

Chapter 7: Conclusion and recommendations

1. Findings and conclusions

At the risk of oversimplification, it is possible to identify two principal roles of any constitution, namely, establishing the process of determining who can rightly exercise legitimate political power, and stipulating the normative, procedural and institutional responsibilities of and constraints on those exercising power. The Ethiopian Constitution has largely been successful in empowering those who govern but has been unsuccessful in restraining them. Given the history of abuse of legislative and executive power and egregious human rights violations by the previous regimes – one a no-party absolute monarchy and the other a brutal one-party communist regime – characterised by the eminence of executives, one would be inclined to assume that the drafters of any subsequent constitution would have imposed effective constitutional restraints on political power and established institutional and procedural safeguards to check the exercise of such power. However, as discussed in the previous chapters, the 1995 Ethiopian Constitution failed to establish an effective and independent constitutional review system to ensure the realisation of human rights.

To be clear, this thesis focuses not on democratic governance as such but on the constitutional limits to democratic governance and the institutional arrangements designed to enforce such limits. It deals with the normative and institutional preconditions necessary to make constitutional review possible and effective in ensuring the realisation of human rights. The success of constitutional review in ensuring the realisation of human rights in any country depends on the existence of certain minimum conditions: (1) constitutional guarantees of justiciable rights, (2) an independent constitutional adjudicator, and (3) organised litigants who actively bring cases to the constitutional adjudicator. It should be noted that, although the focus of this thesis is the normative and institutional framework, the existence of the preconditions depends on the politico-legal context in a particular country. This thesis explores the (non)existence of these necessary preconditions for the success of constitutional review in the Ethiopian context. Each chapter incorporates specific conclusions and recommendations. This Chapter provides the major findings and recommendations. It also presents the different theories of constitutional review with a view to link the failure of the Ethiopian constitutional review system to the original intention of the dominant political group that adopted the Constitution and engineered the unique constitutional review system.

Constitutional review can play a significant role in the realisation of human rights. Experiences from Ghana, Uganda and Malawi indicate that constitutional review can contribute to the realisation of human rights even in countries that are not fully democratic. The experiences also indicate that opposition political parties, CSOs, media professionals and human rights advocates will likely resort to constitutional review if the power of constitutional adjudication resides with an organ whose independence is constitutionally protected and which has shown its keenness to enforce the constitution in practice. Unlike in Ethiopia where the power of constitutional review is entrusted to a political organ, in all the three countries considered, that power belongs to independent courts.

An independent constitutional review system is particularly important in Ethiopia due to the absence of effective control mechanisms between the legislative and executive organs emanating from the parliamentary form of government the Constitution establishes. The Ethiopian Constitution does not establish any checks and balances – institutional veto points – within the state structure in the making of laws and policies. The constitutional review system is the only possible avenue to challenge laws and policies and other administrative decisions based on constitutional standards. The entrenchment of justiciable rights, combined with the supremacy of the Constitution, provides the necessary normative basis for rights-based constitutional review in Ethiopia. Despite this clear normative basis, the contribution of constitutional review to the realisation of human rights has been invisible and almost totally irrelevant. The constitutional review system has failed to constrain the government from enacting several laws that have legalised very restrictive and potentially unconstitutional government policies and ideologies. Although the existence of justiciable constitutional rights is necessary for the success of constitutional review, it is clearly not sufficient. The mere existence of justiciable constitutional rights does not lead to successful constitutional review.

The failure of the constitutional review system in Ethiopia is partly attributable to the absence of an independent constitutional adjudicator. The power of constitutional review belongs to the HoF which is designed to be part of and work in harmony with the political organs. Contrary to worldwide patterns, where an independent constitutional adjudicator is established to oversee compliance with constitutional requirements, a purely political organ is established as the guardian of the Ethiopian Constitution. Under the Constitution, each electoral winner is mandated to appoint its own constitutional adjudicators. The Constitution does not establish an independent institution to prevent or redress the abuse of power by governing political groups, thereby reinforcing a take-all or lose-all

political scenario that has historically plagued Ethiopian politics.¹ Given that the HoF is designed to be fully controlled by the political group that is in power, the Ethiopian Constitution is a constitution without a guardian. It is unlikely, almost naive, to expect a political majority controlling the HoF to effectively enforce constitutional limits on its powers. As a direct result of the absence of an independent constitutional adjudicator, the role of the Ethiopian constitutional review system in calibrating legislative and policy making in line with constitutional requirements has been insignificant.

Two principal reasons provided the justification for empowering the HoF as the final arbiter of constitutional disputes, namely, the desire to ensure that the ethnic groups, whom the Constitution declares are supreme, retain the power to interpret it, and the counter-majoritarian character of judicial review.

At close scrutiny, however, it appears that the constitutional review system does not ensure the effective protection of smaller ethnic groups as the HoF has a majoritarian composition. The bigger ethnic groups have a proportionately higher number of representatives in the HoF. Most importantly, the Ethiopian constitutional review system cannot ensure the effective protection of individual rights. Because the constitutional adjudicator is part of the government and is designed to be exclusively dominated by political groups that have won the elections, it cannot independently and effectively adjudicate disputes between those in government and those outside government, which the adjudication of human rights often, if not always, entails. Only an organ that is independent of the political organs can reasonably be expected to reach at conclusions different from the wishes and decisions of the political organs.

Objections to constitutional review based on democratic theory also do not justify the conflation of the power of constitutional review with the same organs the constitution aims to limit. The counter-majoritarian difficulty does not justify the failure to establish a constitutional review system that can ensure the effective protection of human rights. Rights-based constitutional review is not undemocratic. Constitutional review rather reinforces democracy by protecting rights that are essential to the proper functioning of democracy. In practice, as well, independent constitutional review is important in enforcing constitutional limits on government power, especially in less democratic countries where politicians lack an unwavering commitment to human rights. The principal role of any constitution is to

¹ Ali identifies a 'political game of take-all-or-lose-all' as the 'malaise of Ethiopian politics' – S Ali 'Is pluralism a fiasco in Ethiopia?' in S Ege *et al* (eds) *Proceedings of the 16th International Conference of Ethiopian Studies* Vol. 2 (2009) 667 – 668. See also M Gudina *Ethiopia: Competing ethnic nationalisms and the quest for democracy* (2003) 110.

limit the exercise of political power. Any sensible constitutional review system should, therefore, ensure that the constitutional adjudicator is sufficiently isolated and independent from the political organs. As indicated, however, the Ethiopian constitutional review system is designed to be part of and work in harmony with the political actors. Moreover, the counter-majoritarian challenge has often been invoked to criticise the power of courts to review the constitutionality of primary statutes. However, Ethiopian courts are excluded from declaring unconstitutional not only primary statutes but also all other government decisions. The exclusion of the judiciary is clearly more sweeping than that mandated by the counter-majoritarian dilemma.

