

**THE POTENTIAL ROLE OF CONSTITUTIONAL REVIEW IN THE
REALISATION OF HUMAN RIGHTS IN ETHIOPIA**

By

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Declaration

I declare that this thesis, which I hereby submit for the degree Doctor Legum (LLD), at the University of Pretoria, is my own work and has not been previously submitted by me for a degree at this or any other tertiary institution.

Adem Kassie Abebe

Signature.....

Dedication

This thesis is dedicated to my family. Your prayers and support keep me going. I also dedicate the thesis to my two cousins, Ab Mar Tezera and Hamdiye Ahmed, who passed away in 2011. May God bless your souls!

Acknowledgment

Writing a doctoral thesis is clearly a mammoth task that cannot be accomplished by the candidate alone. I could not have made it this far without the relentless support of several persons. Many have contributed to the growth of my academic career and personal life during my stay at the Centre for Human Rights.

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Acronyms and abbreviations

Council	Council of Constitutional Inquiry
CSOs	Civil Society Organisations
EHRC	Ethiopian Human Rights Council (Human Rights Council)
ELA	Ethiopian Lawyers Association
EPRDF	Ethiopian Peoples' Revolutionary Democratic Front
Ethiopian Commission	Ethiopian Human Rights Commission
EWLA	Ethiopian Women Lawyers' Association
FDRE Constitution	Federal Democratic Republic of Ethiopia Constitution
FJAC	Ethiopian Federal Judicial Administration Council
FSC	Ethiopian Federal Supreme Court
HoF	Ethiopian House of Federation
HPR	Ethiopian House of Peoples' Representatives
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
SSC	Regional/State Supreme Court

Summary of the thesis

The constitutionalisation of rights is seen as one of the main drivers of the proliferation of constitutional review. Experiences from around the world reveal that constitutional review can play a considerable role in the realisation of human rights. This thesis identifies that the existence of a justiciable bill of rights, an independent constitutional adjudicator and potential litigants provides the necessary normative and institutional precondition for successful constitutional review. Despite the existence of a robust bill of rights, the role of constitutional review in the realisation of human rights in Ethiopia has been insignificant. This thesis critically examines the Ethiopian constitutional review system through the prism of the effective protection of human rights. The thesis is intended to stimulate, and contribute to, a constitutional reform agenda concerning an appropriate constitutional adjudication system.

This thesis argues that the main reason for the failure of constitutional review system is the fact that the power of constitutional review is granted to the House of Federation, the upper chamber of parliament, a political entity that is designed to be part of and work in harmony with other political organs. It is submitted that the Ethiopian constitutional review system cannot effectively protect human rights. It is argued that independent constitutional adjudicators serve as the principal constituencies for human rights. Moreover, the thesis provides a theoretical exposition to the establishment, and retention, of a politically dependent constitutional review system. It argues that institutional choices are shaped by the interests and ideological bent of dominant political groups. The thesis concludes that the constitutional adjudication system was designed to reinforce and legitimise the status quo, justify the exercise of political power, and countenance executive and parliamentary supremacy as opposed to constitutional supremacy. Based on this, the thesis develops a 'legitimation' theory of constitutional review.

The absence of litigation-centred CSOs, opposition parties, and other human rights advocates that actively resort to constitutional adjudication has further compounded the insignificant role of constitutional review. The reluctance of these potential litigants is directly related to the lack of an independent constitutional adjudication system. In the absence of the prospect of 'supply' of rights by constitutional adjudicators, it is difficult to expect 'demand' for rights in the form of constitutional complaints. The lack of independence inhibits the submission of constitutional complaints including from the 'usual suspects', such as CSOs and political parties. Besides, there is no tradition of reliance on constitutional adjudication in Ethiopia. The failure to establish an independent constitutional review system and to create an environment conducive to the operation of CSOs is a direct consequence of the

lack of a rights-based political and legal culture. However, despite the importance of the politico-legal culture, this thesis focuses on the normative and institutional aspects of constitutional review.

The constitutional review system in Ethiopia has been invisible and so far largely irrelevant. Given the absence of an independent constitutional adjudicator, the thesis concludes that the Ethiopian Constitution is a constitution without a guardian. The thesis outlines a theoretically sound and practically viable alternative constitutional review design from the perspective of the effective realisation of human rights. It recommends that the Constitution should be overhauled to grant the power of constitutional review to an independent adjudicator.

List of key terms

Constitutional review – Human rights – Ethiopian Constitution – House of Federation – Council of Constitutional inquiry – Counter-majoritarian difficulty – Ethiopian judiciary – Domestic status of international instruments – Constitutional litigants – Legitimation theory.

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Chapter 1: Introduction to the thesis

1. Background and problem statement

Prior to the Second World War, the practice of constitutional review – the power of constitutional adjudicators to review legislative and executive decisions based on constitutional standards – was largely unknown outside the United States of America (US).¹ Once considered to be of an ‘exceptional and American character’, the role of constitutional adjudicators in policy-making through constitutional review has become a common phenomenon in all corners of the world.² The constitutional recognition of human rights and the establishment of a system of constitutional review is a significant feature of constitutional democracies worldwide.³ The rights and constitutional review tandem has become ‘an essential, even obligatory, component of any move toward constitutional democracy’.⁴ The idea of a limited government that inheres in the concept of constitutionalism and constitutional supremacy has provided the theoretical foundation for the proliferation of judicial or quasi-judicial organs charged with ensuring that government decisions comply with constitutional requirements. Constitutions around the world empower either regular courts or establish a constitutional court or council with the task of reviewing the decisions of political organs in line with constitutional standards including mainly constitutional rights.⁵

¹ M Shapiro ‘The success of judicial review and democracy’ in M Shapiro and A Stone Sweet *On law, politics and judicialization* (2002) 149. Although it was not practiced extensively to constrain government power, judicial review was recognised in many Latin American countries due to the influence of the US – P Navia and J Rios-Figueroa ‘The constitutional adjudication mosaic in Latin America’ (2005) 38 *Comparative Political Studies* 189. Constitutional review is currently recognised throughout the world. Western European countries, such as Germany and Italy, established constitutional courts after the Second World War. Constitutional review spread to Eastern Europe, East Asia and Africa particularly after the fall of the Berlin Wall.

² N Tate ‘Comparative judicial review and public policy: Concepts and overview’ in D Jackson and N Tate (eds) *Comparative judicial review and public policy* (1992) 4. Hirschl talks of ‘profound transfer of power from representative institutions to judiciaries’ worldwide – R Hirschl ‘The new constitutionalism and the judicialisation of pure politics worldwide’ (2006) 75 *Fordham Law Review* 721, 721.

³ L Keith *Political repression: Courts and the law* (2012) 2 observing that ‘the global script for state legitimacy calls for a written constitution or the equivalent, with an embedded bill of rights, democratic processes and institutions and, increasingly, a judicial check on state power to protect an internationally recognized set of rights’.

⁴ Shapiro and Stone (note 1 above) 136.

⁵ As at 2008, 158 of the 191 constitutional systems in the world include some formal provision for constitutional review – see T Ginsburg ‘The global spread of constitutional review’ in K Whittington *et al* (eds) *Law and politics* (2008) 81 & 87. For a tabular presentation of constitutional review systems around the world, see A Mavric ‘Constitutional/judicial review around the world’ <http://www.concourts.net/comparison.php> (accessed 9 February 2012). Although most constitutions in the world have established constitutional review systems, there are also constitutions that include clear provisions excluding any possibility of judicial review in respect of all or a certain category of statutes. For instance, article 120 of the 1983 Constitution of the Netherlands unequivocally prohibits any form of judicial review of primary statutes and international treaties – see D Law and M Versteeg ‘The declining influence of the United States Constitution (2012) 87 *New York University Law Review* 763, 793 observing that, as of 2006, 18% of the world’s constitutions do not explicitly recognize judicial review.

The constitutionalisation of rights and the establishment of some form of constitutional review has now become part of the 'conventional wisdom of contemporary constitutional thought'.⁶ Within the African context, the Assembly of Heads of State and Government of the African Union (AU) has expressed its satisfaction with the fact that African states have progressively provided for judicial mechanisms of control over the constitutionality of laws.⁷ This expansion of the institution of constitutional review reflects the general consensus on its instrumentality to guaranteeing fundamental rights and building, maintaining and reinforcing constitutional democracy.⁸ The power of constitutional review tilts the balance of power in favour of constitutional adjudicators.⁹ As a result, the role of constitutional adjudicators in shaping and influencing decisions on important constitutional and policy issues has been augmented. Constitutional adjudicators in all kinds of states, including authoritarian states, actively decide issues of enormous social, economic and political significance.¹⁰

The Ethiopian Constitution was adopted in 1994 and entered into force in 1995.¹¹ The Constitution was drafted and adopted under the dominant, if not the sole, tutelage of the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) – a coalition of 'independent' ethnically-based political parties that ousted the Derg communist regime in 1991. Paul notes that 'none of the political and ethnic forces

⁶ R Hirschl *Towards juristocracy: The origins and consequence of the new constitutionalism* (2004) 2. A cursory assessment of the institutional and procedural design of constitutional review in different parts of the world reveals an interesting variety. Depending on the organ in charge of constitutional review, constitutional review can be 'centralised' (European or Kelsenian), where only one court exercises constitutional review, or diffused (American) where all courts exercise constitutional review. Constitutional review can be 'concrete' or 'abstract' depending on the context within which the review is conducted. In concrete review, review may only be conducted in relation to actual and continuing cases. In the case of abstract constitutional review, the constitution is interpreted to resolve constitutional issues and not disputes as such. Depending on when the constitutionality of laws can be challenged, judicial review can be classified into '*a priori*' or '*a posteriori*' review. *A priori* review is a procedure whereby a bill may be challenged after its final adoption by parliament but before its official enactment. *A posteriori* judicial review relates to a situation where the constitutionality of a law may only be an issue once the law has been officially enacted. There are also other common variations. Constitutional review can have *inter partes* effect only in relation to the actual parties and the particular case, or *erga omnes* effect on all parties, government organs, and lower courts. Constitutional systems also differ in relation to who can access constitutional adjudicators (standing rules) and in relation to which issues (jurisdiction). The appointment procedure and number of the members of constitutional adjudicators and their term of office also vary. See generally M Sachor 'Mapping comparative judicial review' (2008) 7 *Washington University Global Studies Law Review* 257; Tate (n 2 above); K Geck 'Judicial review of statutes: A comparative survey of present institutions and practices' (1965-1966) 51 *Cornell Law Quarterly* 250.

⁷ Decision on the Establishment of an African Framework for Constitutional Justice, Doc. Assembly/AU/17(XVII) Add. 5 (2010) para 4.

⁸ P Pasquino 'Constitutional adjudication and democracy. Comparative perspectives: USA, France, Italy' (1998) 11 *Ratio Juris* 38, 38 noting that constitutional control of legislation is an essential character of the constitutional state.

⁹ D Beatty 'The forms and limits of constitutional interpretation' (2001) 49 *American Journal of Comparative Law* 79, 79 observing that with the constitutionalisation of rights, 'the authority of judges has grown apace'. Hirschl talks of 'judicial empowerment' – R Hirschl 'The political origins of judicial empowerment through constitutionalisation: Lessons from Israeli's constitutional revolution' (2001) 33 *Comparative Politics* 315.

¹⁰ R Hirschl *Constitutional theocracy* (2010) 248; Hirschl (n 2 above). See also P Woods and L Hilbink 'Comparative sources of judicial empowerment' (2009) 62 *Political Research Quarterly* 745, 750 observing that 'regime type is not a significant predictor of judicial empowerment'. Constitutional adjudication is particularly associated with the protection of fundamental rights.

¹¹ Federal Democratic Republic of Ethiopia (FDRE) Constitution Proclamation no 1/1995 (FDRE Constitution).

which make the opposition to [the EPRDF] had participated in the constitutional making'.¹² Young similarly observes that

constitution-making under the EPRDF has little in common with the bargaining, trade-offs, and compromises that usually typify such processes; rather it reflects the weakness of the country's democratic institutions, the political objectives of the governing party, and its position of dominance within a state where serious opposition had been crushed or marginalised.¹³

The EPRDF was able to dominate the drafting process and determine the final content of the Constitution as it had the largest number of delegates.¹⁴ Prior to the adoption of the Constitution, the EPRDF either constructively dismissed or forcefully crushed all the major political opposition groups. After it came to power, the EPRDF saw itself as a long-term, if not eternal, political leader of the country.¹⁵

In stark departure from its predecessors, the Constitution establishes a federal form of government with regional states drawn primarily along ethnic lines. Both the federal and regional governments have their own legislative, executive and judicial organs. At the federal level, the Constitution establishes a parliamentary form of government with two chambers. The House of Peoples' Representatives (HPR), the Lower Chamber, is the principal federal legislative organ composed of members directly elected by the people. The House of Federation (HoF), the Upper Chamber, is the organ in charge of adjudicating constitutional disputes, but it also has limited legislative powers.¹⁶ The HoF is composed of representatives of nations, nationalities and peoples (ethnic groups) who are appointed by the legislative councils of the regional states.¹⁷ The legislative councils have the option to organise elections

¹² C Paul 'Ethnicity and the new constitutional orders of Ethiopia and Eritrea' in Y Ghai (ed) *Autonomy and ethnicity: Negotiating competing claims in multi-ethnic states* (2000) 189.

¹³ J Young 'Regionalism and democracy in Ethiopia' (1998) 19 *Third World Quarterly* 191, 195. See also T Vestal 'An analysis of the new Constitution of Ethiopia and the process of adoption' (1996) 3 *Northeast African Studies* 21.

¹⁴ M Ashenafi 'Ethiopia: Processes of democratization and development' in A An-Na' im (ed) *Human rights under African constitutions: Realizing the promise for ourselves* (2003) 32.

¹⁵ See EPRDF's 'Our revolutionary democratic goals and the next steps' (1993). The document outlines the long term goal of the party to unilaterally dominate Ethiopian politics and political power without losing elections even once. For a summary of the document, see 'TPLF/EPRDF's strategies for establishing its hegemony and perpetuating its rule' (1996) *Ethiopian Register* http://www.enufforethiopia.net/pdf/Revolutionary_Democracy_EthRev_96.pdf (accessed 9 November 2011).

¹⁶ The principal legislative functions of the HoF include its role in constitutional amendment and its power to determine which civil matters should be under the legislative jurisdiction of the federal or the regional states – see FDRE Constitution, articles 62(5) & (8), 105(1)(c) & 105(2)(a). The HoF is composed of representatives of ethnic groups ('nations, nationalities, and peoples'). Each ethnic group has at least one representative and an additional one more for every one million members of the ethnic group. For example, an ethnic group that has 20 million people will have 21 representatives. Although the HoF is considered as a parliamentary organ, it barely has any legislative powers. It rather acts as a superior parliament that determines the constitutionality of laws enacted by the HPR. It is also the organ in charge of resolving disputes between different government organs and between the federal and regional governments.

¹⁷ Legislative councils of the regional states (the provinces that make up the federal state) are the law-making organs of the regional states composed of members directly elected by the people.

for the purpose of electing the members of the HoF.¹⁸ In practice, so far the members of the HoF have been appointed by the legislative councils of the regional states. The Executive is headed by the Prime Minister who serves as the Head of Government and Commander-in-Chief of the armed forces. As the Head of State, the President of the country enjoys ceremonial powers and is intended to serve as a unifying figure. The Constitution vests all federal judicial powers in an independent federal judiciary.

The Constitution is the supreme law of the land.¹⁹ Any law, customary practice or a decision of an organ of the state or a public official that violates the Constitution is, therefore, invalid. To ensure its supremacy, the Constitution establishes a novel system of constitutional review. The design for constitutional review to invalidate unconstitutional measures is different from the American (diffused) or European (centralised) constitutional review models common around the world. The Constitution empowers the HoF to adjudicate ‘all constitutional disputes’.²⁰ Since members of the HoF are not legal technocrats, the Constitution establishes the Council of Constitutional Inquiry (Council), composed predominantly of legal experts, to assist the HoF in determining whether there is need for constitutional interpretation and, if so, to provide recommendations to the HoF for final decision.²¹ The role of regular courts in the constitutional adjudication process is largely limited to referring constitutional issues to the Council. Whenever a constitutional issue arises in judicial proceedings, courts must stay the proceeding before them and refer the constitutional matter to the Council. If the Council rules that there is indeed a constitutional issue, it passes its recommendations to the HoF for a final decision. The HoF is not bound by the recommendations of the Council. If the Council rules that there is no constitutional issue involved, it refers the matter back to the court that referred the matter.

The Constitution enshrines a robust catalogue of human rights encompassing ‘civil and political’, ‘economic, social and cultural’ and ‘group’ rights.²² The emphasis on human rights is reflected in the fact that the Constitution conditions the success of its socio-political objectives to the full respect and

¹⁸ FDRE Constitution, articles 62 & 84.

¹⁹ FDRE Constitution, article 9(1).

²⁰ FDRE Constitution, articles 62(2) & 83(1).

²¹ See FDRE Constitution, articles 82 – 84. The Council is composed of 11 members including the President and Vice President of the Federal Supreme Court, six legal experts with ‘proven professional competence and high moral standing’ appointed by the President of Ethiopia upon the recommendation of the HPR, and three others nominated by the HoF from among its members.

²² FDRE Constitution, Chapter three. More than one-third of the Constitution is devoted to enshrining human rights. For a discussion of the human rights provisions in the Ethiopian Constitution, see A Abebe ‘Human rights in the Ethiopian Constitution: An overview’ (2010) 3 *Journal of African and International Law* 639; T Regassa ‘Making legal sense of human rights: The judicial role in protecting human rights in Ethiopia’ (2009) 3 *Mizan Law Review* 287; G Aneme and S Yeshanew (eds) *The constitutional protection of human rights in Ethiopia: Challenges and prospects* (2009); F Nahom *A constitution for a nation of nations: The Ethiopian prospect* (1997) Chapters 8 & 9.

protection of human rights.²³ It also declares that international instruments ratified by Ethiopia form ‘part and parcel’ of the law of the land.²⁴ The human rights provisions of the Constitution must be interpreted in line with the principles recognised in international human rights instruments adopted by Ethiopia.²⁵ The Constitution is unalterable through ordinary legislative procedures. It entrenches the human rights provisions more securely than the rest of the Constitution by imposing more stringent procedures for the amendment of constitutional rights provisions.²⁶

As can be garnered from the experiences of many countries, constitutional review can play a significant role in advancing the realisation of human rights. Socio-economic rights litigation in India²⁷ and litigation relating to sexual minorities in South Africa²⁸ provide evidence of the potential role of constitutional review in ensuring the realisation of rights and the transformation of law and society.²⁹ The existence of a reasonably expansive panoply of constitutional rights in Ethiopia provides the basic normative foundation for constitutional rights litigation as a desired critical standard against which any government action or inaction – whether legislative, executive or judicial – may be tested. Nevertheless, however robust and ideal, the principles and standards that a constitution embodies, including the constraints on the democratic majority, are nonsensical unless there are independent and effective institutional arrangements to ensure that the constraints actually shape the behaviour of

²³ The Constitution articulates the common objective of ‘building a political community founded on the rule of law and capable of ensuring a lasting peace guaranteeing a democratic order’. It notes that ‘the full respect for individual and people’s fundamental rights’ is a foundational principle and condition-precendent for the success of this ambitious objective – FDRE Constitution, preamble, paras 1, 2, & 5.

²⁴ FDRE Constitution, article 9(4). Ethiopia has ratified several international human rights instruments including the African Charter on Human and Peoples’ Rights (African Charter, ratified 15 June 1998), the International Covenant on Civil and Political Rights (ICCPR, ratified 11 June 1993), and the International Covenant on Economic, Social and Cultural Rights (ICESCR, ratified 11 June 1993).

²⁵ FDRE Constitution, article 13(2).

