

Chapter 5: The judiciary and its role in the realisation of constitutional rights

1. Introduction

The Ethiopian Constitution establishes an independent judiciary and exclusively vests judicial powers in the courts.¹ However, as was indicated in Chapter 3, the Constitution has taken away from the judiciary one of its essential functions, constitutional adjudication. Although, as a result, courts and lawyers rarely mention let alone rely on constitutional provisions in adjudicating disputes, the Ethiopian judiciary still has some entry points to engage in constitutional interpretation and, therefore, to influence the understanding of the Constitution in general and the human rights provisions in particular. This Chapter discusses the structure and independence of the Ethiopian judiciary and explores the opportunities and avenues for courts to engage in constitutional interpretation particularly of the human rights provisions. It also investigates the practical problems that hinder the potential role of the Ethiopian judiciary in the realisation of constitutional rights. Furthermore, given the relevance of the Ethiopian Human Rights Commission and the Institution of the Ombudsman in the protection and promotion of constitutional rights, this Chapter briefly looks at their potential role in complementing constitutional review. The Commission and the Ombudsman complement the protective functions of the judiciary and also promote human rights.

1.1. Structure of the judiciary

Following the federal structure of the Ethiopian state, the Constitution establishes independent judiciaries both at the federal and state levels. The Constitution establishes the Federal Supreme Court (FSC) and authorises the House of Peoples' Rights (HPR) to establish Federal High Courts (FHC) and First Instance Courts (FFIC) nationwide or in some parts of the country, as deemed necessary, by a two-third majority vote.² It requires the establishment of State Supreme Courts (SSCs), State High Courts (SHC) and State First Instance Courts (SFIC) at the regional level.³ Until such time as the HPR establishes federal high courts and federal first instance courts in the regions, the Constitution delegates the exercise of the powers of entrusted to federal high courts and federal first instance courts to the state

¹ FDRE Constitution, article 79(1).

² FDRE Constitution, article 78(2). Originally, the HPR only established FHC and FFIC in Addis Ababa and Dire Dawa – the two autonomous cities under federal administration. The HPR has so far established FHC in the following regional states due to the critical incapacity of the judicial systems in these regional states: Afar, Benshngul/Gumuz, Gambela, Somali, and Southern Nations, Nationalities and Peoples' Region (SNNPR) – Federal High Court Establishment Proclamation no 322/2003.

³ FDRE Constitution, article (3).

supreme courts and state high courts, respectively.⁴ The Constitution also allows the establishment of customary and religious courts to adjudicate disputes relating to personal and family laws in accordance with customary or religious laws upon the consent of all parties to the dispute.⁵ Social courts designed to deal with petty offences and claims involving small amounts of money have also been established throughout Ethiopia.

The FSC is the highest federal judicial organ and exercises final judicial power concerning federal matters. SSCs have the highest and final judicial power over state matters. The FSC exercises power of cassation over any final court decision containing basic errors of law. The SSCs similarly exercise power of cassation over any final decision of a state court on state matters which contains basic errors of law. Decisions of the cassation divisions of SSCs are subject to appeal to the Cassation Division of the FSC.⁶ It should be noted that the cassation divisions do not have the power to quash unconstitutional laws. They only have the power to provide a final and binding interpretation of ordinary laws.

1.2. Independence of the judiciary

The Constitution enshrines provisions designed to guarantee the personal independence of judges as well as the institutional independence of the judiciary. Courts of any level must be free from any interference or influence of any governmental body, government official or any other source.⁷ To ensure the financial independence of the judiciary, the Constitution authorises the FSC to draw up the budget for federal courts and submit it directly to the HPR for approval.⁸ The executive does not have any substantive role in the drawing up and approval of the budget of the judiciary. Upon approval, the FSC administers the budget. In practice, the FSC follows the prescribed process. According to a recent report on judicial independence and accountability in Ethiopia (the Report), the FSC has been ‘fairly successful’ in obtaining from the legislature the resources it asked for, ‘except for major capital funding’.⁹

Article 37 of the Constitution prohibits the establishment of special or ad hoc tribunals which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial

⁴ FDRE Constitution, article 79(2).

⁵ FDRE Constitution, articles 34(5) & 78(5). In accordance with this, shari’a courts have been established all over the country.

⁶ The judicial sequence on federal matters: FFIC – FHC – FSC – Cassation Division of FSC (regarding basic errors of law); the judicial sequence on state matters: SFIC – SHC – SSCs – Cassation Division of SSCs – Cassation Division of FSC (regarding basic errors of law).

⁷ FDRE Constitution, article 79(2).

⁸ FDRE Constitution, article 79(6).

⁹ National Judicial Institute for the Canadian International Development Agency *Independence, transparency and accountability in the judiciary of Ethiopia* (October 2008) 128.

functions and which do not follow legally prescribed procedures. The Proclamation establishing the Federal Judicial Administration Council (FJAC) prohibits judges from simultaneously serving in the legislative or executive branches of government or becoming a member of any political organisation.¹⁰ The power to determine salary, allowance, promotion, and medical benefits of federal judges is granted to the FJAC, which can ensure the financial security of judges.

Regarding personal independence, the Constitution requires judges to exercise their functions solely directed by law.¹¹ To this end, it prescribes judicial appointment procedures. The President and Vice President of the FSC are appointed by the HPR upon the recommendation of the Prime Minister.¹² Regarding other judges, the Prime Minister submits candidates selected by the FJAC to the HPR for appointment.¹³ The Prime Minister has the exclusive power to nominate candidates for the Presidency and Vice Presidency of the FSC – the FJAC does not have any official involvement. However, in relation to the appointment of other judges the Prime Minister does not have any power as he or she must submit to the HPR the candidates selected by the FJAC.¹⁴

The Constitution most importantly establishes rigorous procedures that must be followed before any judge may be removed from his or her office before attaining retirement age. Accordingly, a judge may be dismissed before his or her retirement age only if:¹⁵

- a. the FJAC decides to remove the judge for violation of disciplinary rules or on grounds of gross incompetence or inefficiency; or
- b. when the FJAC decides that the judge can no longer carry out his responsibilities on account of illness; and
- c. when the HPR approves by a majority vote the decision of the FJAC.

The Constitution absolutely prohibits the extension of the retirement age of judges – currently the compulsory retirement age is 60.¹⁶ It should be noted that the Constitution only deals explicitly with

¹⁰ Amended Federal Judicial Administration Council Establishment Proclamation no 684/2010, article 11(2). The FJAC is established to realise the constitutionally guaranteed independence of the judiciary – preamble, para 2. It is composed of the President, who serves as Chair, and Vice President of the Federal Supreme Court; three members of the HPR; the Minister of the Federal Ministry of Justice; President of the Federal High Court; the President of the Federal First Instance Court; a judge selected by all the federal judges; a lawyer appointed by the FJAC from those practicing in the federal courts; legal academic appointed by the FJAC from a recognised higher educational institution; and a distinguished citizen appointed by the FJAC – article 4. The Proclamation requires efforts to be made to ensure representations of women in the FJAC.

¹¹ FDRE Constitution, article 79(3).

¹² FDRE Constitution, article 81(1).

¹³ FDRE Constitution, article 81(2).

¹⁴ The Proclamation does not determine the process of selection of judges. However, it authorises the FJAC to adopt regulations to govern issues including the process. In practice, the FJAC interviews applicants to make the appointments.

¹⁵ FDRE Constitution, article 79(4).

instances of removal of judges. There is no constitutional procedure on the possible placement, transfer or suspension of judges. The power to decide on the transfer and placement of federal judges is granted by subordinate legislation to the FJAC.¹⁷ The constitutional lacuna may provide opportunities for abuse and exertion of undue pressure on the judiciary, thereby threatening its independence.

Nevertheless, mere constitutional guarantees of judicial independence 'do not by themselves produce an independent judiciary'.¹⁸ In practice, although the fact that the judiciary is deprived of the power of constitutional adjudication has diminished instances of face-off between the judiciary and other branches of government,¹⁹ there have been incidents that have tainted the independence of the judiciary. The constitutional provisions on appointment and removal are frequently disregarded, especially by regional legislative councils. There have been 'cases where judges had allegedly been transferred, taken off active judicial duty or had their salary discontinued in order to pressure them into resignation'.²⁰ Fiseha has recorded a long list of instances of disregard of the constitutional provisions whereby the executive and legislative organs exercised immense control over the appointment, dismissal and transfer of judges.²¹ The Economic Commission for Africa indicated that the judiciary is at least to some degree dependent on the other branches and is also significantly corrupt.²² According to Freedom House, although the judiciary is 'officially independent', there have been 'few significant examples of decisions at variance with government policy'.²³

In practice, the political organs have expanded their control of the judiciary especially after the 2005 elections as part of a larger drive to absolutely dominate all spheres of life. Since 2005, 'judges have fled the country, alleging government interference. ... Judges were reportedly arrested, threatened, intimidated, pressured to resign, transferred to remote locations or somehow removed from active

¹⁶ Proclamation no 684/2010, article 12(1)(b).

¹⁷ Proclamation no 684/2010, article 6(1)(g).

¹⁸ K Rosenn 'The protection of judicial independence in Latin America' (1987) 19 *University of Miami Inter-American Law Review* 1, 34.

¹⁹ K Whittington 'Legislative sanctions and the strategic environment of judicial review' (2003) 3 *International Journal of Constitutional Law* 446, 465 observing that the exclusion of politically sensitive cases from judicial jurisdiction may help to preserve the independence of the judiciary.

²⁰ National Judicial Institute for the Canadian International Development Agency (n 9 above) 130.

²¹ A Fiseha 'Some reflections on the role of the judiciary in Ethiopia' (2011) 14 *Recht in Afrika* 1, 22 – 24 concluding that 'the process of appointment, removal and tenure of judges has been violated'.

²² Economic Commission for Africa 'Governance profile of Ethiopia: Measuring and monitoring progress towards good governance in Africa: East Africa' ECA/DPMD/TP/04/03 (2004) 15.

²³ Freedom House 'Freedom in the World: Country Reports: Ethiopia (2010)' <http://www.freedomhouse.org/template.cfm?page=22&year=2010&country=7821> (accessed 09 January 2011). It should be noted that judicial outcomes do not necessarily reflect independence or the lack thereof. Nevertheless, the importance of the complete lack of decisions against government cannot be overlooked.

judicial duties'.²⁴ Moreover, there were instances where 'members of the government are reported to have made damaging public comments on the impartiality and integrity of the judiciary'.²⁵ In one instance, the Minister of Justice admonished judges 'for assuming jurisdiction over cases that, in his view, fell outside their mandate'.²⁶ The Minister reportedly also 'filed complaints [to the FJAC] against those who had rendered decisions that did not agree with his interpretation of the law'.²⁷

Also there are reports that the legal system, including courts, is being used to muzzle criticism and marginalise dissent, particularly in the form of prosecuting members of opposition political parties, the media and CSOs on unsubstantiated charges. For instance, during the aftermath of the 2005 elections, almost all senior opposition political party leaders and several critical voices from the private media and CSOs were successfully prosecuted. Defamation laws are also frequently used to silence criticism of public officials.²⁸ The Anti-Terrorism Law has been used mainly to jail critical journalists and members of opposition groups.²⁹ The Committee against Torture expressed concern at the 'frequent interference by the executive branch with the judicial process, in particular in criminal proceedings, as well as about reported cases of harassment, threats, intimidation and dismissal of judges resisting political pressure, refusing to admit confessions extracted by torture or ill-treatment in court proceedings, and acquitting or ordering the release of defendants charged with terrorist or State crimes'.³⁰

2. The Ethiopian judiciary and the realisation of constitutional rights: Circumventing the exclusion of the judiciary from constitutional review

It was argued in Chapter 3 that the Ethiopian judiciary does not have the power of constitutional adjudication. As a result, courts have a very limited role in challenging the constitutionality of laws and

²⁴ National Judicial Institute for the Canadian International Development Agency (n 9 above) 117.

