing that a certain number of members need not be lawyers. In any case, even if Ethiopia were to empower the Federal Supreme Court or establish a new constitutional court with the final say on constitutional issues, the constitutional amendment procedure ensures that democratic representatives, although through procedures which should obviously be stricter than the ordinary legislative procedure, still retain the ultimate say on constitutional issues.

In sum, the Ethiopian institutional design of constitutional review is defective when considered through the prism of the effective and independent protection of human rights. This thesis, therefore, recommends that the constitutional review system should be overhauled to empower either the ordinary courts or a newly established constitutional court. However, it does not argue that good institutional designs are a panacea. Law and institutions alone cannot lead to the realisation of human rights. They obviously need the support of politics. A constitutional review system 'might not become a positive component, regardless of how well it is designed, if other conditions for democratic consolidation are not met'.¹²³ Kleinfeld observes that 'power plays a far greater role than mere court organisation in limiting the government, although well-organised courts with self-confidence can play a strong role in curtailing government power'.¹²⁴ Evolution towards a political and popular culture of constitutionalism and human rights is, therefore, of critical importance.

¹²¹ In diffused judicial review systems, the power of constitutional review belongs to the ordinary judiciary and there is no entity which can claim the sole authority to interpret and enforce the Constitution. In such systems, 'any judge of any court, in any case, at any time, at the behest of any litigating party, has the power to declare a law unconstitutional' – A Stone and M Shapiro 'The new constitutional politics in Europe' (1994) 26 *Comparative Political Studies* 397, 400.

¹²² As indicated, a completely reconstructed Council can serve the role of a constitutional court. A constitutional court is preferable as it can be provided that not all the members need to be lawyers. It can also have a symbolic significance. A modest combination of the diffused and centralised systems of judicial review, similar to the one that exists in South Africa, can be ensured by empowering the Federal Supreme Court with the final say; the Regional Supreme Courts and Federal High Courts can be allowed to inquire into the constitutionality of legislative and executive action subject to appeal to or confirmation by the Federal Supreme Court. Given the low competence level of the lowest courts, I do not believe that they should have the gargantuan task of interpreting the Constitution. Giving the regional supreme courts and federal regional courts the first say can help ease out the possible arguments and other relevant issues that will help the final arbiter.

¹²³ Navia and Ríos-Figueroa (n 117 above) 194. Cappelletti similarly observes that granting the power of judicial review to courts 'is not "bad" or "good" per se' – M Cappelletti 'The "mighty problem" of judicial review and the contribution of comparative analysis' (1980) 53 *Southern California Law Review* 409, 410.

¹²⁴ R Kleinfeld 'Competing definitions of the rule of law: Implications for practitioners' (2005) 9 (Carnegie Papers, Rule of Law Series No 55)

Nevertheless, an independent constitutional review system can contribute to complement and accelerate the evolution in political and popular culture: ‘well-planned institutional reforms can certainly affect political culture and change societal expectations’.¹²⁵ A well-designed constitutional review system has a desirable added value in itself. Constitutions and institutions can help to shape society in a desired way. Designing appropriate institutions for constitutional review is an essential precondition for the long-term success of the constitutional democracy the Ethiopian Constitution aspires to erect. The establishment of an independent constitutional adjudicator raises the likelihood of winning a constitutional case. An independent constitutional adjudicator will find it more difficult, say, than a political organ, to simply and uncritically endorse government decisions. Because of the prospect of success, litigants, too, will be encouraged to relentlessly challenge government decisions. This action and reaction can ultimately contribute to building a political and popular culture of respect for rights.

¹²⁵ Kleinfeld (n 124 above) Kleinfeld calls, in addition to institutional reform, for emphasis on reforming social and political culture to achieve substantive rule of law.