²⁶ FDRE Constitution, article 105. The human rights provisions of the Constitution may only be amended when all the legislative councils of the regional states approve the proposed amendment; and when the HPR and the HoF, in separate sessions, approve the proposed amendment by a two-third majority vote. Other provisions of the Constitution may be amended if: the HPR and the HoF, in a joint session, approve the amendment by a two-third majority vote, and when two-third of the legislative councils of the regional states (six out of nine) approve the proposed amendment by majority vote. Note, however, that under the current political realities, these procedural safeguards do not provide the intended constraint as the ruling Ethiopian People’s Revolutionary Democratic Front (EPRDF) masters more than 99% of the federal parliamentary seats after the sycophantic May 2010 elections. There has been a similar dominant trend since the first Ethiopian multi-party elections in June 1995. For a discussion of the amendment procedure and its implications to human rights, see Abebe (n 22 above) 662 – 664.

²⁷ P Bhagwati ‘Judicial activism and public interest litigation’ (1984-1985) 23 *Columbian Journal of Transnational Law* 561; J Balakrishnan ‘Growth of public interest litigation in India’ (2008) (Address at the Singapore Academy of Law, Fifteenth Annual Lecture) [http://supremecourtindia.nic.in/speeches/speeches_2008/8\[1\].10.08_singapore_-_growth_of_public_interest_litigation.pdf](http://supremecourtindia.nic.in/speeches/speeches_2008/8[1].10.08_singapore_-_growth_of_public_interest_litigation.pdf) (accessed 9 February 2011).

²⁸ I Currie and J de Waal *The bill of rights handbook* (2005) 25; S Woolman *et al* (eds) *Constitutional law of South Africa* (2007) 35-64 – 35-69.

²⁹ For a discussion on the role constitutional rights litigation can play, see Chapter two, section two.

constitutionally bound actors and that any violations are addressed and reversed.³⁰ Unless properly given meaning and enforced through a ‘puissant judiciary’, constitutional rights will remain ‘printed futility’.³¹ The organs entrusted with the power of constitutional review have a real burden of facilitating the realisation of rights, particularly in aspiring and emerging constitutional democracies in Africa.³² Constitutional review mechanisms play an important role in ensuring that the limits on the exercise of government power are given effect.³³

However, in Ethiopia, despite the existence of justiciable constitutional rights, the constitutional review system has not played much of a role in constraining government power. The situation in Ethiopia has been characterised by the dominance of the EPRDF and, increasingly, the narrowing of political space. Currently, Ethiopia can best be described as an electoral authoritarian state.³⁴ Since the dawn of democracy and multi-party politics in 1991, Ethiopia witnessed a slow transition towards democracy. The early years of transition were characterised by great optimism about respect for the rule of law and human rights.³⁵ Since the entry into force of the Constitution, there have been four national elections at the federal level, in 1995, 2000, 2005 and 2010.³⁶ The 2005 elections were praised for being the most contested elections in Ethiopian history. Significantly, during the 2005 elections the opposition won more than 170 of the 547 HPR seats, a major improvement over the 2000 elections where the opposition won only 12 seats. The ‘openness and dynamism’ that preceded the 2005 elections was ‘unprecedented’.³⁷

³⁰ For a detailed discussion of the main factors that determine the success of constitutional review, see Chapter two, section three.

³¹ V Iyer *Justice at the crossroads* (1992) 59.

³² N Udombana ‘Interpreting rights globally: Courts and constitutional rights in emerging democracies’ (2005) 5 *African Human Rights Law Journal* 47, 55.

³³ Issachnaroff identifies two major justifications for the idea of constitutionalism and constitutional review: to protect individual and minority rights including against majoritarian will, and also to ensure that ‘majorities can change, that the rules of the [democratic] game remain fair, and that those elected remain accountable to the electorate’ – S Issachnaroff ‘Constitutionalizing democracy in fractured societies’ (2003/2004) 82 *Texas Law Review* 1861, 1862 – 1863. The purpose of this thesis is to critically assess whether the current Ethiopian constitutional review system can ensure that individual and minority rights are not abridged at a stroke of legislation and that temporary majorities are constrained from enacting laws to entrench themselves to the disadvantage of other competitor political forces.

³⁴ L Aalen and K Tronvoll ‘The 2008 Ethiopian local elections: The return of electoral authoritarianism’ (2009) 108 *African Affairs* 111.

³⁵ S Pausewang *et al* (eds) *Ethiopia since the Derg: A decade of democratic pretension and performance* (2002) 1 – 25.

³⁶ According to articles 54(1) and 58(3) of the FDRE Constitution, elections must be organised every five years to elect members of the HPR.

³⁷ J Abbink ‘Discomfiture of democracy? The 2005 election crisis in Ethiopia and its aftermath’ (2006) 105 *Africa Affairs* 173, 181. See also K Tronvoll ‘Ambiguous elections: The influence of non-electoral politics in Ethiopian democratisation’ (2009) 47 *Journal of Modern African Studies* 449, 454 noting that ‘[d]uring the electoral process, the electorate witnessed an unprecedented context of openness and plurality of political opinions through campaigning and broadcast through public media’.

Alas, the 2005 elections ended fatally due to the post-election violence that claimed more than 200 lives. The elections were followed by the harassment, prosecution and punishment of the major critical voices including mainly opposition party members, journalists and human rights defenders.³⁸ The gains of the first decade of democratic transition have since been reversed and democratic space is narrowing.³⁹ Since the 2005 elections, the human rights situation in Ethiopia has deteriorated as a result of both illegal and clandestine harassment, as well as legal harassment based on a series of laws that have legalised restrictive policies and ideologies of the government. Several laws, such as the Media law,⁴⁰ Election Law,⁴¹ Anti-Terrorism Law,⁴² and the CSO Law,⁴³ which have severely restricted constitutional rights, have been adopted. The enactment of these laws has legalised the authoritarian tendencies of the government in what can be characterised as rule *by law*.⁴⁴ The landslide electoral

³⁸ For a detailed discussion of the post-election violence and trials following the 2005 elections, see Amnesty International 'Ethiopia: Prisoners of conscience on trial for treason: Opposition party leaders, human rights defenders and journalists' (May 2006) <http://www.amnesty.org/en/library/asset/AFR25/013/2006/en/d1ce45d9-d43e-11dd-8743-d305bea2b2c7/afr250132006en.pdf> (accessed 10 April 2012). Most of the opposition leaders were convicted although they were later pardoned by the President of the country after publicly apologising to the government and peoples of Ethiopia.

³⁹ Clapham observes that the Ethiopian ex-Prime Minister, Meles Zenawi, 'officially adopted market liberalism as an economic ideology, [but] his approach to politics is thoroughly Marxist' – C Clapham 'Ethiopian development: The politics of emulation' (2006) 44 *Commonwealth and Comparative Politics* 108, 116.

⁴⁰ Freedom of the Mass Media and Access to Information Proclamation no 590/2008. The law criminalises, among others, criticism of public officials as an aggravated form of defamation.

⁴¹ Electoral Law of Ethiopia Amendment Proclamation no 532/2007, and the Revised Political Parties Registration Proclamation no 573/2008. These laws highly restrict, among others, access to resources of political parties and ban anonymous donations of funds to political parties.

⁴² Anti-Terrorism Proclamation no 652/2009. This law criminalises, among others, any form of publication that is 'likely' to directly or indirectly 'encourage' terrorism. The law also allows gathering information through surveillance and interception of all forms of communication. Such information obtained through surveillance and interception must be kept in secret. It is, therefore, inaccessible to suspected terrorists. The law also authorises arrest without court warrant and the remanding of suspects of acts of terrorism for up to four months without charge. Once charged with terrorism, suspects cannot be released on bail.

⁴³ Charities and Societies Proclamation no 621/2009. The most restrictive aspect of this law relates to the prohibition on activities related to human rights and democratisation issues if a CSO receives more than 10% of its funds from 'foreign' sources.

⁴⁴ For a discussion of rule *by law* in Ethiopia, see A Abebe 'Rule *by law* in Ethiopia: Rendering constitutional limits on government power nonsensical' (April 2012) *CGHR Working Paper 1*, Cambridge: University of Cambridge Centre of Governance and Human Rights. Rule *by law* is a situation where governments use the law to govern, whether or not the law complies with constitutional rights or other higher law requirements. In rule *by law*, 'law is amoral and an instrument of power' – an instrument of maintaining and strengthening power; power controls law and not the other way round. Rule *by law* is procedural in the sense that any law that is made following established procedures is considered valid regardless of its consequences or implications. Rule *of law*, on the other hand, represents a case where governments rule based on laws that comply with constitutional or other higher law standards. 'Although no canonical formula exists for the rule of law, a moral ideal lies at the core'. Rule of law requires that laws comply with certain substantive requirements in addition to the procedural requirements of making laws – see generally A Bedner 'An elementary approach to the rule of law' (2010) 2 *Hague Journal on the Rule of Law* 48; K Winston 'The internal morality of Chinese legalism' (2005) 2 *Singapore Journal of Legal Studies* 313; B Tamanaha *On the rule of law: History, politics and theory* (2004).

victory for the ruling EPRDF in May 2010, which has effectively created a de facto one party-state, is directly attributable to these laws.⁴⁵

In Ethiopia, the executive exercises enormous and untrammelled powers. The legislature merely serves as ‘a façade of legitimacy for party and executive decisions’, decisions that are detached from society and with inconsequential civil society participation and influence.⁴⁶ The parliamentary form of government that the Constitution establishes further strengthens the power of the executive and blurs the distinction between the executive and legislature.⁴⁷ In practice, the EPRDF strictly adheres to the principle of democratic centralism whereby the politburo, the party Executive Committee, takes all the important decisions. Prime Minister Meles Zenawi served as the head of government between 1991 and 2012 as there are no term limits on the position of the Prime Minister.⁴⁸

The measures taken after the unprecedentedly competitive 2005 elections including mainly the establishment of elaborate administrative structures of control, and the enactment of repressive laws targeting the media, opposition political parties, CSOs and human rights advocates have led scholars to conclude that Ethiopia has ‘returned firmly into the camp of authoritarian regimes’.⁴⁹ After the 2005 elections, Ethiopian ‘has undergone a markedly negative political development, severely undermining liberal values and the politics of plurality in the country’.⁵⁰ The unprecedented openness that preceded the 2005 elections transpired into an unprecedented restriction leading to ‘not more democracy, but

⁴⁵ The EPRDF won 99.6% the seats in the HPR. See K Tronvoll ‘The Ethiopian 2010 federal and regional elections: Re-establishing the one-party state’ (2010) 110 *African Affairs* 121, 132 attributing the results of the 2010 elections to, among others, a set of ‘restrictive legislative acts imposing severe limitations on freedom of expression and organisation’.

⁴⁶ M Wolde ‘A critical assessment of institutions, roles and leverage in public policymaking: Ethiopia, 1974-2004’ unpublished PHD thesis, University of Stellenbosch, 2005 iii. Absolute executive dominance similarly characterised the two previous regimes.

⁴⁷ A parliamentary form of government is a system where the head of the executive or government is elected by and from members of parliament rather than independently and directly by the people. Moreover, members of parliament may be appointed Ministers (cabinet members). Theoretically, parliamentary systems of government provide lesser checks and balances on power than presidential systems as in the latter case one is not part of or otherwise subject to the other.

⁴⁸ Some have described the Prime Minister as a ‘benevolent dictator’ – W Easterly ‘Benevolent autocrats’ (May 2011) <http://williameasterly.files.wordpress.com/2011/05/benevolent-autocrats-easterly-2nd-draft.pdf> (accessed 25 August 2011). Given that the Constitution clearly imposes two term limits on the position of the President, who serves as the Head of State, the absence of term limits on the position of the Prime Minister was a deliberate omission. Zenawi indicated that the absence of term limits is in line with the parliamentary form of government the Constitution establishes. Zenawi died in August 2012. Following the election of Hailemariam Desalegn as the new Prime Minister, the EPRDF has announced that it has imposed two five-year-term-limits on all ministerial positions including the Prime Minister. However, the term limits are mere internal party rules. The limits have not been included in the Constitution.

⁴⁹ See generally L Aalen and K Tronvoll ‘The end of democracy? Curtailing political and civil rights in Ethiopia’ (2009) 36 *Review of African Political Economy* 193. For some, the authoritarian tendency of the EPRDF regime is inherited from the previous regimes – see R Kasleder ‘Semi-authoritarianism: The case study of Ethiopia’, unpublished MA thesis, College of Graduate Studies and Research, University of Saskatchewan, 2011.

⁵⁰ K Tronvoll ‘Ambiguous elections: The influence of non-electoral politics in Ethiopian democratisation’ (2009) 47 *Journal of Modern African Studies* 449, 469.

more authoritarianism'.⁵¹ The cumulative effect of several restrictive laws and policies and the sole control and use of state-owned media have enabled the government to monopolise the public sphere without any meaningful alternatives.

Ethiopia was classified as 'partly free' in the 2010 *Freedom in the World Index* published by Freedom House.⁵² According to the 2011 Report, however, the freedom status plummeted to 'not free' for the first time since 1995, showing a decline in the enjoyment of political rights.⁵³ The regression is particularly attributable to the suppression of civil and political rights before and after the 2010 elections including based on the repressive laws. The Mo Ibrahim Foundation ranked Ethiopia thirty-fourth out of 51 states in Africa in its 2011 *Ibrahim Index of African Governance* – thirty-eighth in the sub-categories of 'safety and rule of law', and 'participation and human rights'.⁵⁴ In its 2010 *Democracy Index*, *The Economist* classified Ethiopia as one of the 55 'authoritarian' regimes in the world, a regression from the 'hybrid' status in 2008.⁵⁵

⁵¹ Aalen and Tronvoll (n 49 above) 194. They conclude that '[t]he journey from instrumentalised liberalisation ahead of the 2005 election to outright repression and legalisation of restrictive policies after the contested polls of that year show that Ethiopia is not on its way towards democracy; but is confirming its place among authoritarian regimes' – 203.

⁵² Freedom House 'Freedom in the World in 2010: Erosion of freedom intensifies – Table of Independent Countries' http://www.freedomhouse.org/uploads/fiw10/FIW_2010_Tables_and_Graphs.pdf (accessed 26 October 2010). Freedom House uses three broad categories to classify states and territories: 'free', 'partly free' and 'not free'. 'Free' represents an average score of 1 – 3 and signifies broad scope for open political competition including whether voters have the right to change their rulers through regular, fair and free elections, a climate of respect for civil liberties, significantly independent civic life, and independent media. 'Partly free' represents an average score of 3 – 5.5 and signifies limited respect for political rights and civil liberties. 'Partly free' states frequently suffer from an environment of corruption, weak rule of law, ethnic and religious strife, and often a setting in which a single political party enjoys dominance despite the façade of limited pluralism. 'Not free' represents an average score of 5.5 – 7 and signifies a situation where basic political rights are absent, and civil liberties are widely and systematically denied. The highest a country scores, the lowest level of freedom; the lowest it scores, the better – 1 represents most free and 7 least free countries. The *Freedom in the World* survey is released annually. It is one of the most widely accepted and reliable yardsticks to assess progress towards constitutionalism and full-fledged democracy.

⁵³ Freedom House 'Freedom in the World 2011: The authoritarian challenge to democracy' http://www.freedomhouse.org/images/File/fiw/FIW%202011%20Booklet_1_11_11.pdf (accessed 17 January 2011). This is the first time Ethiopia has been classified as 'not free' by Freedom House since 2002. Even after the violent 2005 elections, Ethiopia was classified as 'partly free' in the 2006 Freedom in the World Index – Freedom House 'Freedom in the World – Ethiopia (2006)' <http://www.unhcr.org/refworld/docid/473c555749.html> (accessed 18 August 2011).

⁵⁴ Mo Ibrahim Foundation 'The Ibrahim Index' <http://www.moibrahimfoundation.org/en/section/the-ibrahim-index> (accessed 10 December 2011).

⁵⁵ The Economist Intelligence Unit 'Democracy Index 2010: Democracy in retreat' http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy_Index_2010_Web.pdf&mode=wp (accessed 12 December 2011). According to the Report, Ethiopia has become more authoritarian in 2010 compared to 2008. Ethiopia's ranking dropped from 105 to 118 'reflecting the regime's crackdown on opposition activities, media and civil society'. The Economist Intelligence Unit's Index of Democracy is based on five categories: electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture. Countries are placed within one of four types of regimes: full democracies; flawed democracies; hybrid regimes; and authoritarian regimes.

Since 2005, political freedom in Ethiopia is shrinking and the democratic gains since the inception of the transition to democracy in 1991 are being reversed.⁵⁶ Currently, Ethiopia has a hegemonic party system where elections merely serve as facades of authoritarianism, 'in which a relatively institutionalized ruling party monopolizes the political arena, using coercion, patronage, media control, and other means to deny formally legal opposition parties any real chance of competing for power'.⁵⁷ More than 17 years down the line under the Constitution, 'the democratization process has not resulted ... in the political institutionalization of democracy'.⁵⁸

While constitutional review has been used to challenge legislative and executive measures and ensure the realisation of human rights in many countries, including some in Africa, its role in Ethiopia has been insignificant. Despite the adoption of repressive laws and executive measures, the constitutional review system has not been relied on.⁵⁹ Although the laws targeting political parties, CSOs, human rights advocates and the media have been described as the most restrictive, none of them has so far been challenged as unconstitutional. The constitutional adjudication system in Ethiopia has not been able to actively engage constitutional rights. It is consequently very difficult to identify successful constitutional rights cases and even cases that were considered on the merits at all. Indeed, more than 17 years since the Constitution entered into force in 1995, the total number of constitutional cases submitted to the Council has been insignificant. In fact, there have only been two successful constitutional challenges so

⁵⁶ Abbink (n 37 above) 173 observing that there is a relapse into centralist authoritarian tendencies and linking the trend to the authoritarian political tradition and heritage, elite rule and patronage in Ethiopia inherited from the previous regimes; S Pausewang 'Political conflicts in Ethiopia – in view of the two faced Amhara identity' in S Ege *et al* (eds) *Proceedings of the 16th International Conference of Ethiopian Studies* (2009) 549 observing that after the 2005 elections 'the process of democratisation, which made generally acclaimed progress until days before the election, seems to be seriously reversed'; Tronvoll (n 45 above) 132 concluding, after considering the results of the 2008 and 2010 elections, that Ethiopia has effectively re-established the one-party state. The reversal is especially visible after the 2005 elections – see, for instance, European Union Election Observation Mission 'Final Report: House of Peoples' Representatives and State Council Elections, May 2010' <http://fr.allafrica.com/download/resource/main/main/idatcs/00020329:1ca36540c3dfc9b90fe80b88e2275f1c.pdf> (accessed 9 January 2011) noting that 'the changes in the legal framework together with the fragmentation of the main opposition forces in the aftermath of the 2005 elections, as well as the imprisonment of leading opposition figures and the departure in exile of one opposition leader, resulted in a cumulative narrowing of the political space within the country'; Human Rights Watch 'One Hundred ways of putting pressure: Violations of freedom of expression and association in Ethiopia' (2010) <http://www.hrw.org/en/reports/2010/03/24/one-hundred-ways-putting-pressure> (accessed 5 January 2011); Freedom House 'Freedom in the World: Country Reports: Ethiopia (2010)' <http://www.freedomhouse.org/template.cfm?page=22andyear=2010andcountry=7821> (accessed 9 January 2011) noting that the Ethiopian government has 'bolstered restrictions on political activity'; Human Rights Watch 'Development without freedom: How aid underwrites repression in Ethiopia' (19 October 2010) <http://www.unhcr.org/refworld/docid/4cbd2fce2.html> (accessed 5 January 2011); M Chebsi 'Ethiopia: Political space narrowing' *International Press Service* (12 January 2009) <http://www.ipsnews.net/africa/nota.asp?idnews=45382> (accessed 9 January 2011) noting frustrations that 'gaining power through the ballot box is impossible' and that 'the fear is that a growing number may instead consider following the route of armed struggle'.

⁵⁷ G Sartori *Parties and party systems: A framework for analysis* (1976) 230 – 238.

⁵⁸ Abbink (n 37 above) 196.