²⁵ National Judicial Institute for the Canadian International Development Agency (n 9 above) 117.

²⁶ National Judicial Institute for the Canadian International Development Agency (n 9 above) 117. The Report does not identify the nature of the cases in which the Minister intervened. The FJAC establishment proclamation (article 13) allows anyone to lodge complaints against any federal judge who is said to have violated the rules in the Federal Court Judges Code of Conduct. The FJAC may conduct investigations for purposes of addressing complaints.

²⁷ National Judicial Institute for the Canadian International Development Agency (n 9 above) 117. The Report, however, applauds the 'assertive manner' with which the FJAC dealt with the complaints of the Minister.

²⁸ Contrary to international trends, under Ethiopian law, defamation of public officials is considered as an aggravated crime of defamation – Criminal Code of Ethiopia (2004), article 618.

²⁹ Only between June and November 2011, more than 30 journalists and members of opposition parties were charged with terrorism. Two Swedish and three Ethiopian journalists have already been convicted of supporting terrorist organisations. For a detailed discussion of the use of the Anti-Terrorism Law to suppress dissent, see Amnesty International 'Dismantling dissent: Intensified crackdown on free speech in Ethiopia' (2011) http://www.ethiomeia.com/broad/dismantling_dissent_in_ethiopia.pdf (accessed on 10 January 2012). Also visit the Committee to Protect Journalists website <http://www.cpj.org/africa/ethiopia/> (accessed 19 December 2011).

³⁰ Committee against Torture 'Concluding Observations: Ethiopia' CAT/C/ETH/CO/1 (November 2010) para 22.

other government decisions. The principal role of courts in the constitutional adjudication process relates to their referral power. Fessha has criticised Ethiopian courts for failing to readily exercise their power to refer cases to the Council.³¹ However, the fact that courts do not have the power of constitutional adjudication does not mean that Ethiopian courts do not have any potential role in constitutional interpretation and generally in the realisation of human rights.³² Indeed, such a blanket exclusion of courts from constitutional interpretation flies in the face of their constitutional duty to obey and ensure observance of the Constitution. This section identifies the mechanisms through which courts can engage in constitutional interpretation. It is argued that judicial power extends from adjudicating rights incorporated in domestic laws to possibly invalidating laws in certain circumstances. It should be stressed that the presence of some entry points for the judicial interpretation of the Constitution does not detract from the recommendation in Chapter 3 that the Constitution should be overhauled to establish a politically independent constitutional adjudicator.

2.1. Adjudicating rights recognised in domestic legislation

One of the major sources of human rights in Ethiopia is domestic legislation. There are laws giving effect to several constitutional rights such as the right to *habeas corpus*, to vote and stand for election, association, assembly, access to information, bail, equality between men and women, the best interest of the child, a clean and healthy environment as well as laws against arbitrary government interference in the enjoyment of the right to housing.³³

³¹ 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, 80.

³² See F Nahom *A Constitution for a nation of nations* (1997) 73 noting that the granting of the power of constitutional interpretation to the HoF does not mean that no one else can interpret the Constitution. Such interpretation will be a daily occurrence throughout the legal system including by the judiciary.

³³ Examples include the 1960 Civil Code which guarantees freedom of thought, religion, choice of residence, the right to liberty, and the inviolability of correspondence and prohibits search of the person and one's domicile – Chapter one, Section two: rights of personality; the 1965 Civil Procedure Code which outlines the procedure to seek *habeas corpus* – Civil Procedure Code Decree no 52/1965, articles 177 – 179; the 1961 Criminal Procedure Code which guarantees the right to bail in certain circumstances, and the right not to in principle be arrested or searched without a court warrant, prohibits any inducement or offer to induce arrested persons by the police and outlines other rights of accused or detained persons – Criminal Procedure Code of Ethiopia 1961, articles 31, 32, 49, 63; the Revised Family Code of 2000 which guarantees the right to equality of men and women prior to, during and after the dissolution of marriage, and also outlines the best interest of the child as a guiding principle – FDRE Revised Family Code Proclamation 213/2000, article 218; the right to demonstration and political meeting – Proclamation to Establish the Procedure for Peaceful Demonstration and Public Political Meeting 3/1991; freedom of expression, access to information, and the media – Mass Media and Freedom of Information Proclamation 590/2008 (amending the Press Law Proclamation 34/92), and the Broadcasting Service Proclamation 533/2007; the right to vote, stand for elections and general regulation of elections – Electoral Law of Ethiopia Amendment Proclamation no 32/2007; the right to a clean and healthy environment – Environmental Pollution Control Proclamation no 300/2002. The Environmental Pollution Control Proclamation imposes positive obligations on state agencies to achieve its objects. It also prohibits everyone, including the government, from engaging in activities that might cause serious environmental damage.

Ethiopian courts have the right and duty to take judicial notice of these laws and the rights recognised therein to ensure government compliance. For instance, a person suspected of committing a crime may not be detained for more than 48 hours unless remanded by a court of law and only when it is necessary for effective investigation purposes.³⁴ Although many detainees still suffer due to long pre-trial detention, mainly due to chronic judicial incapacity rather than unwillingness, courts can and have played a significant role in the enforcement of, for instance, *habeas corpus* provisions. Courts routinely order the release of individuals on bail, at times even in politically sensitive cases. In 1992, just one year after the overthrow of the previous government, courts ordered the release of more than 1,300 detained officials of the previous regime on conditional bail.³⁵ In one of the most politically sensitive cases, the Federal First Instance Court, then presided by Birtukan Mideksa, currently the most influential female politician in Ethiopia, ordered the release of Seeye Abraha, the former Minister of Defence who was arrested on suspicion of corruption, on bail.³⁶ In 2006, as well, the Federal Supreme Court ordered the release of the chairman of the previous Ethiopian Teachers Association (ETA) who was arrested on charges of participating in the Ethiopian Patriotic Front (EPF), an outlawed armed group allegedly operating in the Amhara Region.³⁷

Courts can clearly play a significant role in the realisation of the rights that have been guaranteed in domestic laws. CSOs and other interested individuals and groups should, therefore, rely on courts to enforce the rights and other entitlements that have been recognised in domestic legislation. They should also lobby for the adoption of new laws to give effect to the rights recognised in the Constitution to provide a wider basis for judicial enforcement of human rights.

One of the major problems associated with domestic laws that reiterate constitutional rights is the fact that domestic laws may provide for protection inferior to that provided by the Constitution. In such cases, enforcing the legislation constitutes enforcing an unconstitutional law. This fear is particularly acute in relation to rights guaranteed in laws that were enacted prior to the coming into force of the current Constitution, considering the fact that these laws were adopted by regimes which did not even have the semblance of a constitutional democratic system – one was a no-party absolute monarchy and

³⁴ FDRE Constitution, article 19(3), & Criminal Procedure Code, articles 29 & 59.

³⁵ US Department of State '1993 Human Rights Practice: Ethiopia' http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_africa/Ethiopia.html (accessed 14 April 2011).

³⁶ The Government, however, re-arrested Seeye Abraha before he left the court building.

³⁷ Anteneh Getnet, the then Chairman of ETA, disappeared shortly after his release – see US Department of State '2008 Human Rights Report: Ethiopia' <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119001.htm> (accessed 14 April 2011).

the other was a brutal one-party communist regime. For instance, strictly applying the bail rights provisions of the Criminal Procedure Code may at times violate the constitutional right to bail which does not authorise the legislature to provide a list of crimes in relation to which bail cannot be granted at all.³⁸

Moreover, domestic laws can be repealed easily by any subsequent legislation enacted through ordinary legislative procedures. Hence, decisions of courts based on ordinary laws can be reversed by simply repealing the law that provided the basis for the decision. For instance, the decisions of the Federal High Court and the Federal Supreme Court invalidating the decisions of the National Electoral Board of Ethiopia precluding CSOs from observing the 2005 elections as a violation of the relevant laws was reversed by the 2007 Election Law.³⁹ Similarly, the decision of the courts to release Seeye Abraha based on the Criminal Procedure Code was reversed two days later by a law which precluded bail to persons charged with corruption offences.⁴⁰ As such, rights in domestic laws exist at the mercy of parliament and may not be relied on to constrain the exercise, failures and manipulations of legislative discretion itself.

Nevertheless, domestic laws that guarantee human rights can provide the basis for court action. The existence of laws that guarantee human rights provides courts with the legislative standards against which to test executive measures. Interpreting statutes in line with the Constitution can also reduce the potential of enforcing laws that restrict constitutional guarantees.

³⁸ Note, however, that the Council has ruled that the legislature actually has the power to determine the crimes in relation to which bail cannot be granted – see the Constitutional case concerning the constitutionality of the law that excluded bail in relation to corruption offences, Council of Constitutional Inquiry (2004) (on file with author).

³⁹ See *Organization for Social Justice in Ethiopia et al v Ethiopian Election Board*, Federal High Court, case no 38472 (11 May 2005); and *Organization for Social Justice in Ethiopia et al v Ethiopian Election Board*, Federal Supreme Court, file no 19699 (May 2005) (on file with author). The decisions were reversed by the Electoral Law of Ethiopia Amendment Proclamation no 532/2007, article 79(1). This law requires CSOs to obtain license before observing elections. It also excludes judicial review of the decision of the Board to or not to grant the license.

⁴⁰ 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 all persons accused of corruption was enacted by an amendment to a law that was adopted two weeks earlier. The amendment was clearly intended to reverse the court decision freeing Seeye Abraha. The arrests and corruption charges were motivated by divisions within the Central Committee of the Ethiopian Peoples’ Revolutionary Democratic Front (EPRDF) headed by the Prime Minister in relation to the Ethio-Eritrean war of 1998-2000 and the way the border issue was handled. The Prime Minister expelled 13 of the 28 members of the Central Committee. Seeye Abraha was released in 2007 after the Federal Supreme Court dropped some of the charges and convicted him for others. He was released as the sentences had already been served. For a detailed discussion of the drama that unfolded following the end of the Ethio-Eritrean war, 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 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. However, if the charge contains a sentence of more than 10 years, the accused cannot be released on bail.