In any case, the Ethiopian Constitution does not establish a constitutional review system that has been effectively absolved from counter-majoritarian charges. Members of the HoF are not directly elected by the people. They are rather appointed by the political groups that control the legislative councils of the regional states. Although the Constitution anticipates the possibility where the regional legislative councils may organise direct elections to choose members of the HoF, this is unlikely to happen as the dominant political group will lose its privilege to determine who should become a member of the HoF. As an organ composed of members who are not elected, the exercise of the power of constitutional review by the HoF can be challenged on democratic grounds. As such, the counter-majoritarian character of constitutional review could not have been the real reason behind empowering the HoF as the final arbiter of constitutional matters.

The granting of the power of constitutional review to a purely political organ has defeated the whole purpose of declaring the supremacy of the Ethiopian Constitution and has rendered meaningless the constitutional guarantee of rights. Human rights standards without corresponding institutional safeguards are mere mythical charades. A constitution can only be supreme if it establishes independent institutional safeguards to ensure that the limits on government power are not abridged at a stroke of legislation or executive action. Because the constitutional adjudicator is designed to be dominated by whichever political group wins elections, it is not the Constitution but the political group that controls the political organs that is truly supreme.

Ethiopian courts have been excluded from invalidating unconstitutional laws and executive decisions. As a result, their involvement in the constitutional review system has been limited. Their principal role in the constitutional adjudication process relates to their power to refer constitutional issues to the Council of Constitutional Inquiry. Nevertheless, courts can still influence the understanding and interpretation of constitutional provisions in their day to day activities. Courts can and should, for

instance, interpret laws in line with constitutional rights and international human rights instruments. Courts also have an important role in ensuring the realisation of constitutional rights that have been enacted in subordinate statutes. However, reminiscent of the civil law tradition, Ethiopian judges follow an extremely legalistic and positivist approach to legal interpretation focused on applying legal texts to particular facts regardless of the implications to constitutional rights.² This formalistic approach has led to the failure of courts to mainstream constitutional rights in the interpretation and application of laws. Courts and judges do not consider the realisation of human rights as their responsibility. The judicial mentality focuses on enforcing laws rather than scrutinizing their implications to human rights. In addition, the enactment of several laws that have precluded the review of decisions of administrative agencies by courts (ouster clauses) has further weakened the role of the judiciary in mainstreaming constitutional rights while reviewing the decisions of administrative agencies.

CSOs, opposition political parties, human rights advocates and other individual litigants have been reluctant to challenge the constitutionality of several repressive laws, policies and executive decisions. Indeed, human rights advocates and CSOs have even refrained from challenging the constitutionality of the CSO Law that has effectively crippled their existence and operation, let alone other laws that affect the public interest. So far Ethiopia has not seen the emergence of litigation-centred CSOs. These organised litigants, which constitute the support structure for human rights litigation, have been reluctant to resort to constitutional review primarily due to the lack of an independent constitutional adjudication system. In the absence of the prospect of supply of rights by an independent constitutional adjudicator, it is hard to expect individuals and groups to invest their limited time and resources in constitutional review.³

The existence of an independent constitutional adjudicator necessarily influences the tendency of CSOs, human rights advocates and opposition parties to resort to constitutional litigation. The tendency of litigants to rely on the constitutional review system is tempered by the lack of an independent organ in charge of constitutional review. CSOs, human rights advocates and opposition political parties will only rely on constitutional review when there is at least a slight possibility that the constitutional adjudicator

² Moustafa and Ginsburg observe that ‘civil law judges may be relatively more constrained than their common law counterparts as a formal matter’ – 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.

³ T Ginsburg ‘The global spread of constitutional review’ in K Whittington *et al* (eds) *Law and politics* (2008) 90.

may uphold their claims.⁴ Given the political and economic costs associated with litigation, it is only when there is a prospect of success that individuals and groups will likely resort to constitutional adjudication. On top of the lack of an independent adjudicator, CSOs that dare to challenge the CSO or other laws may be subjected to government harassment including de-registration, which is justifiable under the CSO Law. Moreover, losing a constitutional case can provide symbolic legitimacy to government decisions. The Ethiopian experience demonstrates that when losing a constitutional case is likely and might be seen as legitimising government action, or when resorting to litigation is seen to potentially attract direct or indirect government reprisal, constitutional review will not be a strategic option.

In sum, this thesis identifies three main mechanisms that the Ethiopian government has employed to preclude and contain any possibility that can undermine or reverse legislative and policy decisions through constitutional review. First, it has retained the power of constitutional review and excluded independent courts from inquiring into the constitutionality of legislative and executive measures. Second, the government has enacted laws intended to strategically incapacitate CSOs and human rights advocates that would have otherwise provided the necessary litigation support structures by actively litigating constitutional cases. Third, the government has enacted several laws that exclude administrative judicial review (ouster clauses) in relation to sensitive issues such as the registration, operation and de-registration of human rights CSOs, and voter education and election observation issues. The combination of these factors has ensured that the constitutional review system and courts play no role in challenging the desires, and legal and policy preferences of the governing political group.