⁵⁹ Regassa (n 22 above) 327.

far – one relating to language requirements to stand for elections and another relating to the subjection of a woman without her consent to the jurisdiction of religious courts.⁶⁰

All the other contentious constitutional cases have been struck out on procedural grounds and lack of need to interpret the Constitution. The Council found the need for constitutional interpretation only in a handful of cases.⁶¹ It has rejected constitutional claims relating, among others, to the right to bail,⁶² suspension of rights during emergencies,⁶³ and jurisdictional ouster clauses.⁶⁴ The Council has so far referred only three cases for final determination to the HoF.⁶⁵ Although many of the cases challenged the constitutionality of laws, no law has so far been declared unconstitutional. Simply stated, despite the adoption of several potentially unconstitutional laws, policies and other measures that constrain political space and outlaw dissent, and the increasingly authoritarian tendency of the government, the number of constitutional challenges has been significantly low. The constitutional history of Ethiopia since the adoption of the Constitution has been as if a system of constitutional review did not exist. The problem is that the constitutional review system has failed to protect human rights.

2. Research questions

The main problem this thesis addresses is the absence of meaningful constitutional adjudication amidst the violation of constitutional rights in Ethiopia. It assesses whether constitutional review can narrow the gap between rhetorical constitutional rights guarantees and their realisation in practice by invalidating unconstitutional laws, policies and other government decisions and practices. The thesis

⁶⁰ *Benishangule Gumuz* case, House of Federation (March 2003); *Kedija Beshir* case, House of Federation (May 2004) – see the House of Federation of the Federal Democratic Republic of Ethiopia (July 2008) 1 *Journal of Constitutional Decisions* 14 – 34 & 35 – 41 respectively.

⁶¹ For a discussion on selected cases, see G Kassa ‘Mechanisms of constitutional control: A preliminary observation of the Ethiopian system’ (2007) 20 *Africa Focus* 75, 88. In all the cases submitted since 2007, the Council ruled that there was no need for constitutional interpretation. No constitutional case has been referred by the Council to the HoF for final decision since 2007.

⁶² Case concerning the constitutionality of the law that excluded bail in corruption offences, Council of Constitutional Inquiry (2004) (on file with author). In this case, the Council dismissed a challenge to the constitutionality of a law that automatically precluded bail in relation to all corruption offences.

⁶³ Emergency declaration case, Council of Constitutional Inquiry (14 June 2005) (on file with author). In this case, the Council ruled that the Prime Minister has the power to declare a state of emergency, without the need for approval from the Council of Ministers, and that the determination of whether the facts that justified the emergency actually exist is made solely by the Prime Minister.

⁶⁴ Case concerning the validity of ouster clauses, Council of Constitutional Inquiry (10 February 2009) (on file with author). 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 right to access to justice or any other provision of the Constitution.

⁶⁵ The Council has been criticised for arrogating the legitimate powers of the HoF by rejecting cases for lack of need for constitutional interpretation but nonetheless interpreting the Constitution. The Council generally confuses the lack of need for constitutional interpretation and a finding that there is no constitutional violation. As a result, it does not refer to the HoF the ‘no violation’ decision for confirmation – T Bulto ‘Judicial referral of constitutional disputes in Ethiopia: From practice to theory’ (2011) 19 *African Journal of International and Comparative Law* 99, 119 – 120.

explores the existence of the preconditions for successful constitutional review and identifies the challenges in the constitutional review system in Ethiopia. It considers how a climate for effective constitutional rights litigation can be forged. Within these broad themes, the thesis answers the following specific questions:

1. What are the basic normative and institutional preconditions that determine the prospect of success of constitutional review in ensuring the realisation of rights?
2. To what extent is the constitutional review system in Ethiopia appropriate for the effective realisation of human rights?
3. To what extent does the counter-majoritarian character of judicial review justify the Ethiopian constitutional review system?
4. What is the role of ordinary courts in interpreting the Constitution and ensuring the realisation of constitutional rights in Ethiopia?
5. What factors have impeded the active resort of CSOs, opposition groups and human rights advocates to constitutional review in Ethiopia?
6. Which theory of constitutional review best explains the original design, and retention, of the novel Ethiopian constitutional review system?

The thesis identifies and analyses the potential and actual impediments that have undermined the success of constitutional review in ensuring the realisation of human rights in Ethiopia. It investigates why the constitutional review system has failed to ensure the realisation of human rights and inquiries whether the basic conditions for constitutional review are present in Ethiopia. It provides a normative assessment of whether the constitutional adjudication system is able to provide an independent and effective forum to discharge its counter-majoritarian functions by purging laws that violate constitutional rights, or whether it is designed to reinforce and legitimise the exercise of political power. In short, the thesis investigates what can and should be done to create a more favourable environment to boost the prospect of success of constitutional review in ensuring the realisation of human rights.

Exploring the role of constitutional review in the realisation of human rights is particularly significant in the Ethiopian context. Due to the parliamentary form of government the Constitution establishes, which ensures that the highest members of the executive are elected from and represent the political group which has the majority in the legislature, there are no real checks and balances or other effective control mechanisms operating between the legislative and executive organs. Moreover, the political party under whose control the Constitution was adopted has continued to dominate all the political organs. The Ethiopian legislative organs merely serve as 'legitimising houses' rubber-stamping the ideologies

and policy preferences of the ruling party politburo.⁶⁶ Indeed, while it is common that parliaments do not often initiate major legislative proposals, compared to other African parliaments, the Ethiopian Parliament has never initiated any consequential legislative proposals, nor has it rejected or even substantively modified any legislative initiative by the executive. It is exceptional for a parliament never to substantively modify legislative proposals tabled by the executive. Due to the restrictive political environment in Ethiopia, which also makes the rise of broad-based social movements difficult, constitutional review provides the only peaceful mechanism to challenge government decisions.⁶⁷

Under the Ethiopian Constitution, the power to enact federal statutes is entrusted solely to the HPR, without any potential veto from any other institution.⁶⁸ The Ethiopian legislative and executive bodies are disproportionately dominated by the ruling political party and its affiliates.⁶⁹ As the political organs act in cahoots with, rather than as check and balances over each other, only an independent and effective constitutional adjudicator can serve as the guardian of constitutional rights and as a bulwark against legislative and executive excess. Moreover, the likelihood of the current ruling party losing political control is slim. There is, therefore, a need to focus on controlling legislative and executive measures from a constitutional perspective. Piecemeal constitutional attacks on governmental measures that do not immediately threaten the foundations of the ruling party should be given more attention. The continued dominance of the political organs by a single group makes constitutional review not only the most effective but also the only alternative for Ethiopians seeking to enforce their rights and restrain the political majority from violating constitutional rights, including through the use of law. Studying the Ethiopian constitutional adjudication system to assess its potential in counterbalancing the decisions of legislative and executive organs is, therefore, important.

The Ethiopian government so far has a policy of avoiding submission to individual complaints mechanisms in international and regional human rights treaty bodies. The only exceptions are the

⁶⁶ Wolde (n 46 above) 258 & 262.

⁶⁷ Moustafa observes that due to the authoritarian and corporatist political environment that characterised Egypt in the 1980s and 1990s, the initiation of broad social movements became almost impossible. In such an environment, litigation provided the only opening to challenge the state – T Moustafa ‘Law and resistance in authoritarian states: The judicialisation of politics in Egypt’ in T Ginsburg and T Moustafa (eds) *Rule by law: The politics of courts in authoritarian regimes* (2008) 151. It should, however, be noted that the revolutions in 2010 – 2011 in North Africa indicate that broad-based social movements can happen even in very constrained environments in stable authoritarian regimes.

⁶⁸ Constitutions may establish different veto points within the state structure to prevent the enactment of laws and other measures that violate human rights and other constitutional limits. In the US, for instance, the Constitution establishes at least three veto points where the Senate, House of Representatives and the President of the Republic can veto legislation that is, *inter alia*, considered in violation of the Constitution. On top of this, US courts are allowed to expunge a law they consider unconstitutional, even when the law has passed all the other veto points.

⁶⁹ The Ethiopian federal parliament has been disproportionately controlled by the EPRDF and its allies – 82.9% (1995), 87.9% (2000), 66% (2005), and 99.6% (2010).

African Commission on Human and Peoples' Rights and the African Committee on the Rights and Welfare of the Child, under which individuals automatically have a right of recourse to the regional level once domestic remedies have been exhausted.⁷⁰ However, it should be taken into account that both these organs only have recommendatory powers. As a result, resort to supranational human rights judicial or quasi-judicial organs is not a real option.⁷¹ Investigating the role of the domestic constitutional review system in ensuring the realisation of human rights is, therefore, significant.

The focus on constitutional adjudication should not be seen as undermining the role of other non-state actors such as CSOs, opposition parties, the media and other domestic and international actors. However, the weakness of domestic actors in Ethiopia means that their views are barely taken into account by the ruling party. In fact, most of the legal harassment is targeted at weakening these institutions. Moreover, the impact of international pressure on Ethiopia has been insignificant due to Ethiopia's strategic relevance to Western States in the fight against extremism and terrorist cells in the horn of Africa.⁷² Nevertheless, given that CSOs and opposition political parties are the principal litigation support structures for constitutional review, the thesis devotes a separate chapter to discuss their role and the challenges they face in advancing human rights through constitutional review.

⁷⁰ So far, all the cases submitted to the African Commission on Human and Peoples' Rights against Ethiopia were rejected on procedural grounds. For a list of cases in the African Commission against Ethiopia, see <http://caselaw.ihrda.org/acmhpr/search/?c=45> (accessed 6 February 2012). It should also be noted that, although remote, there is a possibility to resort to the Common Market for Eastern and Southern Africa (COMESA) Court of Justice to challenge laws and practices in Ethiopia based on article 6(e) of the COMESA Treaty, which endorses as one of the fundamental principles 'the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'. Ethiopia is a state party to the COMESA Treaty.

⁷¹ Given the subsidiary nature of international and regional human rights bodies, there is always a need to focus on the domestic human rights system as the primary means of ensuring the realisation of human rights. It is in recognition of this primacy of domestic law and litigation that recent research is increasingly focusing on how to strengthen the capacity, *inter alia*, of domestic judicial mechanisms and ensuring that domestic courts and tribunals apply international human rights standards rather than merely looking up to international and regional entities for review in individual cases – in the African context, see M Killander (ed) *International law and domestic human rights litigation in Africa* (2010); see also the Oxford Reports on International Law in Domestic Courts at www.oxfordlawreports.com. However, it should be clear that this thesis is not belittling the potential opportunities international and regional treaty bodies offer to the realisation of human rights. In fact, international tribunals present an opportunity to complement the protection of human rights at the domestic level. Any international decision that finds a violation is an improvement over the domestic understanding of a particular right. International tribunals are more progressive or liberal than domestic courts as more often than not, international tribunals find a violation in cases where the highest domestic court did not find a violation. This is particularly so as states cannot approach international tribunals to challenge progressive decisions of their own highest courts.

⁷² See A Borchgrevink 'Limits to donor influence: Ethiopia, aid and conditionality' (2008) 2 *Forum for Development Studies* 195 observing that donors have failed to influence the Ethiopian government. The West considers Ethiopia a stable strategic ally in the war against terrorism and extremism in the Horn of Africa. This has enabled Ethiopia to continue to receive large amounts of money in foreign aid and loan from the international community regardless of its poor human rights record and the increasingly authoritarian tendencies of the government.

3. Literature review

Constitutional adjudicators around the world play significant roles in the realisation of human rights. Constitutional review characterises contemporary constitutions,⁷³ particularly in states where the protection of human rights has been constitutionally entrenched and in federal states.⁷⁴ It has become an important tool to ensure the realisation of human rights and other constitutional limits.⁷⁵ The role of constitutional review is particularly important in protecting ‘discrete and insular minorities’ and individual rights.⁷⁶ Independent constitutional review systems are often associated with ‘greater freedom’.⁷⁷ With increasing constitutionalisation of rights, constitutional adjudicators have been empowered to decide ‘core political controversies that often define and divide whole polities’.⁷⁸ As a result, constitutional review has become an attractive strategy for CSOs, human rights advocates and opposition groups around the world.⁷⁹

Despite its worldwide recognition and practice, the role of constitutional review in ensuring the realisation of human rights in Ethiopia has been insignificant. Charles Epp has identified the minimum conditions that determine the realisation of a ‘rights revolution’ through constitutional review.⁸⁰ The prospect of success of constitutional review in ensuring the realisation of human rights depends on the existence of certain factors, namely, (1) justiciable constitutional rights, (2) an independent and activist constitutional adjudicator, and (3) potential litigants that constitute the ‘support structure for legal mobilization’. The politico-legal context necessarily influences the existence of these preconditions. Although these conditions were identified within the context of the US and other democratic states, they can be extrapolated to any jurisdiction. This thesis is intended to explore the (non)existence of these normative and institutional preconditions within the Ethiopian context with a view to explain the so far insignificant role of constitutional review in Ethiopia.

⁷³ Hirschl (n 2 above); M Cappelletti *The judicial process in comparative perspective* (1989) 4. Cappelletti notes that ‘one of the forceful reasons for the expansion of the scope of judicial review is the trend towards the adoption and judicial enforcement of declarations of fundamental rights’.

⁷⁴ W Newman ‘Standing to raise constitutional issues in Canada’ in S Kay (ed) *Standing to raise constitutional issues: Comparative perspectives* (2005) 195 noting that the capacity to challenge the validity of state action before the courts of the land is one of the cornerstones of modern constitutionalism.

⁷⁵ E Chemerinsky ‘Losing faith: America without judicial review?’ (2000) 98 *Michigan Law Review* 1416.

⁷⁶ J Ely *Democracy and distrust: A theory of judicial review* (1980).

⁷⁷ R La Porta *et al* ‘Judicial checks and balances’ (2004) 112 *Journal of Political Economy* 445.

⁷⁸ Hirschl (n 10 above) 248.

⁷⁹ ‘Introduction’ in ‘Litigating human rights: Promise v. perils’ (2000) 2 *Human Rights Dialogue* 1 (Carnegie Council on Ethics and International Affairs).

⁸⁰ C Epp *The rights revolution: Lawyers, activists, and supreme courts in comparative perspective* (1998) 2 & 3. Epp’s book explores the role of organised human rights groups – litigation support structures – in ensuring ‘sustained judicial attention and approval for individual rights’.

The existing literature investigating the factors impeding the role of constitutional review in Ethiopia is both insufficient and incomplete. To my knowledge, no work has attempted to explain the paucity of constitutional rights adjudication in Ethiopia. There is also no work that systematically addresses the role of litigation support structures, mainly CSOs, human rights advocates, and opposition political parties, in constitutional adjudication. The issue of which organ has the power to adjudicate constitutional disputes has been discussed by some scholars. However, the focus of these works has been limited to determining the institutions in charge of constitutional adjudication to answer the question whether the Constitution has left anything regarding constitutional adjudication to ordinary courts.⁸¹ The primary focus of existing works has been to provide an interpretive description of the power of constitutional adjudication. This thesis takes the discussion further to a prescriptive vision to lift the prospect of success of constitutional review in Ethiopia. To this extent, it elevates the discussion from *what is* – which has so far been the main focus of scholars – to *what ought to be* concerning the constitutional review system in Ethiopia. The thesis is, therefore, a significant addition to the research world.

Two articles have considered whether there is need to change the institutional design for constitutional adjudication in Ethiopia.⁸² After assessing the independence and impartiality of the HoF in politically sensitive cases and its ability to effectively protect minorities, Mgbako *et al* conclude that the HoF, as a majoritarian organ, ‘has proven itself a conceptual and practical failure in constitutional adjudication’.⁸³ They recommend that a strong and reformed judiciary should assume the power of constitutional review. Fessha similarly concludes that the HoF is ‘neither institutionally suited nor competent to engage in complex constitutional debate’.⁸⁴ The main goal of Fessha’s work is to show that the granting of the power of constitutional adjudication to the HoF does not address the counter-majoritarian dilemma as the members of the HoF are not directly elected by the people. Nevertheless, the two articles do not comprehensively assess the theoretical foundations and practical implications of the Ethiopian system of constitutional review to the protection of human rights. Neither of them addresses

⁸¹ Eg Bulto (n 65 above); A Fiseha ‘Federalism and the adjudication of constitutional issues: The Ethiopian experience’ (2005) *Netherlands International Law Review* 1; I Idris ‘Constitutional adjudication under the 1994 FDRE (Federal Democratic Republic of Ethiopia) Constitution’ (2002) 1 *Ethiopian Law Review* 63. For a summary of all the major publications on constitutional adjudication in Ethiopia, see G Assefa ‘All about words: Discovering the intention of the makers of the Ethiopian Constitution on the scope and meaning of constitutional interpretation’ (2010) 24 *Journal of Ethiopian Law* 139.

⁸² 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; and C Mgbako *et al* ‘Silencing the Ethiopian courts: Non-judicial constitutional review and its impact on human rights protection’ (2008) 32 *Fordham International Law Journal* 259.

⁸³ Mgbako *et al* (n 82 above) 294.

⁸⁴ Fessha (n 82 above) 77.

the role of litigation support structures in constitutional litigation. Moreover, both works argue or assume that courts do not have any role in constitutional interpretation. This thesis, however, identifies several mechanisms through which courts can engage in constitutional interpretation and shape the understanding of constitutional human rights.

This thesis further explores the different theories of constitutional review to explain the decision of the drafters of the Ethiopian Constitution to establish, and continue to retain, a dependent and weak constitutional review system. Political scientists have developed theories to explain why politicians establish constitutional review systems despite the fact that such systems have the potential to constrain the exercise of political power. The three principal theories are the ‘insurance’ theory, the ‘hegemonic preservation’ theory and the ‘commitment’ theory of constitutional review.⁸⁵ The first two primarily explain why politicians establish formally strong constitutional review systems. The commitment theory, on the other hand, explains decisions to establish both formally weak and strong constitutional review systems.⁸⁶ This thesis analyses whether any of these theories are applicable to Ethiopia, or whether the Ethiopian experience can help to develop a new or related theory of constitutional review. No work has attempted to explore the Ethiopian system of constitutional review from a perspective of the theories of constitutional review.

All in all, the purpose of this thesis is to uncover the reasons behind the low level of constitutional rights litigation in Ethiopia by studying the (non)existence of the necessary normative and institutional preconditions for successful constitutional review, including mainly an independent constitutional adjudication system and potential litigants. It is intended to stimulate and contribute to a constitutional reform agenda as it relates to constitutional adjudication. It aims to be the most comprehensive and original study on the potential role of constitutional review in the realisation of human rights in Ethiopia.

⁸⁵ See generally Ginsburg (n 5 above) 90 *et seq.* For a detailed discussion of these theories, see Chapter 7, section 2.

⁸⁶ The main difference between weak-form and strong-form judicial review is whether or not independent courts have the final say on the meaning of the constitution. If the decisions of constitutional adjudicators cannot be overturned by legislatures except through amending the Constitution, the judicial review system is strong-form. If, on the other hand, the legislature can overturn or revise the decisions of constitutional adjudicators through ordinary procedures or if the constitutional adjudicator is one of, or otherwise subject to, the political organs, it is a weak-form judicial review – see generally W Sinnott-Armstrong ‘Weak and strong judicial review’ (2003) 22 *Law and Philosophy* 381; M Tushnet ‘Forms of judicial review as expressions of constitutional patriotism’ (2003) 22 *Law and Philosophy* 353; M Tushnet ‘Weak-form judicial review and “core” civil liberties’ (2006) 41 *Harvard Civil Rights-Civil Liberties Law Review* 1, 3 *et seq.*

4. Assumptions

This thesis does not discuss the philosophical underpinnings of the idea of a limited government and of human rights. It takes as theoretically given the value of limited government, which is imposing restrictions on the unfettered rule of the political majority. This is a reasonable assumption as almost all constitutions around the world are designed to do just this – naturally a constitutional government is a limited government.⁸⁷ The thesis intends to discuss the role of constitutional review as one of the major strategies to ensure that the limits on government power embodied in human rights guarantees are complied with.

Similarly, the thesis assumes the desirability of constitutionalising human rights. It does not explore whether rights should be given a constitutional or higher law status. That status has been conferred on rights by the Ethiopian Constitution as normative limitations on the exercise of political power. This thesis addresses whether the Constitution also establishes effective institutional structures for constitutional review to ensure that the limitations are not abridged at a stroke of legislative or other political action.