2.2. Interpreting domestic legislation in line with the Constitution

The Ethiopian Constitution requires courts to obey and ensure observance of the Constitution.⁴¹ One mechanism through which courts can discharge this constitutional obligation is by interpreting domestic legislation in line with the Constitution. This constitutes an indirect application of constitutional rights.⁴² In a case that set a binding precedent, the Cassation Division of the FSC interpreted a legal provision in line with the Constitution and the CRC to give effect to the best interest of the child in a clear deviation from the wordings of the Federal Family Code.⁴³ In this case, the Cassation Division relied on the constitutional provision and the CRC, which provide that the best interest of the child should be a primary consideration in legislative, administrative and judicial decision-making procedures, to deviate from a clear provision of the Family Code which gives a surviving parent the automatic right to be a guardian of his or her children. The aunt who raised the child for more than 12 years since the child's mother died challenged the decision of a SSC to grant guardianship rights to the surviving father who never looked after, took care of or paid the child a proper visit for more than 10 years. The FSC criticised the decision of the lower courts for their reliance on the literal reading of the law and for failing to consider the best interest of the child which required deviation from the literal interpretation of the Family Code in the instant case.

Essentially, the Cassation Division used its power of interpretation creatively to impliedly amend the Family Code in conformity with the Constitution and the CRC. The decision has set an important and legally binding precedent. As such, in instances where there are different ways of interpreting a particular law, courts should favour interpretations which are in line with the Constitution. Such choices can only be made once the courts have interpreted the Constitution.

The principle of constitutional avoidance⁴⁴ also supports the conclusion that courts and other organs must as far as possible interpret the Constitution and invalidate a law only when necessary. The Ethiopian Constitution does not preclude the Council and the HoF from interpreting domestic legislation

⁴¹ FDRE Constitution, article 9(2).

⁴² The fact that both the HoF and the Council are ad hoc entities imposes a higher burden on courts to serve as permanent forums to mainstream the constitutional provisions in their day to day activities.

⁴³ *Miss Tsedale Demissie v Mr Kifle Demissie*, Federal Supreme Court Cassation Division, file no 23632, (6 November 2007) (on file with author).

⁴⁴ This principle essentially requires courts to avoid deciding a constitutional question unless it is necessary for purposes of resolving a case. For a discussion of the applicability of the principle in South Africa, see I Currie 'Judicious avoidance' (1999) 15 *South African Journal on Human Rights* 138.

in line with the Constitution. Indeed, in the *Election Rights* case,⁴⁵ the HoF interpreted the Election Law, which the Council had ruled was unconstitutional, in line with the Constitution to save it from being unconstitutional. The Council and the HoF can, therefore, provide authoritative interpretations of laws in conformity with the Constitution. Courts can and should similarly avoid referring a constitutional issue to the Council if they can interpret the impugned laws in line with the Constitution.

Interpreting domestic legislation in line with the human rights provisions of the Constitution can, for instance, be helpful in applying defamation and anti-terrorism laws which have direct bearing on freedom of expression. Accordingly, courts should first consider whether conviction on defamation or terrorism charges will not entail a violation of the freedom of expression guarantee in the Constitution. However, in practice, courts rarely consider the constitutionality of conviction and punishment for defamation in each individual case. In fact, in most of the cases, courts barely mention the implications of their decisions on defamation charges to freedom of expression.⁴⁶ In the few instances where courts actually considered the issue of freedom of expression, they only look at the constitutionality of the law and not the constitutionality of the application of the law to the particular case.⁴⁷ Even if a law is in line with the Constitution, its application to particular cases can be unconstitutional.

2.3. Interpreting domestic legislation in line with international human rights instruments

There are two ways through which Ethiopian courts can rely on international human right instruments. The first and less controversial mechanism is the power of courts to use international human rights instruments in interpreting the Constitution and domestic legislation – indirect application of international instruments. The second more controversial one is direct application of international human rights, where courts rely on international instruments regardless of the fact that there is no national law domesticating the instruments. Another controversial issue in Ethiopian constitutional law is the status of international instruments in the hierarchy of laws, which determines which law prevails in cases where international instruments contradict the Constitution or domestic statutes.

⁴⁵ The *Benishangul Gumuz case*, House of Federation (March 2003) House of Federation of the Federal Democratic Republic of Ethiopia (July 2008) 1 *Journal of Constitutional Decisions* 14 – 34. In this case, the National Electoral Board of Ethiopia (NEBE) excluded members of settler minorities in the Benishangul Gumuz Regional State, who did not speak any of the local languages, from running for elections. The HoF of Federation ruled that the decision of the NEBE violated the Election Law which only required understanding of the working language – and not any local language – of the regional council of the states.

⁴⁶ G Timothewos 'Freedom of expression in Ethiopia: The jurisprudential dearth' (2010) 4 *Mizan Law Review* 221. The lack of jurisprudence on the meaning and implications of the constitutional rights has also been bemoaned by Fessha (n 31 above) 80 who deplores the lack of 'complex interaction over questions regarding the meaning of the provisions of the Constitution'.

⁴⁷ Timothewos (n 46 above) 226 criticising the failure of the Federal High Court to determine the existence of legitimate grounds that may justify the limitation of freedom of expression in that particular case.

2.3.1. Indirect application

The Constitution requires that the fundamental rights provisions should be interpreted in line with international human rights instruments adopted by Ethiopia.⁴⁸ The human rights provisions of the Constitution should be interpreted in conformity with ‘the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights⁴⁹ and international instruments adopted by Ethiopia’.⁵⁰ The requirement to interpret the fundamental rights provisions of the Constitution in line with international instruments should be extrapolated to also require the interpretation of domestic legislation in line with international human rights instruments. Hence, whenever a domestic law may be interpreted in line with international instruments, such interpretation should be preferred. This is what the Cassation Division of the Federal Supreme Court did in the *Child Rights* case when it relied on the CRC and the Constitution to interpret the Family Code.⁵¹ The fact that the interpretations of the Cassation Division are binding on lower courts has sanctioned the use of international instruments in the interpretation of legislation.⁵²

It should be noted that the relevant international human rights instruments need not have been ratified by Ethiopia. Even declarations, resolutions and other soft laws which by their nature may not be ratified are also relevant in moulding the meaning of the constitutional rights provisions. However, the explicit reference is limited to ‘adopted’ instruments and does not include customary international law, which cannot technically be adopted.⁵³ In any event, there is no law or judicial precedence that has determined the status and relevance of customary international law in Ethiopia.

⁴⁸ FDRE Constitution, article 13(2). See also Consolidation of the House of Federation and Definition of its Powers and Responsibilities Proclamation no 251/2001, article 7(2); and Council of Constitutional Inquiry Proclamation no 250/2001, article 20(2) requiring the HoF and the Council to interpret the fundamental rights provisions in line with international human rights instruments adopted by Ethiopia. Note, however, that the Ethiopian Constitution does not incorporate a general interpretation clause whose application cuts across all the provisions.

⁴⁹ This seems to refer to the 1966 Covenants (ICCPR and ICESCR) which, together with the UDHR, constitute the International Bill of Rights.

⁵⁰ ‘International instruments’ should be understood to include regional and sub-regional instruments, as well.

⁵¹ *Miss Tsedale Demissie v Mr Kifle Demissie* (n 43 above).

⁵² Despite the monist approach implied in the Constitution and the decision of the Cassation Division, the reference to international instruments in judicial decisions has been insignificant. This dearth of reference to international law also characterises other monist civil law countries in Africa – for studies on the use of international instruments in domestic courts in Africa, see M Killander (ed) *International law and domestic human rights litigation in Africa* (2010). The book concludes that ‘courts in many traditionally dualist countries in Africa use international law to a larger degree than explicitly monist countries such as those of Francophone Africa’ – M Killander and H Adjolahoun ‘International law and domestic human rights litigation in Africa: An introduction’ in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 4.

⁵³ Similarly, article 9(4) of Constitution, which makes ratified instruments ‘part and parcel’ of the law of the land, does not mention customary international law. Note that article 9 is the incorporation clause whereas article 13(1) is the interpretation clause.

The requirement that interpretations should conform to international instruments only applies to the human rights provisions included in Chapter 3 of the Constitution.⁵⁴ However, there are provisions outside this Chapter that are directly or indirectly relevant to human rights. For instance, the Chapter dealing with the National Policy Principles and Objectives (Chapter 10) contains essential provisions germane to human rights, particularly socio-economic and environmental rights.⁵⁵ Even more directly relevant is the provision that deals with derogation from rights.⁵⁶ Interpreting the derogation clause needs guidance based on international and regional instruments and jurisprudence. However, since the provisions dealing with the substantive and procedural requirements for derogation of rights in emergency situations exist outside Chapter 3, the interpretation of the derogation provision does not technically have to be in conformity with the principles incorporated in international instruments. It is submitted that the interpretation provision should be understood purposively to oblige guidance and conformity in interpreting all provisions that have direct or indirect bearing on fundamental rights and freedoms enshrined in the Constitution.

Incidentally, the Constitution does not say anything about the relevance of foreign law and jurisprudence. The proclamation enacted to consolidate the HoF authorises the HoF to identify, develop and implement principles of constitutional interpretation that it deems appropriate.⁵⁷ The legislation enacted to constitute the Council also replicates the same authorisation.⁵⁸ These laws provide the HoF and the Council with the authority to scan through foreign law and the existing and developing diverse and rich jurisprudence in consolidating their own principles of interpretation. These provisions, if applied proactively, are also relevant in fixing the constitutional omission regarding customary international law. However, as a civil law country highly influenced by civil law traditions, the instance of reference to foreign law and jurisprudence is likely to be cautious and infrequent.⁵⁹

2.3.2. Direct application

In addition to interpreting domestic laws in line with international instruments, Ethiopian courts may also directly apply rights guaranteed in international human rights instruments. The Constitution

⁵⁴ FDRE Constitution, article 13(2) provides that ‘the fundamental rights and freedoms specified in *this* [human rights] *Chapter*’ should be interpreted in line with international human rights instruments (emphasis added).

⁵⁵ See FDRE Constitution, articles 88 – 92 dealing with political, economic, social and environmental objectives, and principles of foreign policy.

⁵⁶ See FDRE Constitution, article 93.

⁵⁷ Proclamation no 251/2001, article 7(1).

⁵⁸ Proclamation no 250/2001, article 20 (1).

⁵⁹ Quite unusually, the Council relied heavily on the laws and jurisprudence of the US Supreme Court in the Constitutional case concerning the constitutionality of the law that excluded bail in corruption offences (n 38 above).

provides that international instruments ratified by Ethiopia form ‘part and parcel’ of Ethiopian laws.⁶⁰ The power of ratifying international treaties lies with the HPR.⁶¹ A literal understanding of this provision implies that ratified instruments can independently – even when there is no corresponding right in the Constitution or other laws – provide a basis for a cause of action in Ethiopian courts. Although the Ethiopian Constitution recognises a robust panoply of rights, it is still incomplete compared to the rights recognised at the international level. For instance, there is no prohibition against arrest for civil debt in the Ethiopian Constitution or other domestic law that corresponds to article 11 of the ICCPR. Since the ICCPR has become part of Ethiopian law through ratification, arrest for civil debt should, by virtue of the ICCPR being ‘part and parcel’ of Ethiopian law, be prohibited in Ethiopia.