The Ethiopian chronicle helps us to develop a theory of failure of constitutional review. In the absence of a formally independent institution for constitutional adjudication, one cannot expect a successful constitutional review system. The absence of an independent constitutional review system in turn discourages litigation support structures from relying on the system to ensure the realisation of human rights and other constitutional restraints. A dependent constitutional adjudicator together with a weak litigation support structure leads to the failure and irrelevance of a constitutional review system. The failure to establish an independent constitutional review system and to create an environment

⁴ It should, however, be noted that strategic litigation may be pursued even when the prospect of success is low. Even losing cases can have significant positive implications to social movements – D Nejaime ‘Winning through losing’ (2010-2011) 96 *Iowa Law Review* 941. In the context of Israel, Dotan and Hofnung observe that political parties and individual politicians resort to constitutional litigation, even when the chances of winning are marginal, to gain considerable media exposure (publicity) – Y Dotan and M Hofnung ‘Legal defeats – political wins: Why do elected representatives go to court?’ (2005) 38 *Comparative Political Studies* 75.

conducive to the operation of CSOs is mainly a consequence of the lack of a rights-culture on the part of the governing political group and its desire to shun political dissent and absolutely and singularly dominate political space. The existence of a constitutional adjudicator outside and independently of political organs could have encouraged CSOs, opposition political parties and human rights advocates to resort to it more often. Frequent resort to the constitutional adjudication system could have potentially resulted in the invalidation of some laws and executive decisions, at least those laws and decisions that do not immediately threaten the core interests and survival of the governing regime. The existence of an independent constitutional adjudicator would have reduced the probability of state repression of rights, including suppression through the use of illiberal laws.

This thesis attributes the failure of the constitutional review system in Ethiopia to the non-existence of the basic normative and institutional prerequisites for its success. Constitutional review has failed to ensure the realisation of human rights because of the institutional design deficit for constitutional review and, as a result, the reluctance of CSOs, opposition groups, and human rights advocates to relentlessly challenge the constitutionality of laws and executive decisions. It should, however, be noted that the thesis does not conclude that the existence of an independent constitutional review system and a robust litigation support structure necessarily and automatically leads to successful constitutional review. The thesis does not conclude that, had there been an independent constitutional adjudicator, the relapse of Ethiopia to authoritarianism would have been avoided. Constitutional review is not a magical wand that can purify all the human rights ills haunting a particular state. The existence of an independent constitutional review system does not guarantee the success of its use.⁵ Even if the constitutional adjudicator has wide powers, it might lack autonomy and may rather become an instrument of suppression.⁶ Particularly in authoritarian regimes, few political effects ‘can be traced to particular judicial causes’.⁷ Indeed, constitutional review cannot turn ‘a demonic government angelic’.⁸ Factors such as the power-balance between competing political forces, the dominance of the political

⁵ M Volcansek ‘Bargaining constitutional design in Italy: Judicial review as political insurance’ (2010) 23 *West European Politics* 280, 183 – 184 observing that ‘judicial selection, tenure and removal, limitations on access and justiciable topics, and the form of review determine how judicial review will be exercised’. See also A Lipjhart *Patterns of democracy: Government forms and performance in thirty-six countries* (1999) 216 – 232 observing that, even in democratic countries, constitutional review systems do not always actively constrain government power.

⁶ In the context of Mexico prior to 2000, see R Barros ‘Enforcing the autocratic political order and the role of courts: The case of Mexico’ in Ginsburg and Moustafa (n 2 above) 180 *et seq.*

⁷ M Shapiro ‘Courts in authoritarian regimes’ in Ginsburg and Moustafa (n 2 above) 335.

⁸ B Simmons *Mobilizing for human rights: International law in domestic politics* (2009) 15. Although Simmons made this observation in the context of the effects of treaty ratification on state compliance, it is equally applicable to constitutional review.

organs by a single political group, and the prevailing political and social culture towards constitutionalism influence the effectiveness of a formally strong and independent constitutional review system.⁹

The success of a constitutional review system to constrain the state partly depends on the nature of the government. The increase in the power of independent constitutional adjudicators is likely to succeed in constraining governments in democratic or democratising states.¹⁰ In fact, empowered and independent constitutional adjudicators have been shown to be less likely to actively constrain government power even in democratic states in instances where the political system is dominated by a single political group. In the context of Japan, for instance, despite the establishment of a strong constitutional review system, the role of constitutional review has been insignificant partly due to the continued dominance of the political system by a single political group.¹¹ Political uncertainty resulting from competitive party systems has been argued to be the driving force behind the active role of formally independent constitutional review systems.¹² Where there are strong parties with comparable chance of alternating in power, 'each party will want strong judicial review and independent judges to protect the constitutional agreement when the party is in opposition'.¹³ In short, institutional design matters, but the political context matters too.

In the Ethiopian context, the political transition has since 2005 been more towards authoritarianism than democracy. As a result, it is difficult to conclude that even a formally independent and powerful constitutional adjudicator could have effectively challenged the core interests of the dominant political

⁹ S Gloppen 'Courts and social transformation: An analytical framework' in R Gargarella *et al* (eds) *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006) 55.

¹⁰ Simmons (n 8 above) 12 – 17. After analysing the constraining impact of international treaties on domestic politics, Simmons observes that treaties are likely to have the highest impact not in stable democracies or stable autocracies but in 'fluid domestic political settings', countries in transition to democracy. Moravcsik similarly observes that international human rights regimes influence the most those states 'in which individuals, groups or government seek to improve or legitimate their own democratic practices' – A Moravcsik 'Explaining international human rights regimes: Liberal theory and Western Europe' (1995) 1 *European Journal of International Relations* 157, 157 & 184.

¹¹ R Hirschl 'The Nordic counternarrative: Democracy, human development, and judicial review' (2011) 9 *International Journal of Constitutional Law* 449, 465 observing that 'little or no judicial empowerment has taken place in countries ... where a single political force has controlled the political system'. Compare, however, the situation in South Africa where, despite the dominance of the political organs by the African National Congress, the Constitutional Court has actively invalidated several important laws and executive measures – see T Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106 observing that the South African Constitutional Court has established an enviable reputation despite the dominance of the political arena by a single political party.

¹² M Shapiro 'The success of judicial review and democracy' in M Shapiro and A Stone Sweet *On law, politics and judicialization* (2002) 160 observing that the fact that 'all successful, domestic, constitutional judicial review systems ... are associated with more or less democratic competitive party systems' can lead one to conclude that 'competitive party systems are a necessary condition to constitutional judicial review'.