5. Methodology

A large part of this thesis is based on desktop research. Research was conducted in Ethiopia, at the University of Pretoria, and at the Centre of Governance and Human Rights, University of Cambridge. While analysing the Ethiopian situation, the preparatory work of the Ethiopian Constitution, the Constitution, and other relevant subordinate laws were closely analysed. Relevant decisions of federal courts, the HoF and the Council were explored. Existing scholarship, mainly articles and books, were thoroughly examined. The scholarly works were selected mainly based on their relevance to answering the research questions this thesis raises.

To further strengthen the work, and hopefully extend its relevance beyond Ethiopia, the thesis employs a general comparative approach. Since the best examples on each issue may not always come from one or two states, the study draws from a variety of states on the relevant thematic issues. With a view to demonstrate the potential contributions of independent constitutional adjudicators in the realisation of human rights even in countries that are not fully democratic, the thesis discusses the experiences of

⁸⁷ Tamanaha observes that ‘the nature of limitations will vary with the society, culture, political and economic arrangements, but the need for limitations on the government will never be obsolete’ – Tamanaha (n 44 above) 101.

Ghana, Uganda and Malawi.⁸⁸ Ethiopia and these three countries adopted their constitutions during the first half of the 1990s. In the *Freedom in the World Index* issued annually by Freedom House, Uganda has been classified as ‘partly free’ since 1995; Malawi was classified as ‘free’ between 1994 and 1999 and as ‘partly free’ since 1999; Ethiopia was classified as ‘partly free’ between 1995 and 2010; in 2011, Ethiopia was classified as ‘not free’; Ghana was classified as ‘partly free’ from 1992-1996, and as ‘free’ since 1997. The cases selected from Ghana were decided during the beginning of the democratic transition in the early 1990s, as the current level of democratic governance cannot be compared to what obtains in Ethiopia. The similarity in the Freedom House categorisation of the states considered here allows for drawing conclusions based on comparable political contexts.

The decisions of the courts in the selected countries were chosen with a view to demonstrate the potential contributions of independent courts in enforcing constitutional rights. The author obviously selects cases where the courts upheld challenges against a legislative or executive action. However, the thesis does not intend to suggest that these courts have been consistent in enforcing constitutional rights. There are and will be cases where the courts fall short of protecting constitutional rights in these selected countries, and in any country for that matter. The main purpose of the discussion of the experiences in these countries is simply to show that, where there are guarantees of justiciable human rights and active litigation support structures, formally independent constitutional adjudicators have the potential to protect these rights even under unpromising political circumstances. A detailed application of the analytical framework to these countries is beyond the scope of this thesis. The analytical framework is applied in detail only in relation to Ethiopia.

In addition to desktop research, interviews with different stakeholders in Ethiopia such as CSOs, members of the judiciary and the Council of Constitutional Inquiry, opposition party leaders and academics were conducted to obtain relevant information, particularly to explore why CSOs, human rights advocates and opposition groups have not challenged some of the most repressive laws despite the dead-end in the ordinary democratic process.⁸⁹ These stakeholders were selected with a view to incorporate qualitative data based on perspectives from both the demand (those who submit constitutional complaints) as well as the supply (constitutional adjudicators) side in the constitutional review equation.

⁸⁸ For more explanation on the reasons for the selection of the three countries, see Chapter 2, section 4 below.

⁸⁹ For a full list of the interviews, see Bibliography.

The thesis attempts to follow a multi-disciplinary approach. Although it is predominantly a study in law, it draws from the findings and theories developed by political scientists. In this regard, my understanding of the different theories of constitutional review and international politics was enriched by the research visit at the Centre of Governance and Human Rights, which is based in the Department of Politics and International Studies (POLIS) of the University of Cambridge.

6. Limitations and scope of the study

This thesis is about litigation that raises the constitutionality of legislative or executive action or inaction in Ethiopia. It is not primarily concerned with litigation that in fact involves human rights issues but does not touch on the constitutionality of the impugned measures. The focus is on constitutional review. Also, although the conclusions and recommendations may have broader implications, the thesis only covers constitutional rights litigation and not constitutional adjudication involving other issues such as impeachment procedures or the division of powers between the central and regional governments in a federal state. The thesis is concerned with constitutional review where the critical constitutional standard is provided by human rights.

The thesis only addresses the Ethiopian constitutional adjudication system at the federal level. As a federal state, Ethiopia has a Constitution at the federal level with a nationwide application, while each regional state has its own constitution applicable within its boundaries. Nevertheless, the regional constitutions are drawn based on the federal Constitution. Due to the comparability of the federal constitutional review system with the systems at the regional level, the discussions in this thesis have direct relevance to those interested in the constitutional adjudication system at the regional level. Similarly, although some reference to litigation at the sub-regional, regional and international levels may be made, the work primarily focuses on the domestic constitutional review system in Ethiopia.

Moreover, this thesis is not mainly about transformative constitutional litigation. In some countries, social movements have relied on litigation with a view to redefine social relations, such as litigation against discrimination based on sex, race or colour, and sexual orientation. Some scholars have questioned the ability and willingness of courts to initiate and implement a broad social reform or transformation agenda.⁹⁰ The thesis rather focuses on the basic role of constitutional review as a means

⁹⁰ See, for instance, G Rosenberg *The hollow hope: can courts bring about social change?* (2008) 422 observing that there is little evidence that court-victories directly or indirectly bring about social change and that litigation often fails to mobilise movement constituents, positively influence public opinion, convince elites, or accelerate the pace of legislative change. See also M Klarman 'Brown, racial change, and the civil rights movement' (1994) 80 *Vanderbilt Law Review* 7.

of constraining government power and invalidating unconstitutional government decisions, which can at times result in legal and social transformation. The existence of an independent system of constitutional review necessarily precedes any transformational role that constitutional adjudicators may play. The focus of this thesis is to explore the (non)existence of the basic preconditions for successful constitutional review in Ethiopia.

The three factors that are explored in this thesis are primarily related to the legal and institutional framework for constitutional review in Ethiopia. The thesis assesses the relevance of the normative and institutional framework for constitutional review in the realisation of human rights. Obviously, the legal and institutional framework does not exist in a vacuum. They are rather embedded in certain social and political realities. Even when the legal and institutional frameworks have been perfectly crafted, the political environment may impose serious constraints on the potential contributions of constitutional adjudication. Indeed, the realisation of human rights depends, more than anything, on a favourable, or at least tolerant, political environment. Arguably, to ensure the fullest possible realisation of human rights, it is not only – or even primarily – the constraints on political power but the nature of the power itself that needs to be changed.⁹¹ This study is, however, limited in that it focuses on the legal and institutional constraints that impede the contribution of constitutional review in ensuring the realisation of human rights in Ethiopia. It does not purport to be a study about the broader political problems that Ethiopia is facing. There should be no doubt that the thesis does not imply that the constitutional review system is a panacea to the protracted political problems the country grapples with. It only addresses the constitutional institutional design that has ensured that the ruling political group does not face significant challenges to its rule. Although the political and legal context is critical and, therefore, some reference to it is unavoidable, it is beyond the scope of this study.

The decisions of Ethiopian courts as well as of the Council and the HoF are not systematically reported.⁹² As a result, accessing the decisions of ordinary courts was a major limitation in analysing the Ethiopian jurisprudence relevant for the thesis. Most importantly, the fact that there are few constitutional cases that were decided on merits can make it difficult to analyse the trend in constitutional interpretation

⁹¹ Mojekwu observes that ‘a written constitution may proclaim lofty ideals as its objectives, but without the will or ability to limit the ‘use or abuse’ of power by the power holders, such a government is unable to enforce legal restraints on the office-holders and could turn into dictatorship’ – C Mojekwu ‘Nigerian constitutionalism’ in R Pennock and J Chapman (eds) *Constitutionalism* (1979) 164 – 165.

⁹² The Cassation Division of the Federal Supreme Court has now started to publish its decisions. The Cassation Division is empowered to decide on all cases alleging basic error of law. The publications are intended to provide access to the decisions of the Cassation Division to lower courts as the decisions set binding precedents. The decisions may be accessed <http://www.fsc.gov.et/faces/indexPages/FCHomePage.jsp> (accessed 6 February 2012).

and understanding. Nevertheless, the focus of this thesis is on the institutional arrangements for constitutional review, not on constitutional interpretation in particular cases. Therefore, the limitations do not affect the findings of this research.

The temporal scope of the study covers the period between 1995, when the Constitution entered into force, and December 2011.

7. Definition of terms

‘Constitutional review’ refers to the review of a statute, regulation, directive, or administrative or judicial action for congruence with a constitution. The terms ‘judicial review’, ‘constitutional litigation’, and ‘constitutional adjudication’ are used interchangeably with constitutional review. ‘Constitutional adjudicator’ refers to the organ in charge of constitutional review, whether a centralised constitutional court or council (following the Austrian or Kelsenian model) or the regular courts (following the diffused or American model). Although there may be overlaps depending on the jurisdiction in question, this thesis distinguishes between constitutional review and ‘administrative judicial review’, which is concerned with whether the actions of government agencies are legally appropriate or constitute an abuse of discretion entrusted by law to administrative agencies.

Rights are considered ‘realised’ when constitutional review precludes the adoption of laws and other measures that violate constitutional rights or leads to the invalidation of unconstitutional laws and other measures. Constitutional rights are also ‘realised’ when the constitutional review system leads to the adoption of new laws and other measures in compliance with constitutional rights, such as after the constitutional adjudicator has expressed its views on the constitutional implications of proposed measures.

8. Overview of chapters

This thesis is presented in seven chapters. This Chapter serves to introduce the thesis and set the background for the subsequent chapters. Given the existence of a robust bill of rights and the supremacy of the Constitution in Ethiopia, it concludes that the basic normative framework for constitutional review has been laid down. Despite this normative framework, constitutional review has failed to ensure the realisation of human rights.

Chapter 2 identifies and discusses the basic normative and institutional prerequisites that determine the prospect of success of constitutional review in the realisation of human rights. It is intended to provide the framework for the subsequent chapters. For any constitutional review system to succeed, it needs, at the minimum, guarantees of justiciable rights (an appropriate normative framework), an independent constitutional adjudicator, and vibrant and organised litigants.⁹³ The existence or non-existence of these preconditions often depends on the political context. The Chapter discusses these preconditions in detail. By drawing from experiences in Ghana, Uganda and Malawi, this Chapter concludes that constitutional review can play a significant role in the realisation of human rights, even in countries that are not fully democratic. The Chapter also discusses the major limitations to human rights litigation in general. As a result of these limitations, even when the minimum preconditions for successful constitutional review are present, litigation should not be the first alternative to ensure the realisation of human rights.

Despite the good normative framework, the role of the Ethiopian constitutional review system in ensuring the realisation of human rights has been negligible at best. With a view to expound on the insignificant role of constitutional review in Ethiopia, **Chapter 3** critically analyses the constitutional review system through the prism of the effective protection of constitutional rights. It concludes that, despite some scholarly works that argue otherwise, the role of Ethiopian courts in the constitutional review system is limited to referring cases that raise constitutional issues to the Council. Ethiopian courts are excluded from invalidating unconstitutional government actions or inactions. It is rather the HoF that exercises the power of constitutional review. The power of constitutional review is granted to a political entity that is designed to be part of and work in harmony with whichever party is governing. After considering the independence and competence of the organs in charge of constitutional adjudication, this Chapter concludes that the Ethiopian system of constitutional review cannot properly restrain the government and protect human rights. The constitutional review system is rather designed to serve as a justificatory and apologist institution for the exercise of political power. The Chapter recommends that the constitutional review system in Ethiopia should be overhauled to empower either the ordinary judiciary or a properly constituted and independent constitutional court with the power of constitutional review if constitutional review is to play its share of responsibilities in ensuring the realisation of constitutional rights.

⁹³ These preconditions are identified based on Epp's seminal work that investigates the factors that determine the realisation of a 'rights revolution' through constitutional litigation – Epp (n 80 above).

Chapter 4 identifies that one of the main factors that motivated the unique constitutional review system designed by the drafters of the Ethiopian Constitution is the alleged counter-majoritarian character of constitutional review by independent adjudicators. The same reasons espoused at the time of constitutional drafting also justify why the government has never considered reforming the constitutional review system. This Chapter assesses and responds to the theoretical basis of the counter-majoritarian difficulty that inheres in the exercise of the power of constitutional review. It outlines the theoretical justifications of rights-based constitutional review. This Chapter argues that constitutional review does not undermine democracy. It is rather instrumental in ensuring the realisation of human rights, which are considered as essential components of democratic theory. Independent courts serve as the principal constituencies for human rights. Political actors often tend to systematically undermine or ignore human rights values in pursuance of other competing policies, or out of political convenience and self-interest. Nevertheless, the chapter recognises that there is an apparent tension between constitutional review and democracy. It therefore analyses the interpretative tools and structural designs crafted by courts and legislatures around the world – in recognition of both the counter-majoritarian implications of constitutional review and the opportunities it presents in ensuring the effective protection of rights – in an attempt to reconcile the tension.

Chapter 3 observes that Ethiopian courts do not have the power to invalidate unconstitutional laws or executive decisions. It also notes that courts can still play a role in shaping the understanding and interpretation of constitutional rights. **Chapter 5** investigates how the judiciary can – despite being excluded from invalidating unconstitutional laws and other measures – contribute to the realisation of constitutional rights. The Ethiopian Constitution provides for an independent judiciary and exclusively vests judicial powers in the courts. However, the Constitution has taken away from the judiciary one of its essential and most powerful functions, constitutional review. Although, as a result, courts and lawyers rarely mention let alone rely on constitutional provisions in adjudicating non-constitutional disputes, the Ethiopian judiciary still has some entry points to engage in constitutional interpretation and, therefore, shape the understanding of constitutional rights thereby contributing to their realisation. This Chapter identifies these entry points and briefly looks at the potential role of the Ethiopian Human Rights Commission and the Institution of the Ombudsman in complementing the realisation of constitutional rights through constitutional review.

Although states are the principal actors, the role of CSOs and human rights advocates in ensuring the realisation of human rights and complementing democratic and development efforts both at the domestic and international level cannot be overstated. The role of CSOs in employing constitutional review as a strategy to advance legal or social change is particularly crucial. CSOs and human rights advocates actively litigate human rights cases and provide legal support to individual litigants in national and international tribunals. **Chapter 6** assesses the legal and practical challenges that have constrained the activities of CSOs and other human rights advocates in facilitating the realisation of human rights through constitutional review. It also examines the possible role of opposition political parties in activating the constitutional adjudication system. It concludes that the role of CSOs and opposition political parties in constitutional rights litigation has so far been miniscule. The lack of an independent constitutional adjudication system and the highly restrictive legal environment governing CSO activities partly explain the policy of disengagement of these litigation support structures towards constitutional review.

Chapter 7 concludes that the absence of an independent constitutional adjudication system coupled with the reluctance of CSOs, human rights advocates and opposition parties – potential litigants – to litigate constitutional rights has resulted in a rather invisible and so far largely irrelevant constitutional adjudication system. The Ethiopian system of constitutional adjudication reflects an undue politicisation of constitutional law. Contrary to worldwide patterns, the HoF, a purely political organ, and not an independent court, is the guardian of the Constitution. Given the improbability of a political majority effectively enforcing the limits embodied in human rights on its powers, and given that the HoF is designed to be fully controlled by the political organs, the Ethiopian Constitution is a constitution without a guardian. The constitutional review system in Ethiopia was designed not to constrain government power. As a result, the role of constitutional review in calibrating legislative and policy making in line with constitutional rights has been utterly limited.

Chapter 7 also explores the different theories of constitutional review developed by political scientists with a view to explain the decision of the drafters of the Ethiopian Constitution to establish, and continue to retain, a formally dependent constitutional review system. It concludes that the dependent and politicised constitutional review system was 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. Based on this, the Chapter develops a ‘legitimation’ theory of constitutional review.

Chapter 2: The appropriateness of constitutional review as a tool for the realisation of human rights

1. Introduction

Since the Second World War, human rights have been elevated to a higher law status both in international and national law. Human rights occupy so much of the public discourse that they have become ‘the dominant faith of our time’.¹ They provide a ‘global critical standard for domestic political institutions’.² There is a general consensus that government power should be exercised bearing in mind the limits embodied in human rights. The rights-based approach, which sets the realisation of human rights as the backbone of social, economic, legal and political development, has become the dominant development paradigm.³ Since the adoption of the Universal Declaration of Human Rights (Universal Declaration) on 10 December 1948, human rights instruments have proliferated at the international and regional levels.⁴ Almost all domestic constitutions in Africa and beyond entrench some or most of the rights in the international bill of rights.⁵ The Ethiopia Constitution recognises a generous list of rights. The main challenge is not the lack of human rights guarantees but their realisation.⁶

As indicated in Chapter 1, most constitutions around the world have established a system of constitutional review to ensure that laws and executive decisions comply with human rights and other constitutional requirements. This Chapter aims to demonstrate the potential role of domestic constitutional review in the realisation of human rights. Following Charles Epp,⁷ the Chapter identifies three basic normative and institutional preconditions that determine the success of constitutional rights litigation in any country, namely, (1) justiciable constitutional rights, (2) an independent constitutional

¹ D Beatty ‘The forms and limits of constitutional interpretation’ (2001) 49 *American Journal of Comparative Law* 79, 79 observing that especially after the fall of the Berlin Wall ‘there was virtually a revolution of rights’; L Henkin *The age of rights* (1990) ix observing that ‘human rights is the idea of our time, the only political-moral idea that has received universal acceptance’.

² C Beitz *The idea of human rights* (2006) xi observing that ‘the language of human rights has become the common idiom of social criticism in global politics’.

³ J Mertus *The United Nations and human rights: A guide for a new era* (2009) 25.

⁴ For a list of international human rights instruments, both hard and soft, visit ‘International law’ <http://www2.ohchr.org/english/law/> (accessed 10 December 2011). The normative and institutional framework for human rights has become functional in Europe, the Americas, and Africa.

⁵ For a comparative overview of the constitutional recognition of human rights in African countries, see C Heyns and W Kagoungo ‘Constitutional human rights law in Africa’ (2006) 22 *South African Journal on Human Rights* 673.

⁶ However, despite the expansion of the human rights catalogue, due to its dynamism, the system remains substantively incomprehensive. Viljoen observes that ‘the international human rights system is a labyrinth of complexity and fragmentation, yet remains substantively under-inclusive’ – see F Viljoen ‘Contemporary challenges to international human rights law and the role of human rights education’ (2011) 44 *De Jure* 206, 209.

⁷ C Epp *The rights revolution: Lawyers, activists, and supreme courts in comparative perspective* (1998).

adjudicator, and (3) organised and capable litigants. The existence of these conditions as well their potential success is largely influenced by popular rights-awareness and the political and legal context. The political environment also influences whether decisions of constitutional adjudicators will be complied with. This Chapter elaborates on the three conditions and provides the foundation for the subsequent chapters. It also identifies the common challenges and limitations that militate against an easy resort to constitutional litigation as the sole or primary tool for the realisation of human rights.

Although the role of constitutional adjudication in democratic states is less controversial, its role in states that are not fully democratic is debatable. With a view to demonstrate that constitutional review has the potential to contribute to the realisation of human rights even in countries that are not fully democratic, the Chapter discusses selected constitutional rights cases in some African countries – Ghana, Uganda and Malawi. Although the political environment influences the potential of realising human rights through constitutional review, it does not necessarily follow that constitutional review can only be relevant and effective in established democracies. The last part concludes the Chapter.

2. The potential role of constitutional review in the realisation of human rights

Litigation is fundamental to building international justice and is becoming an increasingly attractive tool for human rights movements throughout the world.⁸

There are several mechanisms that can help to ensure the realisation of constitutional rights. Legislative measures give effect to constitutional provisions and represent an important step toward building a state and system of government based on the sacrosanct ideals of human rights and rule of law. The legal recognition of rights is, however, only the beginning. Educational and awareness creation campaigns and continuous advocacy and social mobilisation are imperative for the effectiveness and sustainability of any human rights system. Most of the measures are and should be taken by the primary duty-bearers, the political actors – the legislature and executive. However, the primary duty-bearers may not always deliver, more exactly, deliver satisfactorily.