There has been substantial divergence of views on whether Ethiopian courts and other relevant organs should take judicial notice of ratified instruments regardless of their publication in the official law gazette (*Negarit Gazette*). The scholarly views on whether or not publication in the law gazette is a precondition before international instruments can be directly applied by Ethiopian courts are contradictory.⁶² In practice, international human rights instruments are not published in full detail. Courts hardly apply international instruments even to reinforce their decisions (indirect application) let alone base their decisions solely on international instruments.⁶³ Yeshanew has indicated that the general trend of avoiding reference to international instruments by courts is attributable to the fact that the full text of international treaties is not published.⁶⁴

Idris argues that courts may only take judicial notice of international instruments upon the publication of the full body of the instrument in the *Negarit Gazette*.⁶⁵ The argument is based on the constitutional

⁶⁰ FDRE Constitution, article 9(4). Unlike the indirect application of human rights based on article 13(2), which applies to soft as well as hard international laws, direct application only relates to international instruments that have been *ratified* by Ethiopia. Also unlike article 13(2) which refers only to international human rights instruments, article 9(4) applies to all kinds of international instruments including but not limited to international human rights instruments.

⁶¹ FDRE Constitution, article 55(12). The power to negotiate and conclude international treaties lies with the Federal Government – article 51(8).

⁶² Idris, for instance, concludes that publication is a basic requirement that excludes courts from considering unpublished international instruments – I Idris ‘The place of international human rights conventions in the 1994 Federal Democratic Republic of Ethiopia Constitution’ (2000) 20 *Journal of Ethiopian Law* 113.

⁶³ S Yeshanew ‘The justiciability of human rights in the Federal Democratic Republic of Ethiopia’ (2008) 8 *African Human Rights Law Journal* 273. Nevertheless, the recent decision of the Cassation Division of the Federal Supreme Court in which the Court invoked the CRC to determine whether a law that apparently gave absolute guardianship rights over a child to a surviving parent may be deviated from if the interest of the child so requires is expected to induce the empathy of other courts towards international instruments – see *Miss Tsedale Demissie v Mr Kifle Demissie* (n 43 above).

⁶⁴ Yeshanew (n 63 above) 287. The publication of the instruments would have enabled the official translation of the instruments to the official language, Amharic.

⁶⁵ Idris (n 62 above).

duty of the President of the Republic to proclaim in the *Negarit Gazette* all laws and international instruments ratified by Ethiopia.⁶⁶ Also the Federal *Negarit Gazette* Establishment Proclamation imposes a duty on the state to publish all federal laws. Once published, courts have the duty to take judicial notice of such laws.⁶⁷

It is argued that article 9(4) of the Constitution will be meaningless if it was not meant to do away with the publication requirement. If publication was intended to be a necessary requirement, the Constitution could have done that in unequivocal terms by, for instance, adding ‘upon publication’ at the end of article 9(4). In addition, the ratification proclamations adopted by the HPR, which indicate that a particular treaty has been ratified without reproducing the whole body of the treaty, constitute one form of publication. Publication might take different forms and the ratification proclamations constitute a form of publication. Moreover, the *Negarit Gazette* establishment proclamation only requires courts to take judicial notice of published laws but does not preclude them from taking judicial notice of other laws including international instruments that have not been declared in the law gazette. Yeshanew argues that the duty to publish all federal laws in the *Negarit Gazette* should not apply to international instruments as the Constitution and several other laws consider international instrument as distinct from other federal laws.⁶⁸ As such, courts have the duty to take judicial notice of published federal laws and also international instruments even if the latter have not been published in the official law gazette.⁶⁹ Publication adds no validity to international conventions which are already valid through ratification.

A purposive interpretation does not support the imposition of a publication requirement with respect to human rights instruments which are designed to provide for entitlements to individuals and impose obligations on government.⁷⁰ Publication is intended to inform individuals, who are the right-holders.

⁶⁶ FDRE Constitution, article 71(2).

⁶⁷ Proclamation to Provide for the Establishment of the Federal Negarit Gazeta Proclamation no 3/1995, article 2.

⁶⁸ Yeshanew (n 63 above) 288.

⁶⁹ Yeshanew (n 63 above) 288 concluding that courts should apply international instruments irrespective of their publication. This does not, however, mean that courts will enforce every provision of international instruments. It is only those parts of the treaty that are self-executing that may be applied directly by domestic courts without need for a domestic implementation measure such as legislation. Whether or not a provision is self-executing usually depends on the extent to which a particular provision is specific enough for judicial application – for a discussion on self-executing provisions, see M Killander ‘Judicial immunity, compensation for unlawful detention and the elusive self-executing treaty provision: *Claassen v Minister of Justice and Constitutional Development* 2010 (6) SA 399 (WCC)’ (2010) 26 *South African Journal on Human Rights* 386; N Botha ‘Extradition, self-execution and the South African Constitution: A non-event’ (2008) 33 *South African Yearbook of International Law* 253.

⁷⁰ Yeshanew (n 63 above) 289.

The government obviously takes notice of the instruments during the process of pre-adoption deliberations, adoption, signing and ratification. Also the government should not be allowed to benefit from its failure to discharge its constitutional duty to publicise ratified instruments – imposed on the President of the Republic. This will violate the basic legal tenet that ‘no one shall benefit from his or her own wrongdoing’. Courts may, therefore, apply international instruments ratified by Ethiopia especially in cases where there is no domestic legislation that gives effect to constitutionally recognised rights. Such an approach will incidentally ensure that Ethiopia complies with its international obligations.

Judicial practice supports the conclusion that publication is not a necessary precondition before courts can take judicial notice of ratified international instruments. The Cassation Division of the Federal Supreme Court relied explicitly on the CRC to interpret the provision of the domestic family law in a case involving child custody.⁷¹ The Court applied the ‘best interest of the child’ standard to grant custody to the aunt of the child, overriding a provision that gave an unconditional guardianship right to a surviving parent. The Federal High Court similarly ruled that it has the mandate to interpret domestic law in line with the Constitution and international law and applied the ICCPR and Universal Declaration of Human Rights in a case involving the previous President of Ethiopia.⁷² The Court ruled that the suspension of benefits due to the previous President, Dr Negasso Gidada, because of his decision to run as an independent candidate, violated his freedom of expression and political participation.⁷³

In a 2011 workshop on the implementation of international instruments ratified by Ethiopian courts, the participants concluded that ratified instruments can be given effect by courts without the need to publicise them in the *Negarit Gazette*.⁷⁴ The President of the Federal High Court, in particular, indicated that there is no publication requirement and that federal courts are increasingly relying on international

⁷¹ *Miss Tsedale Demissie v Mr Kifle Demissie* (n 43 above).

⁷² *Dr Negaso Gidada v The House of Peoples’ Representatives and the House of Federation*, Federal High Court, appeal file no 41183 (6 October 2004) (on file with author).

⁷³ The decision of the High Court was reversed on appeal by the Federal Supreme Court – *House of Peoples’ Representatives and House of Federation v Dr Negaso Gidada*, Federal Supreme Court, file nos 22980 & 22948 (25 October 2004) (on file with author). The Supreme Court ruled that running for membership to the HPR necessarily constituted participation ‘in a partisan political movement’ which justified the suspension under the law. The benefits due the former President were suspended based on a law that authorised such suspension if the president participated in ‘any partisan political movement’. The Council of Constitutional Inquiry also rejected the complaints of the former President that the suspension of benefits violated his freedom of expression and political participation – *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).

⁷⁴ Ethiopian Human Rights Commission (2011) Vol. 1 No 5 Issue 3 *Human Rights Bulletin* 7 <http://ehrc.org.et/LinkClick.aspx?fileticket=7nDDzAMpwzM%3d&tabid=106> (accessed 10 May 2011).

instruments in their judgments.⁷⁵ This conclusion sends out an unmistakable message that international human rights instruments are invaluable tools for the interpretation of the rights in the Constitution as well as other domestic legislation. This approach is supported by the fact that the decisions of the Cassation Division with not less than five judges set a binding precedent for lower courts.⁷⁶

These arguments should not, however, be taken as belittling the significance of publishing international instruments. Publication creates an informed and demanding citizenry. That is why, after ratifying a human rights instrument, a state is obliged to take all appropriate measures toward the full realisation of the instrument. Bringing the instruments to the knowledge of the public is necessarily one of the state's commitments. Publication is thus key. Nevertheless, the fact that international instruments gain validity through ratification and not through publication must be recognised. Consequently, courts are allowed to apply a right directly even though there is no corresponding right in the Ethiopian Constitution or other laws.

2.3.3. Status of international instruments

The status of international instruments in general and human rights instruments in particular in the Constitution is not clear, but has been the subject of substantial scholarly disagreement. Article 9(1) of the Ethiopian Constitution declares the supremacy of the Constitution. Hence, a literal reading of this provision indicates that international instruments – which become part and parcel of the laws of the land upon ratification under article 9(4) – are subordinate to the Constitution.⁷⁷ Since human rights treaties form part of international agreements, they should also be understood to be subordinate to the Constitution. However, the inclusion of the interpretation clause – article 13(2) – in relation to the fundamental rights Chapter has led some scholars to conclude that international human rights

⁷⁵ Ethiopian Human Rights Commission (n 74 above) 8.

⁷⁶ Federal Courts Proclamation no 25/1996, article 10(4) as amended by the Federal Courts Proclamation Re-Amendment Proclamation no 454/2005, article 2(1). Nevertheless, the Court applied the CRC indirectly to guide the interpretation of the Family Code. It does not imply that Ethiopian courts can rely directly and exclusively on international instruments. For instance, the Ethiopian Constitution does not guarantee the right to remedy which is guaranteed under article 9 of the ICCPR. The decision does not imply that Ethiopian courts will recognise the right to remedy. It is debatable if the Court would have arrived at the same conclusion if the principle of the best interest of the child was not recognised under the Ethiopian Constitution and domestic law. It is interesting to note that the Court did not refer to the African Charter on the Rights and Welfare of the Child.

⁷⁷ C Mgbako et al 'Silencing the Ethiopian courts: Non-judicial constitutional review and its impact on human rights' (2008) 15 *Fordham International Law Journal* 701, 713; S Yeshanew 'The constitutional protection of economic and social rights in the Federal Democratic Republic of Ethiopia' (2008) 23 *Journal of Ethiopian Law* 135, 147; G Gebregiorgis 'The incorporation and status of international human rights under the FDRE Constitution' (2008) 2 *Ethiopian Human Rights Law Series* 37; Idris (n 62 above) 132 – 134.

instruments adopted by Ethiopia have a status higher than, or at least equal to, Chapter 3 of the Constitution itself.⁷⁸

Nevertheless, the Constitution is very clear in declaring its singular supremacy – it does not anticipate any possible exception to or sharing of its supreme status. It also broadly requires reference to the ‘principles’ rather than the ‘provisions’ of international instruments to guide the interpretation of the Ethiopian Bill of Rights. The Constitution also refers to hard as well as soft international human rights instruments. It would be overly facile to conclude that the drafters intended to subordinate the Constitution even to vague principles and soft international instruments. Moreover, indirect application is required only when there is need for constitutional interpretation, which excludes cases where there are clear differences between the Constitution and international instruments as well as in relation to clear constitutional provisions, if any, which merely require application. As such, even international human rights instruments have a status subordinate to the Constitution. Whenever a contradiction cannot be resolved by interpreting a constitutional provision in line with international human rights instruments, the Constitution takes precedence. For instance, the list of non-derogable rights in the Ethiopian Constitution is much narrower than that provided in the ICCPR.⁷⁹ Hence, despite its non-derogable status in the ICCPR, the right to life, for instance, is clearly derogable under the Ethiopian Constitution.