¹³ Volcansek (n 5 above) 283.

group. The success of the constitutional review systems in Ghana and Malawi in ensuring the realisation of human rights has been facilitated by the fact that both states have been in a transition towards democracy since their constitutions were adopted. In Uganda, as well, although the recent transition has been more towards authoritarianism, the presence of an active civil society sector and a relatively independent judicial system has ensured the modest success of the constitutional review system. In Ethiopia, on the other hand, the lack of an independent constitutional review system has excluded any possibility where CSOs, opposition groups and other human rights advocates rely on the system to challenge the state. This has led to the failure of the system in ensuring the realisation of constitutional rights. The deliberate designing of a dependent constitutional review system has precluded any possibility of challenging effectively government decisions based on constitutional rights.

Although many scholars have challenged the assumption that constitutional review can protect rights only in democracies, the potential contribution of a formally independent constitutional review system in protecting rights in authoritarian or semi-authoritarian regimes is not clear-cut. There should be no doubt that this thesis only addresses the mechanisms designed by the Ethiopian governing regime to ensure that opposition groups and human rights advocates do not rely on the robust constitutional rights provisions to challenge the state. Even if the Constitution had empowered the ordinary judiciary or established a centralised constitutional court with wide constitutional review powers, several factors such as one-party dominance, judicial self-restraint, the personal and professional attitudes or ideologies of the judges, legal and historical tradition, legislative reversal of decisions (political backlash), court-packing, outright intimidation or firing of judges, the use of ouster clauses, strict standing rules, legal and illegal attacks on litigation support structures, refusal to comply with decisions, and even the establishment of parallel ‘kangaroo’ courts could have weakened the role of an independent constitutional adjudicator.¹⁴ The success of formally strong constitutional review systems to constrain authoritarian regimes often depends on the extent to which dominant political groups tolerate or allow the active role of the constitutional adjudicator.¹⁵

¹⁴ R Hirschl ‘The new constitutionalism and the judicialisation of pure politics worldwide’ (2006) 75 *Fordham Law Review* 721, 744. On how authoritarian rulers can capitalize on the regime-supporting roles of formally independent and powerful courts while minimizing their utility to opposition groups and human rights advocates, see Ginsburg and Moustafa (n 2 above) 14 – 21. See also P Solomon, Jr ‘Courts and judges in authoritarian regimes’ (2007) 60 *World Politics* 122, 141 – 145.

¹⁵ Solomon (n 14 above) 143 observing that the gap between ‘formal institutions and informal practices’ is more common and systematic in authoritarian states than in democracies. See also E Ip ‘A positive theory of constitutional judicial review: Evidence from Singapore and Taiwan’ (2012) 2 *Asian Journal of Law and Economics* 1 observing that the success of formally strong constitutional review systems in challenging the state depends on ‘politics and historical contingency’.

Nevertheless, so far the failure of the constitutional review system in Ethiopia cannot mainly be attributed to the authoritarian nature of the government. Even between 1995 and 2005, where there was a modest transition towards democracy, there was no successful constitutional challenge against any laws or other government decisions. From 1995 to 2010, Ethiopia was ranked 'partly free' by Freedom House. *The Economist* classified Ethiopia as 'authoritarian' only in 2010. The failure of the constitutional review system so far is attributable to the design of a formally dependent constitutional review system and, as a result, the lack of continuous engagement of the constitutional adjudicators by relentless litigants. The absence of an independent constitutional adjudication system has reinforced the general lack of interest in constitutional review, perhaps due to the influence of the civil law legal culture. One could investigate the impact of the authoritarian nature of government or of judicial tradition on constitutional review only if the Constitution had established a formally independent constitutional adjudication system and where litigants resort to the system to challenge the state. If the constitutional adjudicator is deliberately designed to be part of the governing political group, constitutional review will likely fail to constrain the exercise of political power, whether or not the government is authoritarian.

2. Explaining the establishment, and retention, of a dependent constitutional review system in Ethiopia: A 'legitimation' theory of constitutional review

Constitutional review allows unelected judges to control the legal and policy choices made by politicians. Why then would politicians willingly establish independent constitutional review mechanisms with the attendant effect of constraining their powers? A decision to establish constitutional review is counter-intuitive given that politicians often act strategically to maximize their potential for unlimited power.¹⁶ Judicial empowerment seems to run against the interest of political power-holders.

Political scientists have attributed the origin and development of constitutional review to the functional need for the peaceful resolution of disputes.¹⁷ Shapiro observes that successful constitutional review is, among others, caused by and a requisite to genuine federalism.¹⁸ The logic is that since federalism necessarily creates different levels of governments, each with its own legislative and executive jurisdiction, leading to the vertical division of powers, conflict over jurisdiction is inevitable. A neutral

¹⁶ Volcansek (n 5 above) 281.

¹⁷ Ginsburg (n 3 above) 82.

¹⁸ Shapiro (n 12 above) 149. Auer similarly observes that '[f]ederalism was first in bringing the constitution to the courts, long before civil rights and liberties did the same' – Auer 'The constitutional scheme of federalism' (2005) 12 *Journal of European public Policy* 419, 427.

constitutional arbiter is, therefore, conceived to ensure the peaceful resolution of such disputes as they arise. The close link of constitutional review with federalism is reflected in the fact that the countries that had functioning constitutional review systems prior to the Second World War were all federal states – US, Canada, Australia and Switzerland – and a large number of federal states today have some form of constitutional review.¹⁹ The federalism hypothesis also explains the growth of judicial review in unitary states, such as France, with horizontal divisions of power between the executive and the legislative branches of government.²⁰ Federalism in particular and division of powers in general are some of the main drivers for the establishment of constitutional review.

The fact that many unitary states with parliamentary forms of government, and, therefore, little or no division of powers between the executive and legislature, have established constitutional review mechanisms clearly shows that the division of powers hypothesis is a sufficient but not a necessary condition for the establishment of judicial review. Many political scientists link the proliferation of constitutional review in recent years to the post-war rights-awareness and popularity of limits on the exercise of political power (the rights hypothesis).²¹ Ideological commitment to human rights partly explains why countries have established constitutional review in modern times. The rights hypothesis is said to have motivated the establishment of constitutional review by several African and East European states after the fall of the Berlin Wall.²² Constitutional review has been associated with the entrenchment of human rights and democratic values.