Constitutional human rights provisions are deliberately broad, often ambiguous, at times contradictory and inevitably incomplete.⁹ There is always to be a difference on the interpretation and exact level of

⁸ 'Introduction' in 'Litigating human rights: Promise v. perils' (2000) 2 *Human Rights Dialogue* 1 (Carnegie Council on Ethics and International Affairs).

compliance with constitutional rights obligations and, therefore, a functional need for a neutral and independent arbiter to resolve disagreements as they arise.¹⁰ Advancing human rights norms and their enforcement unequivocally necessitates the judicial elucidation of the content of the rights.¹¹ Constitutional review is necessary to expound the meanings, implications and consequences of constitutional provisions. It provides a neutral and independent forum where complainants unsatisfied with the human rights performance of the legislature and executive and other constitutionally bound actors may launch their complaints. Moore observes that '[d]omestic litigation offers a potentially powerful tool to challenge rights violations, to expose the repressive nature of the governing system, and/or to generate public attention and awareness'.¹² The constitutionalisation of rights and the establishment of constitutional review have 'the potential to plant the seeds of change'.¹³

In addition to the enforcement of traditional civil and political rights, social movements have resorted to litigation to achieve broad issues of social justice. Constitutional litigation 'uniquely reveals ways in which law-making and, by extension, legal practices generally, are and/or could be a medium for accomplishing justice'.¹⁴ On top of receiving a favourable judicial remedy (the direct outcome of litigation), court victories reinforce and ignite social mobilisation and enhance publicity thereby creating greater rights-awareness and facilitating compliance with human rights.¹⁵ Court victories also have the potential to legitimise the causes a social movement represents.¹⁶ Kingsbury observes that 'litigation, along with the political and media activity that accompanies it, creates expectations, channels concerns, structures community organization, and even moulds people's sense of identity'.¹⁷ As such, litigation has

⁹ J Brudney 'Recalibrating federal judicial independence' (2003) 64 *Ohio State Law Journal* 173, 175 observing that 'constitutional language is often imprecise or inconclusive, and the circumstances of its application often unanticipated or unforeseeable by its authors'.

¹⁰ S Hampshire *Justice is conflict* (1999) 34 observing that 'there will always be a plurality of different and incompatible conceptions of the good and there cannot be a single comprehensive and consistent theory of human virtue'.

¹¹ V Jaichand 'Public interest litigation strategies for advancing human rights in domestic systems of law' (2004) 1 *SUR International Journal on Human Rights* 127, 127.

¹² D Moore 'Safeguarding civil society in politically complex environments' (2007) 9 *International Journal of Not-for-Profit Law* 3, 19.

¹³ R Hirschl *Towards juristocracy: The origins and consequence of the new constitutionalism* (2004) 14 – 15. However, Hirschl questions the capacity of judicial review to advance notions of egalitarian notions of distributive justice through the enforcement of socio-economic rights. Schwartz similarly observes that constitutional courts can 'help to maintain, nurture, and perhaps even to strengthen' human rights – H Schwartz *The struggle for constitutional justice in Post-Communist Europe* (2000) 248.

¹⁴ K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 147.

¹⁵ 'Interview with Ndubisi Obiorah' in 'Litigating human rights: Promise v. perils' (2000) 2 *Human Rights Dialogue* 22 (Carnegie Council on Ethics and International Affairs).

¹⁶ D Nejaime 'Winning through losing' (2010-2011) 96 *Iowa Law Review* 941, 944.

¹⁷ B Kingsbury 'Representation in human rights litigation' in 'Litigating human rights: Promise v. perils' (n 15 above) 4. It should be noted that litigation can have similar effects even when the decision has not been complied with and even when the case was lost. Simmons observes that although litigation cannot force compliance, it can 'raise the political costs of government resistance' – B Simmons *Mobilizing for human rights: International law in domestic politics* (2009) 14.

been used not just to resolve controversies between individual litigants but broadly as a political strategy to shape public policy.¹⁸ Historical experiences from the US particularly in relation to racial and sex discrimination, and recent experiences from India in relation to socio-economic rights protection¹⁹ and South Africa in relation to the protection of the rights of sexual minorities²⁰ demonstrate the potential constitutional litigation holds in ensuring the realisation of human rights particularly of minorities and other marginalised groups that lie at the periphery of mainstream politics.²¹ Experiences around the world demonstrate that constitutional review forms part of the panacea to tackling human rights abuses, particularly to challenge systematic repression that is based on laws, policies and practices.

The focus on litigation should not be understood as portending that litigation is the only, or even the primary, tool for vindicating human rights. Reliance on political action is necessary to create a favourable climate for successful constitutional litigation as well as the eventual implementation of judicial outcomes.²² However, political support to human rights may not always be present as most constitutional cases challenge the *status quo* and existing legal and political conceptions, values, and practice. It is when the political process is the cause of violations, or is unresponsive or sluggish to respond to demands for change that constitutional litigation becomes the only viable alternative.²³ Sometimes, litigation becomes ‘the best of a series of not very good alternatives’.²⁴

¹⁸ R Cowan ‘Women’s rights through litigation: An examination of the American Civil Liberties Union women’s rights project, 1971-1976’ (1976-1977) 8 *Columbia Human Rights Law Journal* 373, 375.

¹⁹ Despite the fact that socio-economic rights are declared non-justiciable in the 1950 Indian Constitution, the activism of the Indian Supreme Court has created an exemplary and transformational jurisprudence on socio-economic rights – P Bhagwati ‘Judicial activism and public interest litigation’ (1984-1985) 23 *Columbian Journal of Transnational Law* 561. In the words of Scott and Macklem, the Court achieved this ‘against the constitutional grain of India’s Constitution’ – C Scott and P Macklem ‘Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution’ (1992-1993) 141 *University of Pennsylvania Law Review* 1, 117.

²⁰ It has been indicated that the constitutional jurisprudence on sexual orientation in South Africa is richer than that on any other prohibited ground of unfair discrimination – for a discussion of constitutional cases on sexual orientation in South Africa, see I Currie and J de Waal *The bill of rights handbook* (2005) 25, and S Woolman *et al Constitutional law of South Africa* (2007) 35-64 – 35-69.

²¹ For a discussion of the role of domestic courts in Africa in applying international human rights law and generally in ensuring the realisation of human rights, see M Killander (ed) *International law and domestic human rights litigation in Africa* (2010).

²² J Lobel ‘Losers, fools and prophets: Justice as struggle’ (1994-1995) 80 *Cornell Law Review* 1331, 1332.

²³ T Keck ‘Beyond backlash: Assessing the impact of judicial decisions on LGBT rights’ (2009) 43 *Law and Society Review* 151, 175 – 182.

²⁴ A Sarat ‘Going to courts: Access, autonomy, and the contradictions of liberal legality’ in D Kairys (ed) *The politics of law: A progressive critique* (1998) 99.

Nevertheless, litigation is, and must be seen as, complementary to, and not a replacement for, other strategies in the ‘human rights box’.²⁵ Prempeh notes that ‘judicial enforcement of rights and constitutional norms is indeed an important component of any credible system of constitutionalism’;²⁶ he, however, warns that excessive reliance on and faith in ‘juridical constitutionalism’ and judicial review without addressing inherent defects in the structure and distribution of power in African states imposes a colossal burden on private litigants and the judiciary. It is ‘fruitless and even dangerous to look to the courts for the first and last word on any matter concerning the vindication of fundamental societal values’.²⁷ Litigation must be seen within the wide spectrum of strategies that can be relied on to ensure the realisation of human rights.²⁸ It is and should be considered as part of a multidimensional advocacy and mobilisation strategy.²⁹ Litigation and the law are clearly not the sole answers. The resort to litigation often involves strategic choices particularly on divisive social, economic and political issues with broad human rights implications. It should be accompanied by relentless advocacy as well as the use of the democratic space, especially where legal, institutional, or social reform is imperative.

Litigation may not always result in decisions favourable to human rights. Even when there is an independent constitutional adjudicator, human rights litigants can lose cases. A losing case may set an unfavourable precedent applicable in future cases. Also just like winning a constitutional case has the potential to legitimise the cause of winners,³⁰ losing cases have the potential to lend symbolic legitimacy to the policy choices and practices of a government.³¹ Courts have the potential to provide ‘moral weight and legal justification’ to oppressive government policies ‘through the veneer of “legal”

²⁵ C Menkel-Meadow ‘When litigation is not the only way: Consensus building and mediation as public interest lawyering’ (2002) 10 *Journal of Law and Policy* 37 exploring how processes other than litigation can serve the public interest as well as, if not better than, litigation. See also ‘Introduction’ (n 8 above); Cowan (n 18 above) noting that ‘pressure on the courts to advance particular public policy does not occur in isolation from related activities in other political arenas. Courts are affected by, and in turn affect, these other activities’.

²⁶ H Prempeh ‘*Marbury* in Africa: Judicial review and the challenges of constitutionalism in contemporary Africa’ (2005-2006) 80 *Tulane Law Review* 1239, 1244 observing that when judicial review is ‘relied upon to be the only countervailing power within the state, and thus when the burden of sustaining constitutionalism rests primarily on its “weak” shoulders, the judiciary cannot achieve much’. He calls for an equal emphasis on confronting structural constitutionalism ‘consisting in the installation of credible checks and balances between the political branches (parliament and executive), strong and independent agencies of horizontal accountability, and meaningful devolution of power to the local level’ – 1294 – 1295.

²⁷ Scott and Macklem (n 19 above) 6 & 7.

²⁸ Lobel (n 22 above) 1333 noting that ‘[l]itigation is but one means to aid political and social movements and to nurture a culture of constitutional struggle’.

²⁹ S Gløppen ‘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) 46

³⁰ Nejaime (n 16 above) 944.

³¹ S Matsui ‘A comment upon the role of the judiciary in Japan’ (1988) 35 *Osaka University Law Review* 17, 21; J Mondak ‘Policy legitimacy and the Supreme Court: The sources and contexts of legitimation’ (1994) 47 *Political Research Quarterly* 675, 690. See also T Roux ‘Legitimizing transformation: Political resource allocation in the South African Constitutional Court’ (2003) 10 *Democratization* 92.

judgments'.³² Litigants should, therefore, be wary of the potential symbolic legitimacy that judicial decisions can confer on government decisions before embarking on litigation. A confirmation by a constitutional adjudicator that a particular government decision is in line with the constitution can also blunt any possibility of advocacy for reform within the democratic process. A government that has won a court case has a stronger bargaining power and, therefore, little motivation to reconsider or otherwise compromise on its decisions.

Moreover, history is replete with cases where progressive government measures were hampered by constitutional rights litigation.³³ The spawning of human rights groups has not necessarily weakened the emergence and strength of other interest groups.³⁴ Such other groups may use the constitutional sword to undermine human rights guarantees or challenge human-rights friendly measures. As such, this Chapter does not categorically conclude that constitutional review always favours human rights.³⁵ The success of constitutional rights litigation depends on several factors including the independence and ideological orientation of the organs in charge of constitutional review, the existence of capable and organised groups with the resources to engage in strategic and repeated litigation, and the state policy on the matter (political context).

In addition to potentially adverse constitutional decisions, favourable constitutional determinations may provoke political and or social backlash – a situation whereby the human rights of winners in judicial proceedings are undermined by political decisions and conservative social movements.³⁶ Amendment of

³² Al-Haq 'Legitimising the illegitimate? The Israeli High Court of Justice and the Occupied Palestinian Territory' http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CDwQFjAD&url=http%3A%2F%2Fwww.alhaq.org%2Fpublications%2Fpublications-index%3Ftask%3Dcallelement%26format%3Draw%26item_id%3D95%26element%3D304e4493-dc32-44fa-8c5b-57c4d7b529c1%26method%3Ddownload&ei=xkdwT56iEoO4hAfagbG8Bw&usg=AFQjCNFU7n6-aW_jKiNyHC8AxmxEpJB8Q&sig2=Mvzs9VoNu_xbKeGo1m4ghg (accessed 26 March 2012).

³³ The US Supreme Court has, for instance, invalidated laws and policies designed to end discrimination against coloured people in the US. In *Scott v Sandford*, 60 US 393 (1856), the Court observed that African Americans 'had for more than a century ... been regarded as beings of inferior order, they had not rights which the white man was bound to respect'. For an account of race and litigation in the US, see B Schmidt, Jr 'Principle and prejudice: The Supreme Court and race in the progressive era – Part I: The heyday of Jim Crow' (1982) 82 *Columbia Law Review* 444; B Schmidt, Jr 'Principle and prejudice: The Supreme Court and race in the progressive era – Part 2: The "Peonage Cases"' (1982) 82 *Columbia Law Review* 646; and B Schmidt, Jr 'Principle and prejudice: The Supreme Court and race in the progressive era – Part 3: Black disfranchisement from the KKK to the Grandfather Clause' (1982) 82 *Columbia Law Review* 835; D Kommers and J Finn *American constitutional law: Essays, cases and comparative notes* (1998) 726.

³⁴ For a discussion on how conservative groups have resorted to courts in the US context, see J Heinz *et al* 'Lawyers for conservative causes: Clients, ideology and social distance' (2003) 37 *Law and Society Review* 5.

³⁵ M Wrong *It's our turn to eat: The story of a Kenyan whistle blower* (2009) 268 observing that political elites can and do 'use the legal system to strangle criticism'.

³⁶ M Klarman '*Brown and Lawrence* (and *Goodridge*)' (2005) 104 *Michigan Law Review* 431, 453 observing that progressive judicial decisions can have 'unpredictable, and occasionally perverse, consequences'. See also L Krieger 'Afterword: Socio-legal backlash' (2000) 21 *Berkeley Journal of Employment and Labor Law* 476, 477 observing that 'backlash tends to emerge when

constitutional provisions that provided the basis for a judicial determination of rights have been used to reverse court decisions reaffirming, for instance, gay rights in the US.³⁷ In Zimbabwe, several constitutional amendments have been introduced to reverse the decisions of the Supreme Court.³⁸ For instance, Amendment No 17 reversed the decision in *Chirwa v Registrar General*,³⁹ which invalidated vague restrictions on the freedom of persons to leave Zimbabwe. Concerning Singapore, as well, given the relatively easy constitutional amendment procedure – a mere two-third majority vote where one party continues to dominate the parliament – Silverstein observes that ‘the Singapore government has become enamoured of the option of constitutional amendment as a means of responding to any hint of an aggressive judiciary’.⁴⁰

These examples illustrate the potential vulnerability of constitutional litigation to sharp social and political axes. Human rights litigants should, therefore, consider the consequences of losing cases, including in the form of setting unfavourable precedents, as well as potential political and social backlash that might accompany favourable constitutional decisions. However, this precaution does not detract from the fact that constitutional litigation offers an important forum to ensure the realisation of human rights. Indeed, despite the challenges and historical low-points, independent constitutional adjudicators are regarded as the guardians of human rights and democracy.⁴¹ However, the success of constitutional litigation depends on the fulfilment of certain minimum normative and institutional framework.

3. Minimum conditions for the success of constitutional review in the realisation of rights

Constitutional review is an important tool to ensure the realisation of human rights. However, the fact that constitutional review has been more successful in some states than in others indicates that there

the application of a transformative legal regime generates outcomes that diverge too sharply from entrenched norms and institutions to which influential segments of the relevant population retain strong, conscious allegiance’.

³⁷ For such instances in the LGBTI rights litigation in the US, see Keck (n 23 above).

³⁸ See Zimbabwe Lawyers for Human Rights ‘Amendments to the Constitution of Zimbabwe: A constant assault on democracy and constitutionalism’ <http://www1.umn.edu/humanrts/research/constitution%20statement-sunday%20mirror.pdf> (accessed 10 January 2011).

³⁹ 1993 (1) ZLR 291 (S).

⁴⁰ G Silverstein ‘Singapore: The exception that proves the rule’ in T Ginsburg and T Moustafa (eds) *Rule by law: The politics of courts in authoritarian regimes* (2008) 81.

⁴¹ G Casper ‘Guardians of the Constitution’ (1979-1980) 53 *Southern California Law Review* 773.

are certain minimum preconditions for its success. Relying on Charles Epp,⁴² this section discusses the main normative and institutional prerequisites that determine the success of constitutional review. The success of constitutional rights litigation requires as a minimum the existence of (1) justiciable rights, (2) an independent constitutional adjudicator, and (3) organised litigants with the resources to engage in repeated and strategic litigation. By ensuring the continuous flow of constitutional complaints to the constitutional adjudicator, organised litigants provide the necessary litigation support structure.

These three factors relate to the normative and institutional aspects of constitutional review. However, the existence of the three preconditions as well as the prospect of success of constitutional review can be influenced to a large extent by the political and legal context and culture in a particular country. The political context can either facilitate or hamper the existence of the three preconditions and the potential success of constitutional review. Formal commitment towards constitutionalism and human rights determines the willingness of political actors to set up the necessary legal, institutional and other arrangements for the effective and efficient operation of constitutional adjudication and adherence to constitutional pronouncements. All the preconditions may only be realised if the political organs are formally committed to constitutional rights and constitutionalism. Political commitment commences with the adoption of justiciable constitutional rights. The establishment of an independent and competent entity with the power of constitutional review is an important political step. Indeed, given the potential of constitutional review to restrain the activities of political actors, only politicians sympathetic towards human rights and other constitutional limits may be expected to establish an independent constitutional adjudication system. The creation of favourable legal platforms for the recognition and operation of organised interest groups, which provide the support structure for constitutional litigation, also depends on legislative and other framework established by the political branches of a government. Formal political commitment precedes the establishment of the three preconditions for the success of constitutional review.

Most importantly, even if a constitutional adjudicator is formally independent, dominant politicians and political groups may influence its decisions in their favour. And even when a constitutional adjudicator hands down decisions against the dominant political group, the implementation of such constitutional decisions requires political action. The political organs may simply overturn adverse decisions or ignore them. The relevance of constitutional review is undermined if there are no safeguards to insulate the constitutional adjudicator from political pressure and no mechanisms to ensure that the executive and

⁴² Epp (n 7 above).

the legislature have the motivation to comply with decisions of constitutional adjudicators empowered to interpret and apply constitutional rights and the values that underlie constitutionalism. Constitutional adjudicators have neither the sword nor the purse to implement their own decisions. According to Lobel,

... traditional public interest litigation relies on political action to create favorable climate for court victory and to implement that victory. Politics is ... a necessary predicate to the courtroom drama.⁴³

Failure to enforce judicial decisions or non-compliance constitutes an affront to the independence of constitutional adjudicators.⁴⁴ Indeed, constitutional decisions will be nothing but futile ignominy if the political branches were to brush aside such judgments. Factors such as the power balance between competing political forces – whether or not there is absolute dominance of one political group – and the prevailing political culture towards constitutionalism determine the effectiveness of a formally strong and independent constitutional review system.⁴⁵ For instance, constitutional amendments – even when entered according to constitutionally established procedures – that reverse unfavourable judicial decisions demonstrate political insolence toward the judiciary and undermine judicial independence.⁴⁶

The politico-legal environment undoubtedly affects the existence of the preconditions that determine the success of constitutional review and whether decisions of a constitutional adjudicator will be complied with. In addition, on a balance of probabilities, a formally independent constitutional review system is more likely to succeed in democratic countries than in non-democratic ones. More often than not, formally independent constitutional adjudicators in authoritarian states lack independence in practice. Also authoritarian states are unlikely to tolerate the existence and operation of litigation support structures. Nevertheless, political commitment may not always result from proactive measures of the political branches. Consistent and relentless pressure from the judicial branch, CSOs, human rights advocates, the media and other domestic and international actors can play a significant role in

⁴³ Lobel (n 22 above) 1332.

⁴⁴ K Rosenn 'The protection of judicial independence in Latin America' (1987) 19 *University of Miami Inter-American Law Review* 1, 30 observing that 'refusal of the executive to enforce judicial decisions that it does not agree with seriously undermines the independence of the judiciary'. See also J Widner and D Scher 'Building judicial independence in semi-democracies: Uganda and Zimbabwe' in Ginsburg and Moustafa (n 40 above) 235.

⁴⁵ Gloppen (n 29 above) 55.