The status of international instruments in relation to domestic legislation is also not clear. Because international instruments are adopted and ratified in a similar fashion with primary statutes, many scholars conclude that international instruments only have a status equal to parliamentary statutes.⁸⁰

⁷⁸ T Bulto ‘The monist-dualist divide and the supremacy clause: Revisiting the status of human rights treaties in Ethiopia’ (2009) 23 *Journal of Ethiopian Law* 132, 160 arguing that ‘the principle of good faith and the resultant states’ duty of ensuring compatibility between its national laws and international obligations, the substantive independence of international law, and Ethiopia’s duty to provide domestic remedies for violations of treaty-based rights warrant the conclusion that treaties are above any proclamation’ and that treaties share at least the same status as the Constitution. Bulto wrongly mingles the relationship between domestic law and international law at the international level, which is defined by international law, and at the national level, which is defined by national law. Nevertheless, even if international law is subordinate to constitutional law at the national level, the state will still be responsible at the international level. Domestic law cannot provide justification to violations of international law – Vienna Convention on the Law of Treaties (1969), article 27.

⁷⁹ The only rights that are not derogable in the Ethiopian Constitution are the right to equality, the prohibition against torture and inhuman treatment, and the right to self-determination including the right to secession – FDRE Constitution, article 93. Article 4 of the ICCPR prohibits derogation from the right to life, the prohibition against torture, the prohibition against slavery, against imprisonment for civil debt, against retroactive application of criminal law, the right to recognition as a person before the law, and the rights to freedom of thought, conscience and religion.

⁸⁰ Treaties are signed by the executive and ratified by the HPR, and bills are presented, inter alia, by the Council of Ministers and adopted by the HPR. See Idris (n 62 above) 134; M Haile ‘Comparing human rights in two Ethiopian constitutions: The

However, the requirement to interpret the fundamental rights provisions of the Constitution by implication requires the interpretation of domestic laws to be in line with international human rights instruments. Based on this implication, it can be argued that international human rights instruments have precedence over domestic legislation. The HoF, the Council and courts should, therefore, interpret domestic legislation in a way that does not contradict international instruments as expounded by the relevant treaty bodies.⁸¹

An interesting issue is whether Ethiopian courts, and not just the HoF and the Council, should ignore legislation that has been declared in violation of the African Charter on Human and Peoples' Rights (African Charter) by the African Commission on Human and Peoples' Rights in a communication, or generally if they are convinced that a domestic law contradicts international human rights instruments. The only treaty-based international human rights bodies that can receive communications against Ethiopia are the African Commission and the African Committee on the Rights and Welfare of the Child. It is submitted that Ethiopian courts may refuse to apply a law if the African Commission or the Committee on the Rights and Welfare of the Child has declared such law in violation of the African Charter or the African Protocol on the Rights and Welfare of the Child. Such refusal is in line with the constitutional requirement to interpret the human rights provisions of the Constitution, and by implication domestic laws, in conformity with international human rights instruments adopted by Ethiopia.

Although the Ethiopian Constitution impliedly grants superior status to international human rights instruments over domestic legislation, it is silent as to which organ should control the conformity of statutes with international instruments. As such, the HoF and the Council do not have exclusive jurisdiction in determining compliance of domestic laws with international human rights instruments. Regular courts are, therefore, not excluded from refusing to apply domestic laws that contradict international instruments. In the French constitutional review system, the French Constitutional Council – the organ in charge of constitutional interpretation – ruled that it has jurisdiction only to determine the constitutionality of laws and international treaties, and that the determination of the compliance of

Emperor's and the "Republic's" – *cucullus non facit monachum*' (2005) 13 *Cardozo Journal of International and Comparative Law* 1, 28.

⁸¹ Bulto (n 78 above) 148 – 149 arguing that the Constitution 'does not allow room for the valid promulgation of a law that is inconsistent with treaties ratified by Ethiopia' and that the HoF is empowered to invalidate domestic legislation that contravenes international human rights instruments.

domestic legislation with international treaties should be done by ordinary courts.⁸² Similarly, the Ethiopia Constitution does not grant exclusive jurisdiction to the Council and the HoF on matters involving conflict between statutes and international instruments. The courts, therefore, have the right to resolve such contradictions without the need to refer the matter to the Council. Ethiopian courts should at least, whenever they have the opportunity, automatically refer laws that have been declared in violation of the African Charter or any other international instrument adopted by Ethiopia to the Council for constitutional interpretation.

2.4. Invalidating secondary legislation or executive action or inaction that is inconsistent with primary legislation

The HoF and the Council have jurisdiction only in relation to cases alleging the violation of the Constitution. Only courts have the power to invalidate secondary legislation and any other executive action or inaction that contravenes primary laws.⁸³ In cases that involve conflicts between primary and secondary legislation, there is really no constitutional issue. The Council has ruled that the issue of compliance of secondary legislation with primary legislation is not an issue of constitutional interpretation which falls within its jurisdiction. In the cases of *Addis Ababa Taxi Drivers Union v Addis Ababa City Administration*⁸⁴ and *Biyadiglign Meles et al v Amhara National Regional State*,⁸⁵ the Council ruled that remedies concerning the conformity of regulations with the enabling legislation do not amount to reviewing constitutionality of laws and, as a result, parties have to seek remedies in courts.

Accordingly, in a case that involved the Electoral Board of Ethiopia,⁸⁶ the Federal High Court invalidated an order of the Board prohibiting CSOs, which did not explicitly provide election observation as one of their objectives in their registered memorandum of association, from observing the 2005 elections. The High Court had to determine whether the Election Law allowed the Board to take such a decision. The bone of contention was article 12 of the Election Law. According to this provision, 'political organisations

⁸² In France, although the determination of constitutionality of a law could only be considered prior to the promulgation of the law and only by the Constitutional Council, ordinary courts have the power to refuse to apply a domestic law if they are convinced that it contradicts the legal principles of the European Convention of Human Rights – a procedure known in France as *contrôle de conventionalité* – P Pasquino 'The new constitutional adjudication in France: The reform of the referral to the French Constitutional Council in light of the Italian model' 11 & 15 http://www.astrid-online.it/Dossier--R2/Studio/Pasquino_New-Constitutional-adjudication-France.pdf (accessed 15 February 2011).

⁸³ Primary legislation refers to parliamentary statutes. Secondary legislation refers to regulations and directives enacted by the executive branch.

⁸⁴ Council of Constitutional Inquiry (25 January 2000) (on file with author).

⁸⁵ Council of Constitutional Inquiry (8 May 1996) (on file with author).

⁸⁶ *Organization for Social Justice in Ethiopia et al v Ethiopian Election Board*, Federal High Court, case no 38472 (11 May 2005) (on file with author).

campaigning for election, the public, various forms of public organisations may through their respective representatives observe the electoral process’.

The applicants argued that the order of the Board violated article 12 of the Election Law, article 38 of the Ethiopian Constitution as well as international instruments ratified by Ethiopia. The High Court ruled that the Election Law only authorises CSOs to observe elections and did not attach any precondition. Hence, even though there is no mention of election observation in their memorandum of association, CSOs can perform any legal activity, including election observation, not inconsistent with their other objectives. The directive of the Board was, therefore, ruled incongruent with the Election Law and in violation of the legal rights of the applicants. The Board appealed the decision to the Federal Supreme Court, which issued an injunction against the implementation of the decision of the High Court before a final decision was rendered.⁸⁷ The Supreme Court rejected the appeal and held that the Board may not impose restrictions other than those imposed by the Election Law. The decision of the Board to preclude CSOs from observing the elections was, therefore, held to be *ultra vires*. Although the legal challenge launched by the Board created logistical inconvenience, following the decision, several CSOs were able to deploy observers throughout the country during the 2005 elections.

However, in a subsequent case,⁸⁸ the HoF failed to reject a non-constitutional matter and invalidated the decision of the Election Board to exclude candidates that did not speak one of the local languages. The HoF ruled that the Election Law was valid but that the decision of the Board was not in line with the law. The HoF should, after providing an interpretation of the Election Law which is consistent with the Constitution, not have engaged itself in examining whether the decision of the Board was in line with the Election Law as interpreted. It should have simply referred the case to the relevant ordinary court for determination whether the decision of the Board was in line with its interpretation of the Election Law. The HoF arrogated to itself the power of ordinary courts.

In summary, although ordinary Ethiopian courts do not have the power to invalidate legislation as unconstitutional, they still have significant powers to ensure that executive decisions are in line with parliamentary statutes. The ruling of the courts to invalidate the decision of the Electoral Board to exclude CSOs from observing the 2005 elections exemplify the opportunities such power presents to

⁸⁷ *Organization for Social Justice in Ethiopia et al v Ethiopian Election Board*, Federal Supreme Court, file no 19699 (May 2005) (on file with author).

⁸⁸ The *Benishangul Gumuz case* (n 45 above).

challenge executive lawlessness in ordinary courts even in seemingly politically sensitive cases.⁸⁹ Moreover, courts should engage in constitutional interpretation in determining whether secondary legislation is inconsistent with primary legislation by interpreting and understanding the latter in line with the Constitution. However, if the issue is the compatibility of legislation, whether primary or secondary, with the Constitution, courts must refer the matter to the Council.

2.5. Constitutional interpretation in the exercise of judicial referral power

Ethiopian courts have the power and duty to refer to the Council constitutional issues that arise in proceedings before them. If a court is convinced that there is a constitutional matter to be determined and that such resolution is necessary to resolve the case before it, it should refer the constitutional matter to the Council.⁹⁰ Similarly, if one or both of the parties to a court proceeding wishes to refer a constitutional issue to the Council, the party may only do so via the courts, which must again be convinced that there is actually a constitutional matter whose resolution is necessary to decide the pending case.

The process of determining whether there is a constitutional issue necessarily requires courts to engage in preliminary constitutional interpretation.⁹¹ As such, courts particularly have the power to declare laws constitutional and proceed with the case if they are convinced, after interpreting the Constitution, that there is no doubt that the law might be unconstitutional. In *Public Prosecutor v Ibrahim M*,⁹² for instance, the judge convicted the editor-in-chief of *Islamia* Newspaper for accusing the Minister of Education of harbouring hatred against Ethiopian Muslims and deliberately attempting to deny them their constitutionally guaranteed rights. The accused argued that he should not be convicted as it would constitute a violation of his freedom of expression. However, the Court ruled that the right to freedom of expression in the Ethiopian Constitution was limitable, not absolute. The Court did not believe that

⁸⁹ During apartheid South Africa, the parliament was supreme. It was, therefore, not possible for courts to invalidate laws as unconstitutional. As a result, activists could only challenge regulations and directives for compliance with parliamentary statutes and principles of administrative law. Although the parliamentary statutes were themselves unjust, litigation provided some avenue to challenge even more unjust executive regulations and directives – see D Davis and M Le Roux *Precedent and possibility: The (ab)use of law in South Africa* (2009); 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) 327-350; J Dugard *Human rights and the South African legal order* (1978) Chapters 10 and 11.

⁹⁰ Proclamation no 250/2001, article 21(2). This is more in line with the approach of the German Constitutional Court which requires courts to be ‘convinced’ that there is doubt as to the constitutionality of laws than the Italian Constitutional Court which requires referral if the courts have the ‘slightest doubt’ about the constitutionality of the impugned legislation – see F Ferejohn and P Pasquino ‘Constitutional adjudication: Lessons from Europe’ (2003-2004) *Texas Law Review* 1671, 1688.