The division of power and the constitutional guarantee of rights provide the traditional explanations for the proliferation of constitutional review around the world.²³ A constitution that endorses division of powers and human rights is likely to establish a strong constitutional review system. The division of powers and the rights hypotheses are, therefore, not mutually exclusive.

However, even the rights hypothesis does not sufficiently explain the decision of politicians to establish constitutional review, particularly in countries where there was no demand for rights, or where such

¹⁹ Ginsburg (3 above) 84.

²⁰ Shapiro (n 12 above) 151. Some scholars have argued that the same idea explains why countries creating free trade agreements establish organs exercising review power over the decisions of the member states in line with community law e.g. the European Court of Justice – Ginsburg (n 3 above) 84.

²¹ Shapiro (n 12 above) 153.

²² Ginsburg (n 3 above).

²³ J Ferejohn 'Judicializing politics, politicizing law' (2002) 65 *Law and Contemporary Problems* 41, 55 – 61.

demand was not strong enough at the time of constitutional drafting.²⁴ Most importantly, both the federalism and rights hypotheses do not account for the ‘variation in institutional design of constitutional review’.²⁵ The hypotheses do not sufficiently explain why some countries have strong and independent constitutional review systems while others only have weak and dependent constitutional review systems. The traditional theories do not also take into account the influence of the human agency and how the interest and desires of elites and those who draft constitutions influence constitutional review designs.

Political scientists have, therefore, come up with ‘institutionalist’ approaches to explain the theoretical drivers or ‘political vectors’ behind the establishment of constitutional review by looking at clues at the time of constitutional drafting or reform.²⁶ According to these theories, institutions matter and institutional choices are therefore not accidental. Institutional choices rather reflect the desires and interests of the elites who design them. The ‘insurance’ or ‘party-alternation’ theory posits that constitutional review is established as a response to the problem of political uncertainty at the time of constitution making.²⁷ Ginsberg observes that

parties that believe they will be out of power in the future are likely to prefer constitutional review by an independent court, because the court provides an alternative forum for challenging government action.²⁸

This theory holds that if political groups under whose auspice a constitution is being drafted are not confident that they will control power after the adoption of the constitution (a situation of electoral uncertainty), they are likely to prefer constitutional review by an independent court. Constitutional review is seen as an instrument to ameliorate the effects of potential electoral loss after the adoption of constitutional democracy. Therefore, the ‘insurance’ theory particularly applies to cases where the drafting process is controlled by parties with more or less comparable chance of assuming power under the newly conceived constitutional dispensation.

²⁴ Ginsburg (n 2 above) 89 – 90.

²⁵ Ginsburg (n 2 above) 90. See also R Hirschl *Towards juristocracy: The origins and consequence of the new constitutionalism* (2004) 212 observing that traditional explanations for judicial empowerment do not ‘account for the significant variation in the timing, scope, and nature of this phenomenon [of judicial empowerment] throughout the world’.

²⁶ Ginsburg (n 2 above) 90; Hirschl (n 24 above) 212.

²⁷ See generally J Finkel *Judicial reform as political insurance: Argentina, Peru, and Mexico in the 1990s* (2008); T Ginsburg *Judicial review in new democracies: Constitutional courts in Asian cases* (2003). Finkel and Ginsburg observe that political groups in transition to democracy in Latin American and Asian countries established constitutional review as political insurance against the risk of losing elections.

²⁸ Ginsburg (n 2 above) 90.

The ‘hegemonic preservation’ theory is related to the insurance theory. It observes that political elites who foresee themselves as losing power – departing or increasingly threatened ‘hegemons’ – are likely to empower independent courts to exercise constitutional review.²⁹ The constitutional review system ensures that the bargains in constitutional and legislative provisions will be respected by the new government. Constitutional review is seen as a means ‘to preserve hegemony outside of majoritarian contexts’ and protect elite interests from the vagaries of democratic politics.³⁰ As such, hegemonic elites will agree to establish a strong and independent constitutional review system only if they believe that doing so would better protect their interests.

The insurance and hegemonic preservation theories are founded on the electoral uncertainty that the adoption of constitutional democracy breeds as a motivating factor that drives the establishment of constitutional review. According to these theories, the spread of democracy, with the accompanying electoral uncertainty, is seen as the cause of the spread of the institution of constitutional review.³¹

The ‘commitment’ theory of constitutional review relates to cases where the constitutional drafting process was dominated by a single political group. According to this theory, the dominant group may ‘acquiesce to judicial review as a means of indicating its own credibility, its intention to honour the boundaries of the constitutional bargain’.³² It also predicts that ‘if the dominant party’s majority is so large that it does not need to appease smaller parties, there might be no judicial review’.³³ Political groups dominating the constitutional drafting process which believe that they will be able to govern for an extended period after the adoption of the constitution have little motivation to establish an independent constitutional review system.³⁴

²⁹ See generally Hirschl (n 24 above) 211 *et seq.* Hirschl argues that ‘the global trend toward judicial empowerment through constitutionalisation should be understood as part and parcel of a large-scale process whereby policy-making authority is increasingly transferred by hegemonic elites from majoritarian policy-making arenas to semiautonomous, professional policy-making bodies primarily in order to insulate their policy preferences from the vicissitudes of democratic politics’ – 16.

³⁰ Volcansek (n 5 above) 283.

³¹ Hirschl attributes the recent empowerment of judiciaries in Scandinavian countries to the transformation of domestic ‘electoral markets’ toward stiff political competition, and the influence of the growing power of European regional judicial organs – Hirschl (n 11 above) 465 *et seq.*

³² Volcansek (n 5 above) 282.

³³ Volcansek (n 5 above) 282.

³⁴ In addition to the three theories, some theorists have linked the decision to establish judicial review in some countries to transnational legal influence and diffusion, such as when a state establishes a constitutional review system similar to its colonial master – Z Elkins and B Simmons ‘On waves, clusters and diffusion? A conceptual framework’ (2005) 598 *Annals of American Academy of Political Science* 33. This theory undermines the relevance of domestic forces in shaping the recognition and institutional design of constitutional review.