⁴⁶ Constitutional amendment procedures have been used to reverse judicial pronouncements in democratic (e.g. United States) as well as undemocratic (e.g. Zimbabwe) states. On the use of constitutional amendments to reverse judicial decisions in the US, see Keck (n 23 above). However, this does not mean that judicial decisions may not in any case be reversed through constitutionally established procedures. Constitutional amendments may indeed be necessary and desirable to ameliorate the generally fixed and rigid nature of judicial decisions. For instance, the Thirteenth and Fourteenth Constitutional amendments in the US abolishing slavery reversed the decision of the Supreme Court upholding slavery in the *Dred Scott* case. However, political branches should not frustrate the judicial branch and the constitutional arrangement by simply denying effect to decisions of courts at the expense of rights, often of the minority.

shaping political behaviour and mainstreaming political commitment and a culture of constitutionalism.⁴⁷ Indeed, constitutional litigation can help ‘inspire political action’.⁴⁸ Constitutionalism may only be fostered if the judiciary, CSOs, interest groups, and other actors committed to human rights, democracy and good governance act concertedly in reprimanding the political branches when off-course and legitimising political action when constitutionally defensible. The presence or absence of political commitment to the value of a constitutional review system and its potential (adverse) outcomes affects the success or failure of constitutional review in ensuring the realisation of human rights. In turn, the existence of an independent constitutional adjudicator and organised strategic litigants (litigation support structures) helps to foster political commitment and a culture of constitutionalism.

3.1. Justiciable constitutional rights

The first logical precondition that determines the success of constitutional rights litigation is, of course, whether or not there are laws which recognise human rights that serve as critical standards against which legislative and executive measures are to be tested.⁴⁹ This consists in constitutionalising ‘natural’ human rights. Constitutionalisation confers on rights a status higher than ordinary law. The presence or absence of justiciable rights guarantees determines ‘the extent of judicial policy making on rights’.⁵⁰ Obviously, litigation can be significant only if the rights are justiciable in the sense that the beneficiaries should be allowed to invoke the rights in courts or other judicial organs whenever aggrieved by the decisions of the entities that are bound to comply with the rights.⁵¹ By restricting the catalogue of rights that are justiciable, constitutions can limit constitutional claims against the state.⁵² If there is no

⁴⁷ Epp (n 7 above) 9 observing that ‘there are limits to the social changes produced by judicial rulings, and those rulings depend on the support from government officials and on private parties having the capability to use them well. But judicial rulings may be used to great effect by rights organisers’. Moore notes the tenacity of civil society not only to survive oppressive regimes, but also to dramatically transform society and regimes – Moore (n 12 above) 4.

⁴⁸ Lobel (n 22 above) 1332 observing that ‘[l]itigation may serve to legitimate a political movement, to publicize the issues raised by that movement, and perhaps to spur political action’. According to Lobel, inspiring political action is one of the primary goals of strategic litigation – cases that are instituted by public interest litigants even when the prospect of success is slim.

⁴⁹ In addition to serving as the basis for constitutional review and supporting litigation, the constitutional entrenchment of human rights creates expectations of compliance that can spark political mobilisation and effect elite-initiated agenda. Simmons identifies similar effects that flow from human rights treaty ratifications – Simmons (n 17 above) Chapter 4.

⁵⁰ Epp (n 7 above) 12. Epp further observes that constitutional guarantees provide the necessary ‘rallying symbols for social movements and may provide the footholds for lawyers’ arguments and foundations of judicial decisions’ – 5.

⁵¹ The duty bearer is often the state (vertical application). However, in some domestic systems even private entities may be required to comply with human rights guarantees (horizontal application). The distinction is irrelevant at the supranational level as failure by the state to ensure compliance with human rights breeds international responsibility due to the existence of a duty to protect.

⁵² It should be noted that some creative judiciaries have innovated mechanisms to use justiciable rights to enforce non-justiciable rights. In India, for instance, the Supreme Court has interpreted civil and political rights, mainly the right to life, to

instrument guaranteeing rights, or if the guaranteed rights are mere guiding principles beyond the ambit of judicial scrutiny, litigation will have little or no role in ensuring the realisation of human rights. The existence of justiciable rights, therefore, determines whether there is a potential for constitutional review.⁵³ However, although the existence of justiciable constitutional rights is mostly necessary for the success of constitutional litigation, it is clearly not sufficient. The mere existence of justiciable constitutional rights does not lead to the success of constitutional review. Epp aptly observes that ‘the fate of a bill of rights depends on forces outside of it’.⁵⁴

It should also be noted that the fact that human rights have not been granted a constitutional status does not necessarily undermine the role of human rights litigation. Some countries, such as England and New Zealand, have chosen to guarantee human rights in ordinary legislation. The power of English courts to declare laws incompatible with human rights, which triggers political action, and the duty of the courts of New Zealand to as far as possible interpret all laws in line with human rights enhance the importance of litigation.⁵⁵ In addition, rights recognised in subordinate legislation provide standards to test the compatibility of executive action with human rights. Nevertheless, constitutionalising rights and, as a result, granting them a higher law status fosters the importance of constitutional litigation to the realisation of human rights, as it entails the invalidation of laws, and not just executive action or inaction, that violate constitutional rights.

3.2. An independent, impartial and activist constitutional adjudicator

The existence of justiciable constitutional rights implies that there is an institutional structure – a constitutional adjudicator – that receives complaints against allegations of violations of these rights. Constitutional review requires a constitutional adjudicator that has the power to test government decisions against constitutional standards. Constitutional adjudicators are important because they ultimately decide rights claims.⁵⁶ Abstract constitutional rights provisions must be given effect through

enforce socio-economic rights which are recognized as non-justiciable Directive Principles of State Policy. As such, even when a right is not recognized as justiciable, constitutional adjudicators can find a way to enforce it. See P Bhagwati ‘Judicial activism and public interest litigation’ (1984-1985) 23 *Columbian Journal of Transnational Law* 561, and Circle of Rights ‘Economic, social and cultural rights activism: A training resource: Justiciability of ESC rights – the Indian experience’ <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm> (accessed 28 May 2012). However, even in India, it is because there are some justiciable rights that the Supreme Court was able to indirectly enforce other non-justiciable rights.

⁵³ B Harris ‘Judicial review, justiciability and the prerogative of mercy’ (2003) 62 *Cambridge Law Journal* 631, 631.

⁵⁴ Epp (n 7 above) 13.

⁵⁵ See S Gardbaum ‘Reassessing the new Commonwealth model of constitutionalism’ (2010) 8 *International Journal of Constitutional Law* 167, 205 concluding that the new models of constitutionalism ushered in the UK and New Zealand, where rights have not been conferred a higher law status, have been ‘moderately successful’ in protecting rights.

⁵⁶ Epp (n 7 above) 14 observing that ‘rights revolutions undoubtedly cannot happen without rights-supporting judges’.

constitutional interpretation. A constitutional review system can only be successful if the constitutional adjudicator is institutionally independent from the organs it is supposed to monitor.⁵⁷ The nature of human rights as principles independent of whoever is in power requires that the organ in charge of ensuring their realisation should also be independent. Constitutional rights litigation may only succeed if there is an autonomous and independent adjudicator capable of controlling the constitutionality of legislative and executive acts or omissions.⁵⁸ Only an entity beyond the control of political organs can fairly be expected to enforce constitutional constraints on these political organs. Independence, particularly from direct political pressure, is a necessary precondition that enables constitutional adjudicators to meaningfully check political power.⁵⁹ In addition to institutional autonomy, the personal independence and impartiality of the members of the constitutional adjudicator should be guaranteed.⁶⁰

An independent adjudicator 'stands at the symbolic centre of those legal systems committed to liberal values'.⁶¹ According to the UN Special Rapporteur on the Independence of Judges and Lawyers, judicial independence is 'a core component of democracy, the rule of law and good governance'.⁶² Independence requires that constitutional decisions are taken fairly and impartially solely based on the law and facts presented, 'not according to whim, prejudice, or fear, the dictates of the legislature or executive, or the latest opinion poll'.⁶³ Judicial independence refers to the degree to which judges decide cases 'free from the coercion, blandishments, interference, or threats from governmental

⁵⁷ UN Human Rights Committee, General Comment no 32, CCPR/C/GC/32 (2007) para 21 observing that constitutional adjudicators should 'appear to a reasonable observer to be impartial'. For a detailed understanding of judicial independence, see S Burbank 'What do we mean by "judicial independence"?' (2003) 64 *Ohio State Law Journal* 323.

⁵⁸ A Carias *Constitutional protection of human rights in Latin America: A comparative study of amparo proceedings* (2009) 87.

⁵⁹ Epp (n 7 above) 11.

⁶⁰ Despite their interrelatedness, it is possible to identify some conceptual differences between 'independence' and 'impartiality'. Independence relates to the absence of improper or inappropriate interference or influence in the conduct of judicial affairs from an external source, in particular from the political organs. Independence essentially requires that judges are the authors of their own views. On the other hand, impartiality denotes neutrality and objectivity, the absence of favour, prejudice or bias on the part of judges towards the parties or the matter under consideration. An organ is not independent if some other organ influences what it does; a person is impartial if his decision is influenced by his interest in the case or his relationship to any of the parties – see generally O Fiss 'The limits of judicial independence' (1992) 25 *University of Miami Inter-American Law Review* 57, 58; A succinct summary of the distinction between 'independence' and 'impartiality' was provided by the Canadian Supreme Court. The Court observed that 'impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "independent", however, connotes not only the state of mind or attitude in the actual exercise of the judicial functions, but a status or relationship with others, particularly to the Executive Branch of government, that rests on the objective conditions or guarantees' – *R v Valente* [1985] 2 S.C.R. 673, 23 C.C.C. (3d) 193 (Can. 1985), at 201–202. See also *Apitz Barbera et al v Venezuela*, (ser. C) No. 24 (Inter American Court of Human Rights 2008) paras 55 and 56; and *Piersack v Belgium*, application no 8692/79 (ECtHR 1982), para 26 – 30. The main focus of this article is the independence of constitutional adjudicators from the political branches.

⁶¹ Sarat (n 24 above) 97.

⁶² Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/14/26, 25 (March 2010) para 17.

⁶³ S Abrahamson 'Keynote Address: Thorny issues and slippery slopes: Perspectives on judicial independence' (2003) 64 *Ohio State Law Journal* 3, 3; M Shapiro *Courts: A comparative and political analysis* (1981) 1 – 8.

authorities or private citizens'.⁶⁴ It represents freedom from partisan influence in each and every case.⁶⁵ Judicial independence sometimes means making unpopular decisions, 'whether unpopular with the legislative or executive branch, the public, or judicial colleagues'.⁶⁶

Independent courts are believed to be 'forceful mechanisms for the defense of constitutionalism and justice', and in the absence of independence, constitutional adjudicators will easily be manipulated 'from questioning the illegal or arbitrary acts of state actors'.⁶⁷ A constitutional adjudicator and its members should, therefore, be institutionally insulated particularly from the political actors. Only an organ beyond the control of the political actors can reasonably be expected to effectively patrol the activities of political organs. Constitutional adjudicators may, therefore, not consist of political officers who represent the interests of voters or particular political groups. There should be a clear constitutional or legislative requirement that the entity and its members be independent and impartial. Such a legal requirement should be corroborated with specific mechanisms that ensure that the entity is indeed independent and impartial. This is often done through guarantees of appropriate nomination and appointment, transfer and dismissal requirements and procedures (judicial tenure) as well as a degree of stability and logistical and financial protection against outside pressure and harassment.⁶⁸

The independence of the judiciary does not imply that judges are absolutely absolved from accountability. Judicial independence does not mean that a judge is free to shoot 'in any direction he or she wishes'.⁶⁹ Judicial independence and accountability 'are not discrete concepts at war with one another, but rather complementary concepts that can and should be regarded as allies'.⁷⁰ There are several mechanisms and arrangements that help to ensure that judges account for their judgments. First, judges must decide cases based on law and facts presented before them. Judges should also provide reasoned decisions which are subject to the possibility of appeal to a higher court – with the

⁶⁴ Rosenn (n 44 above) 7. See also the Bangalore Principles of Judicial Conduct (2002), principle 1.

⁶⁵ Widner and Scher (n 44 above) 235.

⁶⁶ Abrahamson (n 63 above) 4.

⁶⁷ C Larkins 'Judicial independence and democratization: A theoretical and conceptual analysis' (1996) 44 *The American Journal of Comparative Law* 605, 606.

⁶⁸ See the Basic Principles on the Independence of the judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁶⁹ Abrahamson (n 63 above) 4.

⁷⁰ Burbank (n 57 above) 330 – 332.

exception of decisions of the highest court.⁷¹ The fact that judicial proceedings are open to anyone including mainly the media and other interest groups is another essential accountability mechanism.⁷² Open proceedings create an environment where courts and judges are judged. Comments on judicial decisions by the media, politicians and authors and scholars of diverse backgrounds and orientation provide sufficient incentive for judges to remain within their legitimate terrain. Moreover, there are often procedures in domestic constitutions and legislation, although more rigorous than the rules that apply to other civil servants with a view to protect judicial independence, through which judges may be removed, transferred, disciplined or held accountable in any other way. Judicial independence does not, therefore, reject potential judicial fallibility. Judicial administration councils which govern judicial appointment, dismissal, transfer and discipline are often established to ensure a depoliticised delicate balance between judicial independence and accountability.⁷³

A rather controversial characteristic is the need to have a creative and activist constitutional adjudicator that provides robust meaning to constitutional rights. Judicial activism refers to the progressive understanding of freedom, democracy and equality.⁷⁴ Activist courts prefer interpretive approaches that are innovative, purpose-oriented and rights-friendly to originalism, literalism and undue deference to existing principles or precedence.⁷⁵ Judicial activism goes beyond merely exercising judicial review.⁷⁶ An activist court responds and adapts to changes to fulfil its role in ensuring social, political and economic

⁷¹ A Lever 'Democracy and judicial review: Are they really incompatible' (2009) 7 *Perspectives on Politics* 805, 811 observing that revealing the reasoning behind a judgment fosters 'accountability as well as political participation'.

⁷² F Michelman *Brennan and democracy* (1999) 59 observing that the duty to give reasons which are subject to public scrutiny contributes to the democratic accountability and legitimacy of courts.

⁷³ See N Garoupa and T Ginsburg 'Guarding the guardians: Judicial councils and judicial independence' (2009) 57 *American Journal of Comparative Law* 103.

⁷⁴ D Kairys 'Introduction' in Kairys (n 24 above) 10. In *Brown v Board of Education of Topeka*, 347 US 483 (1954), for instance, the US Supreme Court ruled that the establishment of separate schools for different races was unconstitutional. In *Minister of Health and Others v Treatment Action Campaign and Others* (2002) 5 SA 721 (CC); 5 July 2002, the South African Constitutional Court ordered the government to, among others, extend the availability of Nevirapine to all hospitals and clinics. In *New Patriotic Front v Ghana Broadcasting Corporation* [1993-1994] 2 GLR 354, the Supreme Court of Ghana ruled that opposition groups should be given access to public media to express their views on the budget statements of the government.

⁷⁵ Activism includes: the willingness to hear matters prior to the exhaustion of other remedies; allowing standing even in the absence of a close personal interest; a relaxed attitude to precedent to the extent of ignoring it; and a broad and 'generous' interpretation of rights – P Lenta 'Judicial restraint and overreach' (2004) 20 *South African Journal on Human Rights* 544, 547; Kmiec adds to the list: invalidating arguably constitutional actions of other branches; departure from accepted interpretative methodology; judicial legislation; and result-oriented judging – K Kmiec 'The origin and current meanings of "judicial activism"' (2004) 92 *California Law Review* 1442. For a discussion of the transformational role of adjudication and courts, see Klare (n 14 above) arguing that the pursuit of transformation projects through adjudication is not, in principle, inconsistent with interpretative fidelity of judges.

⁷⁶ E Chemerinsky 'The price of asking the wrong question: An essay on constitutional scholarship and judicial review' (1984) 62 *Texas Law Review* 1207, 1207 – 1210.

justice.⁷⁷ Activist judges do not merely accentuate ‘the elements of pure and formal logic’ as inanimate ‘mouth[s] of the court’.⁷⁸ Judicial activism has the potential to rewrite constitutional law.⁷⁹ Constitutional adjudicators should not disconnect the transformative aspirations of constitutions through conservative legal culture.⁸⁰ It should be noted that an entity need not rule against the government all the time to be considered activist. In fact, rulings in favour of a government may be as activist.⁸¹ The level of activism of a court determines the extent to which constitutional rights will be given a robust and creative meaning. The more competent and independent a constitutional adjudicator is the more likely for it to also become activist.

Judicial activism is controversial as what is progressive to one may not be considered as such by others. It essentially lies in ‘the eye of the beholder’,⁸² changing faces depending on one’s vantage point. Kairys observes that ‘judicial activism is not consistently liberal, and judicial restraint is not consistently conservative’.⁸³ Indeed, an entity considered activist today might be criticised for being regressive by the same individuals or entities that praised it. Often, activism is seen to depend solely on the particular judicial outcome different interest groups preach for. For instance, a religious group might consider rulings that allow gay marriage to be regressive activism, while LGBT and other liberal groups eulogise it for protecting minority groups. Nevertheless, in addition to the outcome of a case, the reasoning or approach to constitutional interpretation, such as deviation from existing precedent, also reflects judicial activism.

In sum, the effectiveness of constitutional rights litigation to a large extent depends on the independence, capacity, and activism of the entities established to ensure compliance with constitutional rights.⁸⁴ Often, an independent judiciary or a constitutional court represents such an institution. An ‘independent judiciary with judicial review power’ is one of the principal structures designed to promote constitutionalism.⁸⁵ In the absence of a constitutional adjudicator beyond the

⁷⁷ W Friedmann *Law in a changing society* (1959) ix.

⁷⁸ M Cappelletti *The judicial process in comparative perspective* (1989) 9.

⁷⁹ Epp (n 7 above) 24 observing that ‘leading justices on the [US] Supreme Court created a revolution in constitutional law’.

⁸⁰ Klare (n 14 above) 151.

⁸¹ Such is the case when, for instance, courts reject constitutional challenges to pro-poor government measures by other interest groups.

⁸² Lenta, for instance, notes that the concepts of activism and restraint are ‘fluid and contested’ – Lenta (n 75 above) 547. Rosenn similarly observes that ‘[j]udicial independence tends to be lauded by liberals and decried by conservatives when the decisions follow a liberal bent; conversely, judicial independence tends to be deplored by the liberals and praised by conservatives when the decisions take a conservative tack’ – Rosenn (n 44 above) 8.

⁸³ Kairys (n 74 above) 7.

⁸⁴ M Seplveda *et al Human rights reference handbook* (2004) 489 – 508.

⁸⁵ M Jain *Indian constitutional law* (1994).

control and influence of political actors, constitutional review will not be able to ensure compliance with constitutional restraints. The full realisation of human rights requires the existence of an independent, competent and arguably activist constitutional adjudicator.

3.3. Informed, capable and organised litigants: Litigation support structures

The existence of justiciable rights and an independent and activist constitutional adjudicator are crucial but not sufficient conditions for the success of constitutional rights litigation. A constitutional review system will only be relevant if there are organised claimants that actively lodge constitutional complaints before the constitutional adjudicator.⁸⁶ Constitutional complaints are ‘the lifeblood and enabling prerequisites of judicial review’.⁸⁷ Constitutional complaints are necessary to set constitutional adjudicators in motion. In the absence of constitutional complaints, constitutional adjudicators will become silent spectators. The success of constitutional adjudication depends on the fact that those whose rights have been violated are able to articulate their concerns and voice their rights as legal claims, or have someone do so on their behalf.⁸⁸

Whether or not constitutional review can lead to successful legal and social change depends on the awareness, ability and resources of the poor and other marginalised groups who are often the victims of systematic violations.⁸⁹ The social, educational and economic context determines the extent to which individual victims of violations might lodge constitutional complaints.⁹⁰ Beyond individual complainants, the success of constitutional litigation largely depends on the extent to which human rights advocates, CSOs, opposition parties and the media actively resort to it. It depends on the existence of a consistent and organised demand for rights. Organised groups provide the expertise, organisation, resources and consistency necessary for the success of constitutional litigation in bringing about progressive and

⁸⁶ See generally, Epp (n 7 above).