⁹¹ M Taddese *Yeethiopia higna fitih getsitawochi [The features of law and justice in Ethiopia]* (2006) 146.

⁹² Federal High Court, criminal file no 71562 cited in Timothewos (n 46 above) 226.

there was a sustainable constitutional issue involved and, hence, refused to refer the case to the Council.⁹³

However, if courts are convinced that the law is or may be unconstitutional, they cannot declare the law unconstitutional; they have to refer the constitutional issue to the Council.⁹⁴ It is not clear if the court would have to explain, in the submission to the Council, why it is convinced that there is need for constitutional interpretation. It is submitted that courts may not merely refer the constitutional issue to the Council. They should rather indicate why they believe there are doubts as to the constitutionality of the law.⁹⁵ Such a requirement is implicit. Constitutional complaints must be in an ‘elaborate writing’.⁹⁶ ‘Elaborate writing’ should be understood to require courts, and any person or entity approaching the Council, to explain why they believe that the Council should be seized of the case. The principle of constitutional avoidance – implied in the requirement that the resolution of a constitutional issue must be necessary to determine the pending case – similarly dictates that the Constitution should be interpreted only when necessary and imperative.

This duty to explain or elaborate gives courts an opportunity to safeguard the Constitution. Through their submissions, courts may and can guide and influence the understanding of constitutional provisions by the Council and the HoF. The duty to explain also serves to filter mundane cases from reaching the Council which should primarily focus on basic constitutional issues. It can also serve to exclude possible ill-considered and inappropriate submission as well as the deliberate avoidance of cases by some courts. Moreover, the Council will benefit considerably from the discussions of the constitutional issue by the referring court in arriving at an appropriate decision.⁹⁷

⁹³ Timothewos, however, criticised the judgment for failing to determine the existence of legitimate grounds that may justify the limitation of freedom of expression in the instant case – Timothewos (n 46 above) 226.

⁹⁴ This is in line with the practice in Germany and other states which follow the centralised judicial review system. H Rupp ‘Judicial review in the Federal Republic of Germany’ (1960) 9 *American Journal of Comparative Law* 29, 32 observing that in Germany the Constitution allows courts to declare a law constitutional. But if courts are convinced that the law is or may be unconstitutional, they must refer the constitutional issue to the Constitutional Court. Courts do not have ‘the power of negation’ to declare a law inapplicable. See, however, Bulto who argues that Ethiopian courts are allowed to disapply laws which are unconstitutional. Bulto argues that the disapplication can only have *inter partes* effect and that dissatisfied parties may appeal to the Council against the decision of the Court to apply or disapply the concerned law – Bulto (n 78 above) 112 – 115.

⁹⁵ However, in the few number of judicial referrals, courts merely identify the constitutional issue and request the opinion of the Council. They do not elaborate their take on the issue.

⁹⁶ Proclamation no 250/2001, article 24.

⁹⁷ The South African Constitutional Court has similarly held, in relation to direct access, that ‘[i]t is ordinarily not in the interest of justice for it to sit as court of first and last instance and that direct access should only be granted in exceptional circumstances’ – *S v Zuma* 1995 2 SA 642 (CC) para 11. One of the reasons for such reluctance to grant direct access is to benefit from the legal analysis of lower courts.

2.6. Invalidating legislation and other measures as unconstitutional in line with precedent set by the HoF

The decisions of the HoF on constitutional issues have a general effect and set a binding precedent on courts and other bodies in relation to similar constitutional matters.⁹⁸ It is argued that courts may declare unconstitutional a law that contradicts a clear constitutional interpretation established by the decisions of the HoF. This is particularly so in relation to existing laws or provisions that have more or less similar provisions with laws or provisions that have been declared unconstitutional by the HoF. Courts may also invalidate new laws that contradict existing binding decisions of the HoF. For instance, if parliament enacts a law that requires the ability to speak a local language to stand for elections, courts should invalidate such legislation as it contradicts the binding decision of the HoF in the *Election rights* case. If courts do not have the power to declare laws or other acts unconstitutional based on the precedent set by the HoF, and if, therefore, they have to refer such cases to the Council, making the decisions of the HoF binding would become pointless.⁹⁹ In France, for instance, courts may not refer a constitutional case to the Constitutional Council if the constitutionality of such law has been considered in the *ex ante* procedure and has been declared constitutional, except in cases where new circumstances justify the reconsideration of the constitutionality of the law.¹⁰⁰

3. Practical problems facing the judiciary in playing its role in the realisation of human rights

Despite the availability of potential entry points for courts to contribute to the realisation of constitutional rights, their role has been rather insignificant. Indeed, the number of cases in which courts have even mentioned constitutional human rights has been very limited. This is principally attributable to the low level of awareness amongst members of the judiciary about constitutional rights and the erroneous belief that the Constitution prohibits them from entertaining cases that invoke constitutional provisions.¹⁰¹ Legal practitioners also barely rely on constitutional human rights primarily out of fear that the case may be referred to the Council for constitutional interpretation thereby delaying the resolution of the case. The heavily legalistic and formalistic approach to the judicial role,

⁹⁸ Proclamation no 251/2000, article 11(1). To ensure access to all stakeholders, the HoF is required to publish its decisions in a special publication.

⁹⁹ Of course a party aggrieved by the decision of the courts can take their case to the Council and finally to the HoF for final determination.

¹⁰⁰ Pasquino (n 82 above) 12. It should be noted that in France courts are prohibited from referring the same law that has been declared constitutional in the *ex ante* procedure. This section is suggesting that Ethiopian courts should not refer laws that are similar to a law that has been previously considered by the Council or the HoF.

¹⁰¹ Yeshanew (n 63 above) 293.

due largely to the influence of civil law legal culture,¹⁰² has created courts and judges that dwell almost exclusively on analysis of legal texts to resolve issues before them, often detaching the case from constitutional and policy issues.¹⁰³ For Ethiopian courts and judges, their principal, if not the sole, role is mechanically enforcing the law regardless of its human rights implications. Courts do not consider themselves as responsible for mainstreaming human rights in the interpretation and application of laws. They do not see themselves as protectors of constitutional rights. There is, therefore, need for transformation in legal culture and education to bring judges in harmony with the values and aspirations enacted in the Constitution.

Even in the absence of any sign of aggressive judicial activism and decisions invalidating sensitive government measures,¹⁰⁴ there is a trend to strip the judiciary of its judicial powers in favour of special administrative bodies with no guarantee of independence. The adoption of legislation that precludes judicial review in the following instances may violate the right to access to justice enshrined in article 37 of the Ethiopian Constitution. The administrative agencies lack the required security of tenure, binding procedures as well as guarantees of impartiality and due process.¹⁰⁵ Most importantly, the Constitution vests judicial power exclusively in courts.¹⁰⁶ As such, the exclusion of judicial review through jurisdictional ouster clauses certainly violates the constitutionally sanctioned 'judicial monopoly' of the judiciary.¹⁰⁷

The Property Mortgaged or Pledged with Banks Proclamation allows creditor banks to sell a mortgaged or pledged property by auction without judicial authorisation upon giving 30 days notice of default to

¹⁰² Ginsburg and Moustafa observe that '[m]ore important than any legal constraints is the norm that judges in civil law systems are to apply the law mechanically, resulting in a tendency towards thin rather than thick conceptions of the rule of law' T Ginsburg and T Moustafa 'Introduction' in T Ginsburg and T Moustafa (eds) *Rule by law: The politics of courts in authoritarian regimes* (2008) 19. See also M Rosenfeld 'Constitutional adjudication in Europe and the United States: Paradoxes and contrasts' (2004) 2 *International Journal of Constitutional Law* 633, 635 observing that traditionally in civil legal systems 'the judge was confined to the application of a legal rule, as crafted by the legislator, to the particular case at issue by means of syllogism in which the law figures as the major premise and the facts of the case as the minor premise'.

¹⁰³ This legalistic and overly brief nature of legal reasoning is generally common in civil law countries perhaps due to the fact that the reasoning in one case may not necessarily be repeated in subsequent cases. In this regard, Klare observes that 'legal culture and socialization constrain legal outcomes quite irrespective of substantive mandates entrenched in constitutions and legislation' – K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 151.

¹⁰⁴ Freedom House (n 23 above) observing that there are 'few significant examples of decisions at variance with government policy'.

¹⁰⁵ Note that the author is not opposed to the establishment of special bodies as such. The author is only opposed to the finality of the decisions these special bodies render thereby ousting administrative judicial review.

¹⁰⁶ FDRE Constitution, article 79(1). The exclusivity is not apparent in the English version. The Amharic version, which is the authoritative one, is clear that the Constitution exclusively vests judicial power in the courts.

¹⁰⁷ Rosenn observes that 'judicial monopoly' is an essential element of an independent judiciary – Rosenn (n 18 above) 14.

the debtor.¹⁰⁸ Similarly, the Income Tax Proclamation permits the Inland Revenue Authority to confiscate property of defaulting tax payers without need to obtain judicial authorisation.¹⁰⁹ The Proclamation establishing the Agency for Government Houses authorises the Agency to expel tenants of government houses, who have allegedly breached their lease contracts and persons occupying such houses without having any lease contracts, without the need to seek court authorisation.¹¹⁰

The Expropriation of Land for Public Purposes Proclamation allows individuals whose land has been expropriated to appeal to courts only as regards the amount of compensation.¹¹¹ Decisions of government bodies concerning the public purpose involved and whether expropriation is justified are not subject to judicial scrutiny. The decision of government commissions on expropriation regarding expropriation of immovable property is incontestable in any forum. Under this Proclamation, large evictions can be carried out without anyone challenging such decision. This, however, is against the right to housing of individuals guaranteed under the Constitution as well as a number of international human rights instruments to which Ethiopia is a party. The UN Committee on Economic, Social and Cultural Rights has observed that states should provide for appeal procedures aimed at preventing planned evictions or demolitions through the issuance of court ordered injunctions.¹¹²

Article 37 of the Council of Ministers Regulation no 155/2007 authorises the Director of the Ethiopian Customs and Revenue Authority to dismiss any employee suspected of corruption without any explanation and without following regular disciplinary proceedings. Most importantly, the decision of the Director is not subject to judicial review.

The 2007 Election Law requires that CSOs and other organisations wishing to observe elections must obtain in advance licenses from the National Election Board of Ethiopia.¹¹³ If the Board denies an

¹⁰⁸ Proclamation no 97/1998, articles 3 & 4. The Constitutional Court of South Africa has held that it is unconstitutional for a registrar of a High Court to declare immovable property specially executable to the extent it permits the sale in execution of the home of a person; such decisions must be taken by a court of law not the registrar – *Gundwana v Steko Development CC et al*, 2011 (3) SA 608 (CC) paras 49&65. The constitutionality of a provision providing for the seizure of property without recourse to a court of law upon default of payment of a debt was also successfully challenged – *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) paras 15 & 16.

¹⁰⁹ Proclamation no 286/2002, articles 77 & 78.

¹¹⁰ Agency for Government Houses Establishment Proclamation no 555/2007, article 6(3).