As it was indicated, the Ethiopian Constitution establishes a constitutional review system that is part of and dependent on the political organs. Most of the theories of constitutional review do not explain the institutional choice in Ethiopia. The federalism and rights hypotheses only justify the establishment of independent and strong constitutional review systems. In the Ethiopian context, the entrenchment of human rights guarantees and the recognition of the right to secession, which pushes federalism to the extreme, should, according to the federalism and rights hypotheses, have led to the establishment of a strong constitutional review system. However, since the EPRDF anticipated absolute control of both the federal and regional states after the adoption of the Constitution, the issue of conflict between the federal and regional governments did not attract sufficient attention amongst the EPRDF. Moreover, there was not a rights-based political tradition or strong social demand for rights. If there was any political conviction, it was for the recognition of the equality of ethnic groups, which was spearheaded by the EPRDF government. The EPRDF did not need to appease the people at large but the ethnic-based warring factions that constituted it.

Similarly, the insurance and hegemonic preservation theories primarily explain decisions to establish strong constitutional review systems. They do not, therefore, apply to Ethiopia, which has a dependent and weak constitutional review system. The transnational or diffusion theory does not also explain the unique Ethiopian constitutional review system.

It is submitted that the commitment theory partly explains the establishment of a dependent and weak constitutional review system in Ethiopia. The theory posits that if a constitutional drafting process is dominated by a single group, which hopes to maintain an uninterrupted grip on political power, with little commitment to human rights, it is likely that a constitution will not establish a constitutional review system. The drafting process of the Ethiopian Constitution was absolutely dominated by the EPRDF, which was a cohesive coalition of ethnic-based political parties.³⁵ The commitment of the EPRDF towards the rights of ethnic groups explains the empowerment of the HoF to exercise constitutional review. There was, however, no intention to establish strong institutional constraints on the powers of the government. As a result, the HoF was designed to be controlled by the political group that controls the political organs. The constitutional review system was designed to be part of and work in harmony with the governing political elite.

³⁵ See discussion in section 1, Chapter 1.

The commitment theory and other theories do not, however, explain why dominant political groups decide to establish formally dependent constitutional review systems, when they could have established a no-review system. A political group that believes that it will continue to rule after the adoption of the constitution and that does not have commitment towards individual rights is not likely to establish any form of constitutional review. There are two possible explanations for the decision of the dominant political group to establish a weak and dependent rather than a no-constitutional review system in relation to individual rights in Ethiopia.

First, the EPRDF was composed of ethnic based ‘independent’ liberation groups, which were later converted into political parties. As a result, there was a need to guarantee that the constitutional guarantees protecting the rights of ethnic groups will be protected by an organ that represents these groups. The constitutional review system was established not to appease smaller opposition political parties, as the commitment theory speculates, but to appease members of the EPRDF coalition representing different ethnic groups. This indicates that had it not been for the explicit recognition of the rights of ethnic groups, there would not have been a constitutional review system in Ethiopia. In that sense, the review of constitutionality based on the individual rights guarantees is merely ancillary to and a by-product of the goal of protecting the rights of ethnic groups through constitutional review.

Second, despite the fact that the emphasis was on the rights of ethnic groups, the dominant political group did not exclude constitutional review based on the individual rights provisions of the Constitution. The costs or risk of excluding rights-based constitutional review were seen as insignificant compared to the potential benefits it could have. On the one hand, given the fact that the HoF was designed to be dominated by the winning political group, the danger or risk of upholding challenges against government decisions was insignificant, at least in relation to issues that matter to the regime. On the other hand, the possibility of rejecting constitutional challenges against the decisions of the dominant party was high. Such rejection has the potential to provide symbolic validation or legitimacy to the decisions of the ruling political group. A dependent constitutional review system under the control of the political majority serves as a legitimising shield to deflect potential claims of violations of human rights and other constitutional restraints. Legitimation, therefore, provides the second principal explanation for the origins of the weak rights-based constitutional review system in Ethiopia. In practice, as well, the decisions of the Council of Constitutional Inquiry in all the controversial human rights cases

so far show a pattern of justifying, rather than constraining, government decisions.³⁶ The Council has so far cooperated with the regime. Given the constitutional review system was adopted to justify and legitimise government decisions, the failure of the system to ensure the realisation of human rights and the effectiveness of constitutional restraints should not come as a surprise.

Indeed, the ineffectiveness and potential legitimising role of the existing constitutional review system also explains why the government has never considered reforming the system. Retaining a merely legitimising constitutional review system is beneficial to the government. The ruling party does not foresee any future electoral loss – a basic precondition that can motivate the establishment of a strong constitutional review system according to the insurance and hegemonic preservation theories. In fact, the dominance of the EPRDF has intensified. It for the first time won 99.6% of the seats in the House of Peoples’ Representatives in the 2010 elections. Nor has the EPRDF demonstrated any serious commitment towards individual rights – a basic precondition in the commitment theory. In fact, the level of individual freedom has continued to plummet since the 2005 elections. From the perspective of all the three theories, therefore, it is unlikely that the constitutional review system will be reformed any time soon.

The counter-majoritarian challenge and the protection of the rights of ethnic groups merely provided the overt justification to EPRDF’s deep-rooted lack of belief in human rights and the notion of a limited government. The Ethiopian system of constitutional review was originally designed not to constrain political power. The system was rather designed to reinforce and legitimise the status quo, justify the exercise of political power, and countenance executive and legislative supremacy as opposed to constitutional supremacy. As a result, it has failed to put a brake on rampant violations of human rights, often based on laws and policies. By retaining the power of constitutional review within the political organs, the dominant political group has avoided any risk whereby an otherwise dependent constitutional adjudicator could provide opportunities to challenge the state.³⁷ Moreover, the continuation of the absolute grip on power of the EPRDF has excluded any possibility of, what Helmke

³⁶ See the discussion in Chapter 3, section 5.1. However, to legitimise activities of the government, constitutional adjudicators should display a degree of independence from the political organs by striking government laws and policies in certain instances – Ginsburg and Moustafa (n 2 above) 6. The constitutional adjudicators in Ethiopia are considered as complicit in the political system and, therefore, enjoy very low level of legitimacy. Indeed, the main reason why opposition members and CSOs do not actively resort to constitutional litigation is because of lack of confidence in the system. It is, therefore, hard to conclude that the constitutional adjudication system has indeed provided the political elite the legitimacy it desperately needs.