⁸⁷ E Ip ‘Constitutional review as political investment: Evidence from Singapore and Taiwan’ (2011) 18, Institute of Law, Economics and Policy, Political Economy Working Paper No 2
<http://instituteleap.org/Documents/Constitutional%20Review%20as%20Political%20Investment%20-%20Evidence%20from%20Singapore%20and%20Taiwan.pdf> (accessed 7 March 2012).

⁸⁸ Gloppen (n 29 above) 46. The existence of constitutional rights can create a popular rights culture which in turn creates a rights-demanding citizenry necessary for successful human rights litigation – 15 – 17 observing that ‘surely the growing attention paid by supreme courts to rights claims would not have developed in the absence of the concept of “rights” or the extension of that concept to areas of life previously untouched by it. Protection of women’s rights, for example, depended in part on a growing recognition that gender discrimination is a problem’.

⁸⁹ Gloppen (n 29 above) 35.

⁹⁰ S Susman ‘Distant voices in the courts of India: Transformation of standing in public interest litigation’ (1994/1995) 13 *Wisconsin International Law Journal* 57, 63; N Barber ‘Prelude to separation of powers’ (2001) 60 *Cambridge Law Journal* 59, 77.

incremental legal and social changes.⁹¹ Organised litigants are important not only to bring cases to courts but also to enhance the implementation of judicially declared rights. They constitute the principal ‘support structures for legal mobilisation’.⁹² Experiences from several countries indicate that the major architectures behind successful constitutional rights litigation are CSOs and social movements.⁹³

The participation of CSOs in constitutional litigation can take three distinct but related forms. First, CSOs and social movements can provide legal assistance to those willing but unable to pursue constitutional cases for several reasons – provision of legal assistance. The role of CSOs in providing legal aid services to needy victims of human rights violations is common knowledge and is not discussed in great detail in this section. Secondly, they can, when the rules of standing allow it, institute public interest litigation in relation to matters relevant to the general public. Thirdly, CSOs can participate in constitutional litigation through *amicus curiae* procedures.

Public interest lawyering⁹⁴ plays a significant role in ensuring that disadvantaged groups benefit from constitutional rights, and that courts do not become the domains of a privileged few.⁹⁵ It ensures that a court does not merely become ‘an arena of legal quibbling for men with long purses’.⁹⁶ Almost all the major constitutional decisions in the US, such as on racial desegregation, rights of sexual minorities and

⁹¹ Epp (n 7 above) 18 – 19 observing that ‘successful rights litigation usually consumes resources beyond the reach of individual plaintiffs – resources that can be provided only by an ongoing support structure. The judicial process is time-consuming, expensive, and arcane; ordinary individuals typically do not have the time, money, or expertise necessary to support a long-running lawsuit through several levels of the judicial system. ... Moreover, successful rights litigation depends on a steady stream of rights cases that press toward shared goals, for changes in constitutional law typically occur in small increments. A support structure can provide the consistent support that is needed to move case after case through the courts’; see also C Epp ‘External pressure and the Supreme Court’s agenda’ in C Clayton and H Gillman (eds) *Supreme Court decision-making: New institutionalist approaches* (1999) 261 observing that constitutional litigation depends on interest groups that provide ‘institutional mechanisms that overcome cost barriers to individuals and plaintiffs’.

⁹² Epp (n 7 above) 8 observing that ‘the presence and strength of a support structure for legal mobilisation enhances the information, experience, skill and resources of rights claimants and thus likely affects the implementation of judicial decisions on rights’.

⁹³ Epp (n 7 above). See also N Tate and T Vallinder *The global expansion of judicial power* (1995) observing that interest groups and political organisations around the world increasingly resort to courts.

⁹⁴ Public interest litigation/lawyering refers to the practice of lawyers seeking to precipitate legal and social change through court ordered decisions with a view to reform legal rules, enforce existing laws, and articulate public norms – A Chayes ‘The role of the judge in public law litigation’ (1976) 89 *Harvard Law Review* 1281.

⁹⁵ CSOs and other organised groups particularly dominate supra-national rights litigation, especially in the African Commission on Human and Peoples’ Rights – see generally N Mbelle ‘The role of non-governmental organisations and national human rights institutions at the African Commission’ in M Evans and R Murray *The African Charter on Human and Peoples’ Rights: The system in practice, 1986-2006* (2008). The active role of NGOs in the African system has been enhanced by the robust standing regime before the African Commission which allows anyone to institute a communication – see generally F Viljoen ‘Communications under the African Charter: Procedure and admissibility’ in M Evans and R Murray (eds) *The African Charter on Human and Peoples’ Rights: The system in practice, 1986-2006* (2008).

⁹⁶ *Kesavnanda Bharathi v State of Kerala* (1973) 4 S.C.C. 225 at 947.

women's rights, were litigated by organised social groups.⁹⁷ The historical role of the American Civil Liberties Union in the advancement of human rights in the US would not have been as multihued without its frequent resort to constitutional litigation.⁹⁸ The history of litigation during and after apartheid South Africa also demonstrates that the vibrancy of CSOs determines to a large extent the success of constitutional rights litigation.⁹⁹ South African CSOs played a paramount role in the transition to democracy and the framing of the content of the current Constitution.¹⁰⁰ In the context of post-apartheid South Africa, Jagwanth observes that 'the majority of the cases decided by the [Constitutional] Court which have made an impact on the lives of disadvantaged South Africans have been brought by organized interest groups, and it is rare to find suits brought by individual litigants in this regard'.¹⁰¹ Reliance on public interest litigation to effect legal and social change, therefore, depends to a large extent on the effective and efficient intervention of CSOs to put forward grievances concerning constitutional rights.

However, strict standing rules may constrain the active involvement of CSOs in constitutional litigation in the public interest. Standing rules determine access to constitutional justice and 'the grip of constitutional rules on public behaviour'.¹⁰² Traditional 'vested interest' standing requirements highly stultify access to judicial bodies, especially of the underprivileged. Obiagwu and Odinkalu, for instance, identified the strict rules of standing as the major legal constraints on the protection of human rights in Nigeria.¹⁰³ Access to courts is a quintessential element of an independent judiciary.¹⁰⁴ Sarat notes that

⁹⁷ Epp (n 7 above) 21 observing that litigation support groups 'organised, financed, and provided legal counsel for many of the most important civil rights and liberties cases to reach the United States Supreme Court'.

⁹⁸ The ACLU has litigation as one of its principal strategies and has been involved in several controversial cases. The ACLU has appeared before the US Supreme Court more than any other organisations except the US Department of Justice – 'About the ACLU' <http://www.aclu.org/courts> (accessed 28 September 2012). On how the ACLU has influenced the jurisprudence and understanding of free speech in the US, see D Rabban 'The Free Speech League, the ACLU, and changing conceptions of free speech in American history' (1992) 45 *Stanford Law Review* 47; see also 'American Civil Liberties Union' http://www.newworldencyclopedia.org/entry/American_Civil_Liberties_Union (accessed 2 December 2010) – noting that 'lawsuits brought by the ACLU have been influential in the development of US constitutional law'

⁹⁹ It is sarcastically noted that one of the best legacies of apartheid in South Africa is the evolution of a strong and vibrant civil society.

¹⁰⁰ See generally S Jagwanth 'Democracy, civil society and the South African Constitution: Some challenges' (2003) (Management of Social Transformations (MOST), Discussion Paper 65 <http://unesdoc.unesco.org/images/0012/001295/129557e.pdf> (accessed 5 January 2011).

¹⁰¹ Jagwanth (n 100 above) 15 – 16.

¹⁰² S Kay 'Standing to raise constitutional issues: Comparative perspectives' in S Kay (ed) *Standing to raise constitutional issues: Comparative perspectives* (2005) 1.

¹⁰³ C Obiagwu and C Odinkalu 'Combating legacies of colonialism and militarism' in A An Na' im (ed) *Human rights in African constitutions: Realising the promise for ourselves* (2003) 233.

¹⁰⁴ A Bedner 'An elementary approach to the rule of law' (2010) 2 *Hague Journal of the Rule of Law* 48, 69 observing that '[i]f they are to be effective, judiciaries must not only be independent but also accessible'.

‘autonomy [of courts] without accessibility would produce an arid, scholastic irrelevance’.¹⁰⁵ Standing rules should not, therefore, be too strict to exclude legitimate claims against human rights violations. The rules should rather be designed to ensure efficiency,¹⁰⁶ and not to exclude complaints against violation of rights depending on the identity of the claimant. Standing rules should only aim at excluding undesirable meddling busybodies and not genuine litigants merely for the sake of having to adjudicate fewer cases. Procedural rules should, therefore, be drafted to be flexible enough to permit adjustments in the face of substantive concerns while at the same time ensuring regularity, uniformity and predictability.¹⁰⁷

Not all claimants are willing and able to litigate. Whenever the immediate effects of a particular action or omission are not felt, individuals have little interest in litigation. Individuals may not be interested in the outcome of a case especially when the potential benefits of the outcomes of litigation are widely diffused, but nevertheless important for society as a whole, such as cases relating to environmental pollution.¹⁰⁸ One way, although only a partial solution, to solve the problem is to allow public interest litigants to institute court action in such instances.¹⁰⁹ There is a progression internationally towards the adoption of flexible standing rules to ensure that violations of constitutional rights are remedied without undue emphasis on the identity of the claimant.¹¹⁰ Public interest litigation is particularly allowed where a case deals with a matter of interest to a wider segment of the population.¹¹¹ However, mere legislative changes in the rules governing standing, without a strong tradition of public interest lawyering, do not necessarily enhance resort to litigation.¹¹² Liberal standing rules will only be relevant if CSOs and organised human rights advocates actively seek judicial intervention in the public interest.

¹⁰⁵ Sarat (n 24 above) 97.

¹⁰⁶ One of the major challenges against opening up standing rules is the possibility of litigation explosion that might result in courts becoming ‘hopelessly overloaded’ – C Murray ‘Litigating in the public interest: Intervention and the amicus curiae’ (1994) 10 *South African Journal on Human Rights* 240, 241.

¹⁰⁷ M Minow ‘Politics and procedure’ in Kairys (n 24 above) 86 & 97.

¹⁰⁸ Barber (n 90 above) 78. Barber gives as an example: a television station which broadcasts violent movies may have caused tangible harm to many people without any one of those persons having sufficient interest to bring a case before the courts.

¹⁰⁹ This is in no way the only solution – E Elhauge ‘Does interest group theory justify more intrusive judicial review?’ (1991) 101 *Yale Law Journal* 32. Elhauge argues that weak interest groups in society will also have a weak force before courts. Hence, merely opening up standing rules may not necessarily bring about the desired result in relation to constitutional litigation.

¹¹⁰ See generally Kay (n 102 above).

¹¹¹ In purely individual cases, on the other hand, there is often a requirement to prove some kind of direct interest in the action or omission challenged – a state may not expose and address a private dispute when the parties are not willing to admit their differences – Barber (n 90 above) 75.

¹¹² Prempeh (n 26 above) 1297. Prempeh criticises lawyers in common law African countries for failing to exploit the liberalisation of standing rules. He notes that ‘private attorney generals’, individuals or organisations that litigate in the public interest, are absent in these countries.

Amicus curiae procedures provide another important avenue for CSOs and human rights advocates to engage in constitutional rights litigation in the public interest. *Amicus* intervention has become an important public interest lawyering strategy.¹¹³ Traditionally, the submission of *amicus* briefs was considered as an offer of assistance from a neutral, disinterested by-stander who wishes to genuinely help a court in arriving at the right decision.¹¹⁴ In modern times, however, interest groups join cases as *amicus curiae* not merely to assist courts but to advocate for particular causes or views – *amicus curiae* intervention has become a formidable tool for advocacy.¹¹⁵ CSOs and human rights advocates should, therefore, actively seek to join human rights cases as *amicus curiae*. Admitting *amicus curiae* briefs is beneficial to the judicial process as well as the *amicus*.

Tobias observes that allowing *amicus* intervention for public interest litigants improves the judicial decision-making process by providing background and relevant information which enables courts to make decisions confident of their social, legal and factual context and consequences.¹¹⁶ Loux similarly notes that the intervention of interest groups should be welcomed by courts as '[w]ithout the participation of pressure groups in litigation, the decisions of the judiciary could suffer from the paucity of fact and argument that may be presented by individual parties to a particular piece of litigation'.¹¹⁷ In addition to their instrumentality in providing relevant legal and factual information to courts, thereby enhancing the accuracy of judicial decisions, the submission of *amicus* briefs fosters 'democratic input to the judicial area'.¹¹⁸ Because extensive *amicus curiae* participation broadens the range of parties and

¹¹³ For a discussion of the influence of *amicus curiae* briefs on the US Supreme Court, see J Kearney & T Merrill 'The influence of *amicus curiae* briefs on the Supreme Court' (1999-2000) 148 *University of Pennsylvania Law Review* 743, 744. Kearney and Merrill observe that *amicus curiae* briefs are submitted in up to 85% of the cases before the US Supreme Court.

¹¹⁴ S Krislov 'The *amicus curiae* brief: From friendship to advocacy' (1962-1963) 72 *Yale Law Journal* 694, 695 describing the traditional role of the *amicus* as 'one of oral "Shepardizing," the bringing up of cases not known to the judge'; E Angell 'The *amicus curiae*: American development of English institutions' (1967) 16 *International and Comparative Law Quarterly* 1017, 1017 observing that the *amicus* was 'originally a bystander who, without any direct interest in the litigation, intervened on his own initiative to make suggestion to the court on matters of fact and law within his own knowledge'.

¹¹⁵ L Re 'The *amicus curiae* brief: Access to the courts for public interest associations' (1983-1984) 14 *Melbourne University Law Review* 522, 525 observing that 'the device [*amicus*] is increasingly moving from neutral 'friend' of the court to one of the partisanship: the submissions tendered are clearly in support of one or the other of the contending parties'; also see Krislov (n 114 above). For Robbins, *amici* have become 'false friends' – J Robbins 'False friends: *Amicus curiae* and procedural discretion in WTO appeals under the hot-rolled lead/asbestos doctrine' (2003) 44 *Harvard International Law Journal* 317.

¹¹⁶ P Collins, Jr 'Friends of the court: Examining the influence of *amicus curiae* participation in the U.S. Supreme Court litigation' (2004) 38 *Law and Society Review* 807 observing that the success of *amicus* intervention depends on the information they present before the courts; C Tobias 'Standing to intervene' (1991) *Wisconsin Law Review* 415, 419. See also Kearney and Merrill (n 113 above) 745 observing that lawyers and judges believe that *amicus curiae* submissions are moderately supportive.

¹¹⁷ A Loux 'Losing the battle, winning the war: Litigation strategy and pressure group organization in the era of incorporation' (2000) 11 *The King's College Law Journal* 90, 92.

¹¹⁸ P Collins, Jr *Friends of the Supreme Court: Interest groups and judicial decision making* (2008) 3.

interests represented, it furthers democratic and constitutional values and has the effect of ameliorating the democratic legitimacy deficit that particularly haunts judicial policy-making¹¹⁹

Although the *amicus curiae* procedure was originally conceived from the perspective of benefitting courts, it also has inherent advantages to the *amici* – the persons or entities that submit amicus briefs. The *amicus curiae* procedure provides opportunities for *amici* to advance their interests and perceptions of ‘good’ law and society by influencing the outcomes of judicial proceedings. Although the exact extent is uncertain and confusion still reigns,¹²⁰ *amicus curiae* submissions have been shown to influence the decisions of judges, and, therefore, judicial outcomes.¹²¹ The *amicus curiae* procedure is also a less-expensive way of advancing interests and views through courts.¹²² Also often the rules applicable to intervene as *amicus* are less strict than the requirements to stand as a principal party to a case or as an interested third party intervenor.¹²³ Amicus procedures, therefore, provide efficient ways of shaping the legal and policy outcomes of judicial decisions on important social, economic and political issues. As a result, *amicus curiae* briefs have become attractive tools for organised groups to advance particular outlooks and interests through courts.

In summary, constitutional litigation can be successful only if there is an organised demand for it in the form of constitutional complaints. A constitutional adjudicator needs constitutional complaints to be set in motion. Independent constitutional adjudicators in turn play a significant role in creating demand for rights through their decisions.¹²⁴ Given courts in most countries are not empowered to consider a constitutional case on their own initiative, the existence of a culture of reliance on courts is necessary for the success of constitutional litigation. Organised groups represent individuals who wish to challenge government decisions, file cases in the public interest and intervene as *amicus curiae* with a view to ensure compliance with constitutional requirements. They provide the prerequisite litigation support

¹¹⁹ R Garcia ‘A democratic theory of amicus advocacy’ (2008) 35 *Florida State University Law Review* 315.

¹²⁰ P Collins, Jr *Friends of the Supreme Court: Interest groups and judicial decision making* (2008) 6 – 10 showing why there is confusion and disagreement as to whether *amicus curiae* submissions actually influence judicial outcomes in the US context.

¹²¹ P Collins, Jr and W Martinek ‘Judges and friends: The influence of *amicus curiae* on U.S. Court of Appeals’, Paper prepared for delivery at the 69th Annual meeting of the Midwest Political Science Association, Chicago, Illinois, March 31 – April 3 2011 <http://www.psci.unt.edu/~pmcollins/Collins%20Martinek%20MPSA%202011.pdf> (accessed 15 March 23012) observing that ‘liberal amicus briefs increase the chances that moderately conservative and conservative judges will cast a liberal vote. Conservative amicus briefs enhance the probability that moderate judges and conservative judges will cast a conservative vote’.

¹²² Angell (n 114 above) 1023 observing that ‘the expenses incurred by one who appears as a friend of the court are trifling; no court fee of any motion, no costs assessed against the amicus who ends up on the losing side’.

¹²³ Tobias (n 116 above) 415 observing that, in the context of Canada, the law ‘does not require that intervention applicants possess standing to sue’.

¹²⁴ T Ginsburg ‘The global spread of constitutional review’ in K Whittington *et al* (eds) *Law and politics* (2008) 90.

structure for the success of constitutional litigation.¹²⁵ The ability of a formally independent constitutional review system to ensure the realisation of justiciable rights largely depends on a continuous demand for judicial intervention from CSOs and organised human rights advocates.

4. Comparative experiences in constitutional review in selected African countries

The success of a constitutional review system to a large extent depends on the political and legal context. The political context essentially relates to the nature of government, broadly the democratic or undemocratic character of the governing regime.¹²⁶ By mainly drawing from experiences in democratic states such as the US, India and South Africa, it was indicated above that constitutional review can play a significant role in the realisation of human rights.¹²⁷ Democratic competition facilitates the creation of the necessary conditions for successful constitutional review. Constitutional adjudicators are likely to be independent in practice in democracies. Also litigation support structures are likely to be more vibrant and effective in democratic countries than in intolerant authoritarian states. However, democracy is not the only or even a sufficient determinant of the success of constitutional review. Even in countries that are not fully democratic, the potential role of constitutional adjudication in ensuring the realisation of human rights cannot be overlooked, especially in relation to cases that are not politically sensitive.¹²⁸ Clearly, the socio-political and economic context influences judicial behaviour, but is not in itself indicative of how judicial behaviour or tendencies will develop.¹²⁹ Judicial review is not inherently a force for either progressive change or the preservation of an unjust status quo. Wise observes that constitutional review is a powerful instrument that can be used to perpetuate the power of established political elites, yet 'it is also a powerful instrument that can serve to protect the politically weak, the electorally disadvantaged, and minorities subject to discrimination from abuse in violation of the constitution'.¹³⁰

¹²⁵ C Epp 'Do bills of rights matter? The Canadian Charter of Rights and Freedoms' (1996) 90 *American Political Science Review* 765.

¹²⁶ Countries considered 'not free' by Freedom House broadly correspond to undemocratic states, and countries rated 'free' are democratic. Countries categorised as 'partly free' fall in between the two – see Chapter 1, footnote 52.

¹²⁷ M Shapiro 'The success of judicial review and democracy' in M Shapiro and A Stone Sweet *On law, politics and judicialization* (2002) 161 observing that 'no state without considerable claims to democracy does have successful judicial review'.