¹¹¹ Proclamation no 455/2005, article 11. However, even a person who has issues with the amount of compensation may not resist eviction. Complaints about the amount of compensation cannot delay the expropriation process.

¹¹² General Comment 4 'The right to adequate housing' (1991), para 17.

¹¹³ Electoral Law of Ethiopia Amendment Proclamation no 532/2007, article 79(1).

application for election observation license, it should notify the applicant in writing.¹¹⁴ However, applicants do not have the right to appeal to courts or other entities against the decision of the Board in cases where license is refused. Furthermore, the Law apparently gives the Board the monopoly over voter education. Any other organisation may only engage in voter education if they have been issued a license to that effect by the Board.¹¹⁵ Again, applicants do not have the right to appeal to courts in case the Board refuses to issue the voter education license. The law has effectively reversed the decision of the Federal High Court as confirmed by the Supreme Court prior to the 2005 elections where the refusal of the Board to allow CSOs to observe the elections was quashed.¹¹⁶ The Election Law not only reversed the decisions; it also precludes any similar judicial challenge in the future.

The most recent law incorporating an ouster clause is the CSO Proclamation.¹¹⁷ The Proclamation does not guarantee the right to appeal against the decisions of the Charities and Societies Agency in relation to CSOs that earn more than 10% of their funds from non-Ethiopian sources, or have foreigners as members, or are established under the laws of another state.¹¹⁸ The Agency operates under and is accountable solely to the Ministry of Justice.¹¹⁹

The above examples clearly indicate that there is a developing pattern towards stripping the judiciary of judicial powers vested in it by the Constitution. Through jurisdictional ouster clauses, Ethiopian courts have been deprived of one of their essential roles, which is to ensure that the executive operates within the parameters set by the law. Under these laws, the executive has the first and final say on what the law and the Constitution requires in particular circumstances. Excluding judicial review of executive measures pursues expediency at the expense of the rule of law, which is a characteristic feature of emergency powers. The fact that courts do not have the power to adjudicate constitutional issues has

¹¹⁴ Proclamation no 532/2007, article 79(2). Many CSOs were denied licences to observe the 2008 local elections in accordance with this law – see L Aalen and K Tronvoll ‘The 2008 Ethiopian local elections: A return of electoral authoritarianism’ (2008) 108 *African Affairs* 111, 118. It should be noted that international observers were also not allowed to observe these elections.

¹¹⁵ Proclamation no 532/2007, article 90(1).

¹¹⁶ This is in line with the observations of Ginsburg and Moustafa that ‘[t]he more compliant the regular courts are, the more that authoritarian rulers allow political cases to remain in their jurisdiction. ... The more the regular courts attempt to challenge regime interests, on the other hand, the more the jurisdiction of the auxiliary courts [judicial bodies that exist side by side with regular courts] is expanded’. In the Ethiopian case, the judicial power of executive bodies has expanded due to fear of judicial adventurism which has been dealt with when manifested as is the case in the reversal of the decision in the *Election Observation* case by Election Law – Ginsburg and Moustafa (n 102 above) 17 – 18.

¹¹⁷ Charities and Societies Proclamation no 621/2009.

¹¹⁸ Proclamation no 621/2009, articles 104(2&3). The law only grants the right to appeal to the Federal High Court to Ethiopian Charities or Societies that exclusively have Ethiopian members and earn more than 90% of their funds from domestic sources.

¹¹⁹ However, it should be noted that there is nothing in the law that prevents CSOs from challenging decisions of the Agency as unconstitutional in the Council of Constitutional Inquiry.

enabled parliament to reverse judicial decisions merely through amending or introducing ordinary legislation.

Interestingly, a constitutional challenge against an Executive Regulation which authorised the Director of the Customs and Revenue Authority to dismiss any employee whom he or she suspects might be corrupt – a decision not subject to judicial review – was rejected by the Constitutional Council of Inquiry.¹²⁰ The Council ruled that in a parliamentary form of government, the legislature has the right to limit the jurisdiction of courts, and, hence, jurisdictional ouster clauses do not violate the constitutional right to access to justice. Whether or not a matter is justiciable is determined by laws enacted by the HPR. Despite its constitutional status, the right to access to justice can be abridged at a stroke of legislation. The implication of this ruling is that any potential constitutional challenge against ouster clauses included in the CSO Proclamation, Election Law, and other laws will not succeed.

As much as dependent and complicit courts can be blamed for sometimes lending hand to the executive in neutralising critical voices and advancing the agenda of the governing regime, the extensive use of ouster clauses and the excessively legalistic judicial tradition of Ethiopian courts also create a sense of judicial helplessness. A combination of lack of judicial activism,¹²¹ and judicial helplessness characterise judicial operation in Ethiopia. The flurry of illiberal laws on several sensitive areas that exclude the judiciary, which courts are bound to loyally enforce as they do not have the power to expunge such laws as unconstitutional, has seriously emasculated the judiciary.¹²²

4. The role of quasi-judicial forums in complementing litigation

With a view to ensure the realisation of human rights enshrined in the Constitution and international agreements ratified by Ethiopia, the Ethiopian Constitution requires the HPR to establish a national Human Rights Commission (EHRC).¹²³ The Constitution also requires the HPR to establish the Institution of the Ombudsman to ensure that administrative entities comply with laws and the Constitution.¹²⁴

¹²⁰ Constitutional case on the constitutionality of ouster-clauses, Council of Constitutional Inquiry (10 February 2009) (on file with author).

¹²¹ M Ashenafi 'Ethiopia: Process of democratization and development' in A An Na' im (ed) *Human rights in African constitutions: Realising the promise for ourselves* (2003) 48 observing that there is little judicial activism and creativity in the interpretation of constitutional rights in Ethiopia.

¹²² The situation of Ethiopian courts is very much like the situation of courts during the apartheid regime in South Africa. Since the courts do not have the power to invalidate legislation, they have to simply enforce such legislation regardless of its implications to human rights. The best Ethiopian courts can do is to refer any constitutional issue to the Council.

¹²³ FDRE Constitution, article 55(14).

¹²⁴ FDRE Constitution, article 55(15).

4.1. The role of the Ethiopian Human Rights Commission

In line with the constitutional requirement, the HPR has established the Ethiopian Human Rights Commission as an autonomous organ of the Federal Government.¹²⁵ The Commission is responsible for and accounts to the HPR. It is composed of a Chief Commissioner, Deputy Chief Commissioner, a Commissioner heading Children and Women Affairs, other commissioners and the necessary staff. The Chief Commissioner, Deputy Chief Commissioner and other Commissioners are appointed by a two-third majority vote of the HPR upon nomination by a Nomination Committee composed of members of the HPR, HoF, the President of the Federal Supreme Court and representatives of the Ethiopian Orthodox, Evangelical, and Catholic Churches and the Islamic Council. The Chief Commissioner accounts to the HPR and the Deputy and other commissioners account to the Chief Commissioner. The appointees serve for five years and are eligible for re-appointment.

The objectives of the Commission are to create awareness through public education, to ensure that human rights are protected, respected and fully enforced, and that appropriate measures are taken where rights are found to have been violated.¹²⁶ The Commission has jurisdiction to entertain human rights issues that occur in any region and to ensure that human rights and fundamental freedoms are respected by all citizens, organs of state, political organisations and other associations as well as by their respective officials.¹²⁷ The jurisdiction of the Commission is, therefore, not limited to government action or inaction but extends to all the actors that are bound to obey and ensure observance of the Constitution.¹²⁸ The Commission may not investigate a complaint if the case is pending before the HPR, the HoF, Regional Councils or before courts of law of any level.¹²⁹

More specifically, the Commission is designed to ensure that laws, regulations, directives and other government decisions do not contravene constitutional rights.¹³⁰ The Commission is authorised to make recommendations toward the revision of existing laws, the enactment of new laws and the formulation of policies. It also has the power to give consultancy service on matters of human rights. The Commission is authorised to forward its opinion on human rights reports to be submitted to

¹²⁵ Ethiopian Human Rights Commission Establishment Proclamation no 210/2000. The Commission commenced operation in 2004.

¹²⁶ Proclamation no 210/2000, article 5.

¹²⁷ Proclamation no 210/2000, article 6 outlines the powers and duties of the Commission.

¹²⁸ Proclamation no 210/2000, article 9(2).

¹²⁹ Proclamation 210/2000, article 7.

¹³⁰ Proclamation no 210/2000, article 6(2). Note that this provision only refers to the rights of citizens. It is not clear whether the Commission has jurisdiction to entertain allegations of violations of the rights of non-citizens.

international organs and to translate into local vernaculars international human rights instruments adopted by Ethiopia and disseminate such instruments.

In cases of allegations of human rights violations, the Commission may undertake investigation, upon receipt of a complaint or of its own motion.¹³¹ To successfully discharge its duties, the Commission has the power to require the production of evidence and to issue summons as necessary. If the Commission finds a violation, it can issue appropriate remedies including ordering the discontinuation of the act that caused the grievance, rendering inapplicable the directive that caused the grievance and redressing the injustice suffered.¹³² Utmost priority should be given to the amicable settlement of disputes.¹³³ Although the recommendations of the Commission are not legally binding, failure to take measures to comply with the reports, recommendations or suggestions of the Commission within three months after receipt of such reports without stating the reasons for non-compliance may entail imprisonment from three to five years and or fine.¹³⁴ The Commission should indicate cases of non-compliance in its report to the HPR, including recommendations on further action by the HPR. A complainant or accused who is dissatisfied with a proposed remedy has the right to appeal following the official hierarchy in the Commission. A decision rendered by the Chief Commissioner is final.¹³⁵

The power of the Commission to investigate complaints can greatly reduce the burden on courts. The complaints procedure provides an efficient way of ensuring respect for human rights and addressing violations. The 2011 Activity Report of the Commission narrates, for instance, a situation where the Commission managed to ensure the release of more than 30 individuals who were arbitrarily detained without charge following opposition to the appellation of a *Woreda* (District).¹³⁶ The fact that

¹³¹ The Commission has considered thousands of complaints since its establishment in 2004. The significant majority of the cases relate to employer-employee relations submitted by employees of private firms, aid agencies and religious institutions. Some also relate to issues of the right to self-determination, rectification of alleged incorrect border demarcations between regional states, clashes between ethnic groups inhabiting areas bordering different regional states or *Woredas* (Districts) and also requests to assert distinct ethnic identity – Ethiopian Human Rights Commission ‘Inaugural report of the Ethiopian Human Rights Commission’ (February 2011) 87 – 89, Addis Ababa Ethiopia. This Report provides the five year activity report of the Commission. The Commission is working on its first report on the situation of human rights in Ethiopia.

¹³² Proclamation 210/2000, article 26.

¹³³ Proclamation 210/2000, article 26(1). In practice, as well, the Commission opts whenever possible to bring parties together with a view to amicably discuss and resolve matters – see Ethiopian Human Rights Commission (n 131 above) 89.

¹³⁴ Proclamation 210/2000, article 46(2).

¹³⁵ Proclamation 210/2000, article 27(3). However, the remedies issued by the Commission are mere recommendations. They are, therefore, not legally binding. The Report, however, indicates that the Commission ‘faces little resistance from concerned parties in securing the sought after relief for most of the petitions it handles’. The Commission also follows up on recommendations to ensure that they are complied with – Ethiopian Human Rights Commission (n 131 above) 90 & 91.