³⁷ In the context of Egypt, Moustafa observes that the establishment of an independent constitutional review system with a view to attract investment by assuring investors that an independent constitutional adjudicator will protect their properties had unintended or ancillary consequences such as the protection of individual rights against the authoritarian regime – T Moustafa ‘Law and resistance in authoritarian states: The judicialisation of politics in Egypt’ in Ginsburg and Moustafa (n 2 above) 151.

dubbed, 'strategic defection' where dependent constitutional adjudicators in authoritarian regimes defect against the government once it starts to lose its dominance with a view to distance themselves from the weakening government and 'curry favour' with the future government.³⁸ In any case, strategic defection or the otherwise consolidation of constitutional review can only happen when there is a constitutional adjudicator that exists outside the absolute control of the political organs. In the Ethiopian context, because the HoF is designed to be controlled by the winning political group, strategic defection is unlikely, if not impossible, to happen, even if the power of the dominant political group diminishes.

3. Recommendations

As a result of the parliamentary form of government the Ethiopian Constitution establishes, there are no effective control mechanisms between the legislature and executive. On top of this, the Constitution establishes a dependent and weak constitutional review system. Because of the absence of any effective mechanism to prevent the adoption of and invalidate unconstitutional measures, the government of the day, not the Constitution, is, as a matter of practical reality, supreme. The lofty ideals inscribed in the Ethiopian Constitution are left to the mercy of the government of the day, with little institutional safeguards. To ensure the realisation of the values and provisions the Constitution prescribes, therefore, there is need to reform the Constitution to empower formally independent courts or a constitutional court to adjudicate disputes concerning the constitutionality of all legislative and executive measures. This reform should at least be undertaken in respect of the adjudication of the human rights provisions of the Constitution. An independent court with strong powers to review the constitutionality of laws and executive measures is necessary, if constitutional rights are to become meaningful.

Given the civil law legal tradition of Ethiopia, with the attendant difficulty in applying the principle of judicial precedence, the emphasis on the counter-majoritarian dilemma and the low level of trust the ordinary courts enjoy amongst the people, CSOs and opposition political groups, this thesis recommends the establishment of a centralised system of constitutional review.³⁹ It is possible to establish either a new constitutional court, or empower the Federal Supreme Court as the only and final constitutional arbiter. Whichever organ is empowered to exercise judicial review, it must be seen to be independent

³⁸ G Helmke 'The logic of strategic defection: Judicial decision-making in Argentina under dictatorship and democracy' (2002) 96 *American Political Science Review* 291.

³⁹ For a detailed analysis of which constitutional review model Ethiopia may adopt, see section 6, Chapter 3.

particularly from political pressure. In the absence at least of formal independence, there is no point in moving the power of constitutional review from the HoF to the courts or another organ.

The establishment of an independent, competent and accessible constitutional review system will enhance the potential role of constitutional adjudication in the realisation of human rights and limit the (ab)use of law making power to enact legislation that constrain constitutional rights. The lack of an independent constitutional adjudication system has led to the increasing use of law to channel unconstitutional and illiberal ideologies and policies of the ruling party into legislative provisions, contrary to the liberal tones of the Constitution. Given that political organs alone cannot ensure the effective realisation of human rights, an independent system of constitutional adjudication should be established. Indeed, the political organs have proved not to be active promoters and protectors of human rights but active violators.

This thesis deals with the role of constitutional review in the realisation of human rights. However, it does not argue that a constitutional adjudicator is the sole guardian of human rights. The thesis does not imply that the political branches do not have a role in the realisation of human rights. The legislature and executive are important actors in the realisation of human rights, and political resolutions to human rights problems are often preferable to and more effective than judicial intervention. Constitutional review is not the most effective, much less the only, means of ensuring the realisation of human rights. Political actors should aspire to comply with constitutional rights. But they do not always succeed. Sometimes human rights give way to political expediency or self-interest. Although political action is necessary for the realisation of human rights, it is clearly not sufficient. If political branches were sufficient, there would not have been any need, in the first place, to limit their powers through constitutional rights. Reliance on political actors is particularly insufficient in states that are characterised by the dominance of a single political group, as is the case in contemporary Ethiopia. Where the political organs are dominated by a single political group, it is the more likely that human rights concerns will give way to party interests and preferences. Therefore, an independent constitutional review system is particularly important in cases where the political organs are dominated by a single political group. An independent and strong constitutional adjudicator serves as an external watchman to curve contingencies involving violation of human rights by those ordinarily expected to protect rights – political actors.

The argument here is that an independent constitutional adjudicator should be established to complement, not substitute, political efforts towards the realisation of human rights. The existence of an independent constitutional review system enhances the protection of rights by creating additional veto points against unconstitutional government behaviour. The fact that human rights are critical standards that transcend party politics and which every political party must adhere to implies that their realisation cannot depend solely on the mercy of political organs which might, and often do, prioritise their own interests at the expense of human rights.

It is also recommended that opposition political parties, CSOs, media commentators, academics and other political actors should work towards reforming the Constitution to establish an independent constitutional adjudication system and the review of the law governing the operation of CSOs. They should make the institutional framework for constitutional adjudication a major bone of contention in political debates. Side by side to their reform agenda, opposition political parties, CSOs and other human rights advocates should rely on the constitutional adjudication system to challenge repressive laws, policies and government decisions. CSOs can start by challenging the constitutionality of the most restrictive aspects of the CSO Law. The establishment of litigation-centred CSOs can facilitate a frequent and coordinated reliance on constitutional review to effect legal and social change. Even though the lack of an independent constitutional adjudication system increases the prospect of failure, which has the potential to provide symbolic legitimacy to government decisions, CSOs, opposition parties and human rights advocates can and should still make use of the available procedures as secondary forums to raise their concerns. They should resort to constitutional review at least when political dialogue is a dead-end. Although it is unlikely, winning a constitutional case is not impossible, at least in relation to matters that do not threaten the core interests and survival of the ruling regime.

Moreover, litigation can be launched not just to win a case but also as part of a broader reform agenda to create awareness and trigger or support political action. Indeed, Tadesse, a former Vice Chair of the Council of Constitutional Inquiry, indicated that due to the low level of resort to constitutional adjudication, there is not sufficient evidence to suggest that Ethiopia has reached a level of ‘constitutional crisis’ necessitating an overhaul of the constitutional adjudication system.⁴⁰ Conclusive proof of the lack of an independent constitutional adjudication system cannot be obtained by merely analysing abstract constitutional provisions. Continuously relying on the constitutional adjudication

⁴⁰ Interview with Memberetsehai Tadesse, former Vice President of the Supreme Court and the Council of Constitutional Inquiry, currently Director of Justice and Legal Systems Research Institute, 21 September 2011, Addis Ababa, Ethiopia.

procedure will help to systematically assess the pattern of behaviour of the institutions to make a forceful case for reform.

It is likely that the recommendations incorporated in this thesis, in particular the call for constitutional amendment, may not be implemented in the immediate future. The ruling party enjoys absolute political power and does not have any motivation to tamper with its own self-designed and largely self-serving system, as any change may lead to the explosion of constitutional litigation against laws which largely embody its ideologies and policies. Perhaps out of convenience, the government and the ruling party run a calculated agenda of presenting the Constitution as a sanctified, untouchable 'Holy Grail'. Since the adoption of the Constitution almost 17 years ago, there has not yet been a single proposal for the reform of any of the constitutional provisions. Nevertheless, the political problem is not immutable and the time must come where constitutional reform will be considered. This thesis is intended to stimulate and contribute to the constitutional reform agenda as it relates to constitutional adjudication.

It should be noted that the failure of the constitutional review system this thesis addresses is only the manifestation of a larger political problem. Since the 2005 elections, Ethiopia has been witnessing a gradual reversal of the slow yet encouraging democratic gains following the adoption of the Constitution in 1995. Unfortunately, the optimism that surrounded the period preceding the 2005 elections was hopelessly overshadowed by the post-election violence and repression. Since then, the government has become even more intolerant of dissent. It has now joined the category of fully-fledged authoritarian states.

The ruling party advances the rhetoric of 'revolutionary democracy' and the 'developmental state'. Revolutionary democracy is based on the concept of democratic centralism where decisions are made within a small party politburo and trickled down to the state machinery. It is founded on an 'unshakable conviction carried over from a Marxist upbringing that there is only one "correct line" and only one genuine revolutionary movement'.⁴¹ It propagates for a state apparatus that exercises effective control over the political, economic and social activities of the entire society. Revolutionary democrats consider all opposition groups as 'oppressors'. The contempt shown by the ruling party towards its political opponents, the media and human rights advocates has translated 'into denying them the space needed to function properly'.⁴²

⁴¹ J Markakis *Ethiopia: The last two frontiers* (2011) 243.

⁴² Markakis (n 41 above) 250.

Moreover, the EPRDF propagates a Korean- and Taiwanese-style developmental state approach, which advances the view that economic development and political stability can only be achieved through massive state involvement and guidance. Although the Ethiopian government, including the Prime Minister,⁴³ has repeatedly argued that a developmental state can also be a democratic state, in other words that it is possible to establish a ‘*democratic developmental state*’, this is problematic. First, the priority of the developmental state is clearly on socio-economic growth; civil and political rights need to follow on or be integrated with socio-economic development; second, a developmental state, as narrowly understood by the Ethiopian government, needs a regime that should rule for more than a few electoral periods.⁴⁴ Moreover, a developmental state is conceived as requiring autonomy from society – it must have an ‘*embedded autonomy*’.⁴⁵ Fritz and Menocal observe that matching a developmental with a democratic state is challenging as ‘*democracy has an inherent tendency to disperse power and slow down decision-making processes, and it also makes the state less autonomous and less insulated from societal demands ... thus slowing down the process of building of a developmental state*’.⁴⁶ The development state rhetoric necessarily slows down any potential transformation to an open and competitive constitutional democracy.

The establishment of an independent constitutional review system should, therefore, be seen as part of a larger political transformation and constitutional reform that the country needs and deserves. This thesis does not argue that the establishment of an independent constitutional review system is a panacea to all the political problems the country is facing. Large scale political transformation is not a goal constitutional review can achieve. To expect such an outcome from constitutional review would be overburdening the weak shoulders of constitutional adjudicators. Constitution review can only be an adjunct and complement to the political process.⁴⁷ Political transformation demands the commitment and co-ordinated effort of the ruling party, opposition groups, social movements, the media, and other political actors and citizens at large. The focus of the thesis on constitutional adjudication should not, therefore, be seen as undermining the role of other non-state actors such as social movements,

⁴³ M Zenawi ‘States and markets: Neoliberal limitations and the case for a developmental state’ in A Noman *et al* (eds) *Good growth and governance in Africa: Rethinking development strategies* (2012) 140 – 174.

⁴⁴ The government admits that a developmental state is a long-term project that needs winning more than a few regular elections. It, however, assumes that a coalition of strong ethnic-based parties, which the EPRDF is, can secure consistent electoral victories necessary to complete the transformational agenda of the developmental state.

⁴⁵ P Evans *Embedded autonomy: States and industrial transformation* (1995). A developmental state must be sufficiently autonomous from society to enable it to construct ‘long-term projects of social change that transcend short-term interests of specific groups’.

⁴⁶ V Fritz and A Menocal ‘Developmental states in the new millennium: Concepts and challenges for a new aid agenda’ (2007) 25 *Developmental Policy Review* 536 – 537.

⁴⁷ R Cover ‘The origins of judicial activism in the protection of minorities’ (1982) 91 *Yale Law Journal* 1287, 1302.

opposition parties, the media, and other domestic and international actors. This thesis recommends the overhauling of the constitutional review system as part of a potential political transformation. An independent constitutional review system can assist and facilitate the success of any transformative project. A formally independent constitutional adjudicator should, therefore, be part of any process of transforming and consolidating Ethiopia into a genuine constitutional democracy.