¹³⁶ Ethiopian Human Rights Commission (n 131 above) 89.

investigations can commence upon complaint by a victim, his or her relatives or any third party, and even at the Commission's own initiative, makes the Commission more accessible than courts.

Regarding its promotional work, as well, the Commission should play a significant role particularly given that the full enforcement of the CSO Proclamation has extremely limited the role of CSOs on human rights and good governance issues. It is commendable that the Commission has begun providing funds to human rights organisations, such as the Ethiopian Women Lawyers' Association (EWLA) and the Ethiopian Lawyers Association (ELA), that are providing legal aid and has signed other project agreements with EWLA and other organisations.¹³⁷

The Commission can provide a kind of non-binding *a priori* judicial review procedure by using its power to give consultancy service on matters of human rights. The consultancy service can be rendered during the drafting of a law. However, the Commission has not been active to use its consultancy functions in discussions on draft laws. Moreover, given that Ethiopian courts have limited role in constitutional review, the Commission should use its power to recommend legal reform to initiate the amendment or repeal of laws. However, the Commission has not again embarked seriously on its law reform mission yet.¹³⁸ The Commission should also recommend the enactment of new laws to give effect to constitutional rights. Enactment of new laws reiterating constitutional rights will empower courts to more readily enforce such rights.

Clearly, the Commission has extensive powers to significantly contribute toward the realisation of rights.¹³⁹ If used effectively, the Commission's activities can significantly diminish the side effects of the peripheral judicial role in the realisation of constitutional rights. So far, however, the Commission's role

¹³⁷ 'EHRC, religious leaders, EWLA signed project agreements' (22 February 2011) <http://www.ehrc.org.et/> (accessed 10 May 2011).

¹³⁸ The Commission only established a unit in January 2011 to look into and comment on proposed laws – 'Replies from the Government of Ethiopia to the list of issues to be taken up in connection with the consideration of the second periodic report of Ethiopia to the Human Rights Committee' CCPR/C/ETH/Q/1/Add.1 (10 May 2011) para 3. There is no information on whether the Unit has started operating. So far, it has not undertaken any law reform programme.

¹³⁹ In terms of its competence and responsibilities, the establishment proclamation of the Commission is in line with the UN Paris Principles Relating to the Status of National Institutions (The Paris Principles) (1993). When it comes to composition and guarantees of independence and pluralism, it does not seem so. The Establishment Proclamation does not create procedures whereby CSOs and other actors may be actively involved in the nomination of the Chief Commissioner or any other member of the Commission. It is only members of legislative bodies, the President of the Federal Supreme Court and religious representatives that are represented in the nomination committee that recruits potential appointees for final approval by the HPR. There is no place for participation of university experts or other professional as required by the Paris Principles. The Commission's geographical presence is also very limited. In practice, as well, the Commission has yet to firmly establish its role as an independent and credible human rights institution. So far, it has generally avoided engaging in politically sensitive cases at the highest level.

in curbing and criticising repressive government laws, policies and ideologies has been insignificant.¹⁴⁰ The Commission has not, for instance, expressed its views on one of the most controversial laws that was enacted to regulate the activities of CSOs. The silence reflected in routinely avoiding engagement with politically controversial legal and policy issues can be seen as complacency on the part of the Commission. Some of its activities in fact pose doubts about its independence and may imply that it is being used as political camouflage to legitimise and justify unacceptable government behaviour and deflect criticisms of international and domestic human rights groups. The Commission, for instance, criticised Human Rights Watch (HRW) for accusing the Ethiopian government of using donor funds to suppress political dissent and requested HRW to reconsider the 'relentless campaign, direct or indirect, to obstruct the flow of development aid to Ethiopia by development partners'.¹⁴¹

4.2. The Institution of the Ombudsman

Another entity directly relevant to the realisation of human rights is the Institution of the Ombudsman. In line with the Constitution, the HPR established the Ombudsman in 2000 with a view to 'rectify or prevent the unjust decisions and orders of executive organs and officials' and to ensure that individuals that have suffered from maladministration are provided easy access to remedies.¹⁴² Its objective is to bring about good governance that is of high quality, efficient and transparent, reinforce the rule of law, and ensure that citizens' rights and benefits provided for by law are respected by organs of the executive.¹⁴³ The Ombudsman is established as an autonomous federal government organ accountable to the HPR.¹⁴⁴ It has a Chief Ombudsman, Deputy Chief Ombudsman, Ombudsman heading the children and women affairs, and Ombudsman heading branch offices and the necessary staff. The Ombudsmen are appointed for five years with the possibility of re-appointment by a two-third majority vote of the HPR upon nomination by the Nomination Committee composed of members of the HPR, HoF and the President of the Federal Supreme Court. The Chief Ombudsman is accountable to the HPR and the other Ombudsmen are accountable to the Chief Ombudsman.

¹⁴⁰ Most of its work has focused on receiving and investigating complaints mainly asserting violations of labour laws in Addis Ababa. The Commission is currently expanding its geographical presence by establishing branch offices in Mekelle, Bahir Dar, Gambella, Jimma, Hawassa and Jigiga – 'Replies from the Government of Ethiopia' (n 138 above) para 3.

¹⁴¹ Ethiopian Human Rights Commission, Press Release 'The Ethiopian Human Rights Commission requests HRW to reassess its communications, calls on stakeholders to critically look into it' <http://ehrc.org.et/NewsEvents/tabid/59/Default.aspx> (accessed 10 May 2011); 'The Chief Commissioner of the Ethiopian Human Rights Commission defended its views on Human Rights Watch reports in a recent interview with the Voice of America' <http://ehrc.org.et/LinkClick.aspx?fileticket=qSKu2jdlko0%3d&tabid=36> (accessed 10 May 2011). The full letter of the Commission to Human Rights Watch is available at <http://ehrc.org.et/LinkClick.aspx?fileticket=Ji%2fBbt57Hzo%3d&tabid=36> (accessed 10 May 2011).

¹⁴² Institution of the Ombudsman Establishment Proclamation no 211/2000, preamble paras 3 & 4.

¹⁴³ Proclamation no 211/2000, article 5.

¹⁴⁴ Proclamation no 211/2000, article 13(1).

Unlike the Commission which has a broad mandate, the Ombudsman is concerned with maladministration within the executive. Its jurisdiction does not also comprise ensuring compliance with international human rights instruments. The proclamations establishing the Commission and the Ombudsman anticipate possibilities of overlap of functions. In such instances, the two institutions should determine by mutual consent which one takes up the complaint. In cases of disagreement, the entity that received the complaint first proceeds with it.¹⁴⁵

The main activity of the Ombudsman is receiving and investigating complaints in respect of maladministration and seeking remedies in cases where maladministration has occurred.¹⁴⁶ It supervises administrative directives, decisions and practices to ensure that they do not contravene the constitutional and legal rights of citizens. It also has the power to undertake, with a view to bringing about better governance, studies and research on ways of curbing maladministration. It is empowered to make recommendations toward revising existing laws, policies, directives and practices, and enacting new laws and formulating policies. However, the Ombudsman may not investigate decisions given by legislative councils established in accordance with election results in their legislative capacity; cases pending before courts of law of any level; matters under investigation by the Office of the Auditor-General; or decisions given by Security Forces and units of the Defence Forces in respect of matters of national security or defence.¹⁴⁷

If the Ombudsman finds a violation, it can issue remedies to ensure the discontinuation of the act or directive that caused the grievance and redress any injustice caused. Just like the Commission, the Ombudsperson should give utmost priority to the amicable settlement of disputes.¹⁴⁸ To successfully discharge its duties, the Ombudsman has the power to require the production of evidence and issue summons as necessary. Although the recommendations of the Ombudsman are not legally binding, failure to take measures to comply with the reports, recommendations or suggestions of the Ombudsman within three months from receipt of such reports without stating reasons for non-compliance may entail imprisonment from three to five years and or fine.¹⁴⁹ The Ombudsman should report cases of non-compliance in its report to the HPR including recommendations on further action by the HPR. A complainant or accused who is dissatisfied with a proposed remedy has the right to

¹⁴⁵ Common article 29, Proclamation no 211/2000 and Proclamation no 210/2000.

¹⁴⁶ Proclamation no 211/2000, article 6.

¹⁴⁷ Proclamation no 211/2000, article 7.

¹⁴⁸ Proclamation no 211/2000, art 26(1).

¹⁴⁹ Proclamation no 211/2000, art 41(2).

object/appeal to the official following the hierarchy in the Commission. A decision rendered by the Chief Ombudsman is final.¹⁵⁰

Despite its extensive powers, the role of the Ombudsman in curbing executive lawlessness has been insignificant. Just like the Commission, the Ombudsman has yet to challenge any sensitive government decision or policy. Both the Commission and the Ombudsman are invisible if the issue affects the interests of the ruling party.

5. Conclusion

Although the Ethiopian Constitution has limited the role of courts in constitutional review, it does not mean that courts have absolutely no role in the interpretation of constitutional rights. There are several ways in which the judiciary can play an active role in moulding the understanding and interpretation of constitutional rights. Judges sitting in regular courts should, therefore, recognise their power to interpret all laws in line with constitutional rights and international human rights instruments ratified by Ethiopia. They should determine in each individual case whether the application of laws can constitute a violation of any constitutional rights. Although a law may be constitutional on its face, its application in certain circumstances may constitute a violation of constitutional rights. Human rights advocates should also challenge government decisions based on statutes and constitutional provisions.

However, due to the fact that courts do not have the power to review the constitutionality of laws, they have to refuse to review decisions of administrative agencies because of laws that have excluded administrative judicial review. Some of the laws excluding administrative judicial review reversed previous judicial decisions. The absence of the power of constitutional review has created a judiciary that should loyally enforce laws largely without questioning their constitutional implications. The absence of the power of constitutional review and the extensive use of ouster clauses breed judicial helplessness. This helplessness is further reinforced by the excessively legalistic and positivist judicial approach to legislative and constitutional interpretation. Due to the civil law legal tradition and their historical subordination to the executive, Ethiopian courts and judges have been reluctant to recognise their heightened responsibility as guardians of human rights. There is need to change the prevalent judicial attitude in relation to their role as enforcers of human rights. A mixture of judicial helplessness,

¹⁵⁰ Proclamation no 211/2000, art 27(3). Just like the Commission, the remedies the Ombudsman issues are mere recommendations.

judicial attitude and perhaps at times (fear-induced) judicial complacency best explains the rather minuscule role of courts in the realisation of constitutional rights.

The Human Rights Commission and the Ombudsman are potentially crucial for the realisation of constitutional rights as they provide cheaper, simpler and faster alternatives to challenge human rights violations committed particularly by the executive. Resort to these two organs can also reduce the burden on courts. By recommending the repeal or amendment of laws that potentially contradict constitutional rights in line with their legal reform mandate, the Commission and the Ombudsman can complement the unsatisfactory constitutional adjudication process in challenging the constitutionality of laws. The Commission and the Ombudsman should also encourage the government to adopt laws to give effect to constitutionally enshrined rights thereby facilitating their judicial enforcement. They have, however, yet to decisively prove their independence and actively engage politically sensitive human rights issues.