¹²⁸ T Ginsburg and T Moustafa 'Introduction' in Ginsburg & Moustafa (n 40 above) 2.

¹²⁹ P Domingo 'Introduction' in Gargarella *et al* (n 29 above) 4.

¹³⁰ M Wise 'Judicial review and its politicization in Central America: Guatemala, Costa Rica, and constitutional limits on presidential candidates' (2010) 2 *Santa Clara Journal of International Law* 145, 147.

Despite the prevalent view that constitutional review can only succeed in democratic states,¹³¹ several studies in the last decades have demonstrated that formally independent constitutional adjudicators can also protect rights even in authoritarian regimes.¹³² The assumption that democracy is a necessary precondition for an independent and relatively activist constitutional review system has increasingly been challenged.¹³³ Constitutional adjudicators in all kinds of states, including authoritarian states, decide issues of enormous social, economic and political significance. Hirschl concludes that the ‘reliance on courts and judicial means to address core political controversies that often define and divide whole polities knows no democratic/authoritarian borders’.¹³⁴ The potential role of formally independent constitutional adjudicators in ensuring the realisation of human rights cannot, therefore, be overruled even in stable authoritarian states, provided the three preconditions for successful constitutional review exist. In short, democracy is good for, but does not categorically determine, the success or failure of constitutional review in ensuring the realisation of human rights.

This section discusses the experiences in three selected African countries – Ghana, Malawi, and Uganda – to demonstrate the potential contributions of constitutional review in the realisation of human rights even in countries that are not fully democratic. This is done through summarising the facts in selected cases on politically sensitive issues and, where information is available, the subsequent compliance with, or defiance of, judicial decisions.¹³⁵ In the *Freedom in the World Index* issued annually by Freedom House, Uganda has been classified as ‘partly free’ since 1995; Malawi was classified as ‘free’ between 1994 and 1999 and as ‘partly free’ since 1999; Ethiopia was classified as ‘partly free’ between 1995 and 2010; in 2011, Ethiopia was classified as ‘not free’; Ghana was classified as ‘partly free’ from 1992-1996, and as ‘free’ since 1997.¹³⁶ However, the cases selected from Ghana were decided during the beginning of the democratic transition in the early 1990s when it was classified as ‘partly free’, given that the current level of democratic governance in Ghana cannot be compared to what obtains in Ethiopia. The

¹³¹ Shapiro, for instance, observes that ‘no state without considerable claims to democracy does have successful judicial review’ – Shapiro (n 127 above) 161.

¹³² See, for instance, T Moustafa *The struggle for constitutional power: Law, politics, and economic development in Egypt* (2007); G Helmke *Courts under constraints: Judges, generals and presidents in Argentina* (2005).

¹³³ G Helmke and F Rosenbluth ‘Regimes and the rule of law: Judicial independence in comparative perspective’ (2009) 12 *Annual Review of Political Science* 345.

¹³⁴ R Hirschl *Constitutional theocracy* (2010) 248.

¹³⁵ The choice of cases is motivated by several factors including the finding of violation of human rights – which partly demonstrates judicial assertiveness – leading to invalidation of a sensitive law or executive action. Accessibility of information about the cases in these countries also partly motivated the choice.

¹³⁶ For the Freedom House ratings from 1973-2011, visit <http://www.freedomhouse.org/report-types/freedom-world> (accessed 4 June 2012). The ratings provided for the four countries here start from the date when the current Constitution of the respective countries was adopted. For instance, because the Ethiopian Constitution entered into force in 1995, the ratings start from 1995.

similarity in the Freedom House categorisation of the states considered here allows for the drawing of conclusions from the experiences of countries with comparable political contexts. Moreover, Ethiopia, Ghana, Uganda and Malawi adopted their current constitutions during the first half of the 1990s. The constitutions and the constitutional review systems in these countries have existed and operated for almost the same period of time.

The experiences in the three countries indicate that, where a constitution establishes an independent constitutional adjudicator, constitutional review has the potential to constrain government power. The experience also demonstrates that the existence of a formally independent constitutional adjudicator encourages organised litigants to challenge government decisions whenever the opportunity arises.

It should be noted that all the three selected countries follow the common law legal system. Ethiopia on the other hand is a civil law country. The author was unable to use a civil law African country as a case study due to language constraints. It is submitted that, if the three preconditions for successful constitutional review identified above exist, constitutional adjudicators in any country can contribute to the realisation of human rights. Indeed, experiences in civil law countries in Latin America, such as Brazil, indicate that the success of constitutional review is not automatically determined by the legal system in a particular country.¹³⁷ If the three preconditions identified in this Chapter exist, the impact of legal culture on constitutional review dwindles.

Admittedly, although the focus of this thesis is the normative and institutional framework, the political and legal environment has the potential to influence the extent to which constitutional adjudicators can contribute to the realisation of human rights. The fact that constitutional review has been modestly successful in the three selected countries does not necessarily imply that, had the Ethiopian Constitution established a formally independent constitutional adjudicator, constitutional review would have recorded the same or comparable levels of human rights protection. Historical, cultural, political, and other factors peculiar to Ethiopia can undermine the potential of an otherwise good constitutional

¹³⁷ See generally A Carias *Constitutional protection of human rights in Latin America: A comparative study of amparo proceedings* (2009). The Supreme Court of Brazil is arguably one of the most active judiciaries in the world. However, see 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. The authors observe that courts in traditionally monist civil law countries in Africa have been slow in applying international human rights law compared to traditionally dualist common law countries. Legal culture can particularly influence the approach of constitutional judges towards constitutional interpretation.

review system.¹³⁸ Legal tradition can influence judicial attitude, interpretative approaches as well as the culture of reliance on constitutional litigation.

4.1. Experiences from Ghana

Ghana is currently considered as one of the icons of African democracy, a beacon of hope.¹³⁹ The visit in 2009 by President Barack Obama is a nominal attestation to the significant democratic success the country has enjoyed in recent years.¹⁴⁰ Freedom House classified Ghana as ‘partly free’ from 1992-1996, and ‘free’ from 1997-2011.¹⁴¹ The progress towards constitutionalism and democracy in Ghana has been ‘quiet but remarkable’.¹⁴² Ghana has passed the true test of democracy by witnessing a peaceful transfer of power through elections to an opposition party for the first time in Ghanaian history in the December 2000 elections, and later in 2009 when the party of John Kufuor, the incumbent, lost the elections.

Ghana was the first Sub-Saharan African colony to attain its independence on 6 March 1957. The adoption of the Constitution in 1960 created the first Ghanaian Republic. Ghana has since then witnessed five *coup d'états* – 1966, 1969, 1972, 1979, and 1981, and three democratic constitutions establishing the first three Ghanaian Republics – of 1960, 1969, 1979.¹⁴³ The last *coup d'état* in 1981 facilitated the coming into power of the Provisional National Defence Council (PNDC) which left Ghana under the leadership of Jerry Rawlings until 1992. The constitutional history of Ghana between independence and 1992 was chequered with military dictatorships. The constitutional and democratic experiences during this period were, as a result, short-lived. A democratic Constitution was adopted in

¹³⁸ In terms of culture, for instance, traditional legal theories in Ethiopia conceive government as omnipotent and god-sent. There is an understanding that government cannot be sued or otherwise challenged and that only a future government can undo what a previous government has done. Two old Ethiopian adages, ‘*semay ayitarus nigus ayikeses*’ (roughly ‘you cannot plough the sky nor sue a government’), and ‘the sun that comes up tomorrow will be our sun; the government that rules tomorrow will be our government’ clearly capture popular conceptions of law and political power. The person or group in power is understood to have an almost absolute power, and courts are understood as being part of and as instruments at the service of political governors.

¹³⁹ The Economist describes Ghana as ‘the most successful democracies in Sub-Saharan Africa’ – The Economist Intelligence Unit ‘Democracy Index 2010: Democracy in retreat’ 18 http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy_Index_2010_Web.pdf&mode=wp (accessed 12 December 2011).

¹⁴⁰ According to the BBC, Obama chose to visit Ghana because of Ghana’s ‘strong democratic record’ – A Harding ‘Obama speaks of hopes for Africa’ BBC 11 July 2009 <http://news.bbc.co.uk/2/hi/8145762.stm> (accessed 9 February 2011).

¹⁴¹ For the Freedom House ratings from 1973-2011, visit <http://www.freedomhouse.org/report-types/freedom-world> (accessed 4 June 2012).

¹⁴² Prempeh (n 26 above) 1288.

¹⁴³ S Bimpong-Buta *The role of the Supreme Court in the development of constitutional law in Ghana* (2007) 25. For a discussion of the constitutional history of Ghana, see 23 – 33.

1992 under the auspices of the last military regime headed by Rawlings.¹⁴⁴ The 1992 Constitution brought into being the Fourth Ghanaian Republic. This Constitution guarantees human rights and democratic values and ushered in the process of democratisation.

Following a peaceful transition towards multi-party democracy, the PNDC government was replaced in 1993 by a democratically elected party, the National Democratic Congress (NDC) led by Rawlings. Although the influence of the wave of democratisation in the 1990's following the fall of the Berlin Wall should not be overlooked, the 1992 Constitution was intended to avoid future *coup d'états*, dictatorial governments and a one-party state. Rawlings left power after serving two terms as prescribed in the Constitution.¹⁴⁵ From the narratives thus far, it transpires that Ghana has progressed democratically over time. It appears from the following discussions that Ghanaian courts, particularly the Supreme Court, have actively played their role in strengthening constitutional democratic values and practice.¹⁴⁶

The story of constitutional human rights litigation in post-colonial Ghana is not consistently positive. Indeed, it started with a huge blow to the development of human rights. The first notable occasion where the role of the judiciary in fostering constitutionalism and constitutional rights was tested was in the *re Akoto*¹⁴⁷ case in 1961, during the First Republic. The case involved a writ of *habeas corpus* against the detention of the applicants based on grounds, *inter alia*, of unconstitutionality of the law based on which they were arrested.¹⁴⁸ The 1960 Constitution of Ghana did not explicitly guarantee a justiciable bill of rights. The constitutional challenge was based on article 13 of the Constitution which enshrined some fundamental rights as part of the solemn declaration that the President of the Nation had to make upon assumption of power. According to article 13(1) the President must, immediately after assumption of office, make the following solemn declaration:

¹⁴⁴ For a detailed account of the process of adoption of the 1992 Constitution, see K Afari-Djan *The making of the Fourth Republican Constitution* (1995).

¹⁴⁵ 'The Fourth Republic: The 1992 Constitution' http://www.modernghana.com/GhanaHome/ghana/government.asp?menu_id=6andsub_menu_id=13andmenu_id2=0ands=b (accessed 28 June 2011).

¹⁴⁶ Ghanaian courts, particularly the Supreme Court, have nurtured, promoted and asserted the constitutional democratic system of government – Bimpong-Buta (n 143 above) 28. This section does not provide an assessment of the transformational role of the Ghanaian judiciary. It rather discusses some cases that were resolved during the beginning of the transition to constitutional democracy that reflect the distinctive contribution of the Ghanaian Supreme Court in facilitating the transition to an established constitutional democracy by enforcing constitutional rights.

¹⁴⁷ *Re Akoto* [1961] 2 GLR 523, SC.

¹⁴⁸ The Preventive Detention Act no 17 of 1958.

That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to courts.

The Supreme Court delivered one of the most criticised judgments in Ghanaian constitutional law history.¹⁴⁹ The Court ruled that the solemn declaration did not create judicially enforceable obligations. It held that

... the [solemn] declaration merely represents the goal which every President must pledge himself to attempt to achieve. The declarations however impose on every President a moral obligation, and provide a political yardstick by which the conduct of the Head of State can be measured by the electorate. The people's remedy for any departure from the principles of the declaration is through the use of the ballot box, and not through the courts.¹⁵⁰

Because of the absence of provisions explicitly guaranteeing justiciable human rights, the Supreme Court held that the solemn declaration was non-justiciable, and, hence, did not impose judicially enforceable obligations. The decision has been criticised even by the post-1992 Supreme Court for undermining the political and constitutional development of Ghana. Any other outcome in the case, the post-1992 Supreme Court observed, would have definitely curved the course of history where 'respect for individual rights and rule of law might very well have been entrenched in our land'.¹⁵¹

The 1992 Constitution corrected the fissure that led to the *Re Akoto* judgment, namely, the absence of a justiciable bill of rights. Under the 1992 Constitution, judicial power is exclusively vested in the courts.¹⁵² The High Court of Ghana has the jurisdiction to receive complaints alleging violation of fundamental human rights and freedoms enshrined under Chapter 5 of the Constitution, subject to appeal to the Court of Appeal and the Supreme Court.¹⁵³ There is no doubt that the current Constitution clearly guarantees justiciable human rights. The Constitution also vests the power of constitutional review in the courts.

Encouraged by this change and conscious of its role in enforcing the Constitution and in the transition towards constitutional democracy, the Ghanaian Supreme Court rendered some judgments with serious

¹⁴⁹ Bimpong-Buta (n 143 above) 350 – 356.

¹⁵⁰ *Re Akoto* [1961] 2 GLR 523, 535. This case incidentally confirms that the existence of justiciable constitutional rights is a necessary precondition for the success of rights-based constitutional review.

¹⁵¹ *Amidu v President Kufuor* [2001-2002] SC GLR 86.

¹⁵² The Constitution of the Republic of Ghana (1992), article 125(1).

¹⁵³ Constitution of Ghana, articles 33(1), 130(1) and 140(2). However, the High Court, and every other lower court, must refer questions of constitutional interpretation or enforcement and questions of whether an enactment was made in excess of the powers conferred on Parliament to the Supreme Court (article 130(2)).

political implications. The government has cemented the efforts of the Court by adhering to judicial decisions, despite at times criticising the Court for orchestrating a ‘judicial *coup d’état*’.¹⁵⁴

In 1993, the Ghanaian Supreme Court decided one of the most controversial cases which involved a challenge against the decision of the post-1992 government to establish 31 December as a public holiday to commemorate the overthrow of a previously legally constituted government on 31 December 1981.¹⁵⁵ The complainants argued that the financing of this day as a public holiday from public funds was inconsistent with and in contravention of the letter and spirit of the 1992 Constitution. Quite expectedly, the primary defence of the government was that the issue in contest was a non-justiciable political matter. It was rather, the government submitted, more appropriate for determination by the executive or the electorate through the legislature. The Court rejected the argument.¹⁵⁶

The Constitution itself is essentially a political document. Almost every matter of interpretation or enforcement which may arise from it is bound to be political, or at least to have a political dimension.

The Court also refused to rely on the ‘political question’ doctrine developed by the US Supreme Court:¹⁵⁷

What we have is a written Constitution, 1992 to be interpreted and enforced, with the result that in Ghana, courts and tribunals much lower in the hierarchy than the Supreme Court may lawfully decide cases which may involve ‘political questions’.

The Court further reaffirmed that the Constitution, and not Parliament, was supreme. The right of Parliament to enact laws was, therefore, not unlimited. As such, the determination of a public holiday cannot be completely left to policy choices but must be within the parameters of parliamentary powers set by the Constitution:¹⁵⁸

Parliament now has no uncontrolled right to pass laws on public holidays, any more than it has to declare a ‘one party’ state, or make a party leader President for life or crown him emperor. As the fundamental or basic law, the Constitution, 1992 controls all legislation and determines their validity. It is for the courts, as the guardians of legality, to ensure that all the agencies of the State keep within their lawful bounds.

¹⁵⁴ Prempeh (n 26 above). The Chief Justice of Ghana observes that the Supreme Court ‘has remarkably contributed to the promotion and protection of civil and political rights in Ghana’ – Chief Justice Mrs Justice Georgina Wood ‘Protecting human rights and improving access to justice in Ghana’ Speech delivered at the New York University African house, 8 February 2011 http://www.judicial.gov.gh/index.php?option=com_content&task=view&id=254&Itemid=152 (accessed 8 February 2012).

¹⁵⁵ *New Patriotic Party v Attorney-General* [1993-1994] 2 SC GLR 35, (the *December 31st Case*). The government in power after the 1992 Constitution (the Rawlings Government) orchestrated the *coup d’état* on 31 December 1981. For a detailed discussion of the case, see Bimpong-Buta (n 143 above) 115, 131, 133 – 134, 144 – 148, 220 – 223.

¹⁵⁶ *December 31st Case*, 65.

¹⁵⁷ *December 31st Case*, 65. However, the exact stance of the Court on the political question doctrine is very controversial and unsettled as witnessed in subsequent cases – see Bimpong-Buta (n 143 above) 109 – 136.

¹⁵⁸ *December 31st Case*, 130.

The Court concluded that the decision to celebrate an unconstitutional overthrow of a previously constitutionally constituted government was unconstitutional and against the spirit of the 1992 Constitution, which was intended to bring an end to unconstitutional changes of government.

In another controversial case decided in 1993, the Supreme Court upheld the right to freedom of expression and access to publicly funded media in favour of opposition political parties.¹⁵⁹ The complaint was against the Ghana Broadcasting Corporation (GBC) for refusing the New Patriotic Front (NPF), the main opposition political party at that time, to access the GBC to react to the statement on radio and television of the then Minister of Finance in defence of the 1993 Budget Statement of the Government of Ghana. The complainant applied to the GBC, the body established by law to control radio and television broadcasting, to be given time to air their views about the same budget statement. The GBC refused. In the Supreme Court, the plaintiff argued that the Constitution imposed a duty on the GBC to afford the plaintiff fair opportunities and facilities for presentation of its views, especially when divergent from the views of the government. Articles 55(11) and 163 of the Constitution provided the normative basis for the action.¹⁶⁰

The Court unanimously ruled that the GBC should afford a fair opportunity and equal access to its facilities to the applicant within two weeks of the date of the order to enable the complainant to present its views. It held that the GBC did not have unlimited discretion in that regard. The views of the Court on the importance of free competition and divergent views in a democratic state deserve a long quote:¹⁶¹

The free exchange of views is necessary to give the electorate an opportunity to assess the performance of the government in power as against the potential of an opposition in the wilderness. It keeps a government on its toes and gives the neutral, apolitical citizen an opportunity to make up his mind either to consign the disenchanted noises he hears around, to mere rabid ranting that proceed from electoral defeat or give it the evocative distinction of demonstrating the quality that unfortunately missed the boat through bad electoral judgment, and therefore deserving of a second chance at the next ballot. In a truly democratic environment, this testing ground is a *sine qua non* to the survival of a free pluralistic society.

It further noted that

¹⁵⁹ *New Patriotic Front v Ghana Broadcasting Corporation* [1993-1994] 2 GLR 354. For further discussion of the case see, Bimpong-Buta (n 143 above) 428 – 430.

¹⁶⁰ Article 55(11) provides: The State shall provide fair opportunity to all political parties to present their programmes to the public by ensuring equal access to the state-owned media; article 163 provides: All state-owned media shall afford fair opportunities and facilities for the presentation of divergent views and dissenting opinions.

¹⁶¹ *New Patriotic Front v Ghana Broadcasting Corporation* [1993-1994] 2 GLR 354, 366.

... a denial of opportunity for the expression of opposing views, inherent in a democracy, would amount to moves which may culminate in the creation of a monolithic government which is one step removed from a one-party government. There is a historical precedent of such a retrogressive descent.¹⁶²

The Supreme Court, therefore, reaffirmed the mandatory and judicially enforceable duty of state-owned or funded media to provide fair opportunities and facilities for opposition parties to present divergent views.

These two decisions of the Supreme Court of Ghana clearly reflect the assertive role played by the Court to claim jurisdiction to adjudicate even the most politically sensitive cases right at the inception of the transition to constitutional democracy. Despite stern criticism of the judgments as illegitimate expansion of judicial power, the government of Ghana complied with the decisions of the Supreme Court in both judgments. Today, 31 December is not a public holiday in Ghana. The GBC granted the NPF time to present its views. The vigour of the Court has been complemented by political commitment towards constitutionalism.

In summary, the Supreme Court of Ghana has contributed its role in the evolution of the country towards a full-fledged democratic order ushered in the 1992 Constitution. It has proved to be a formidable force in ensuring the realisation of constitutional rights and the transition to constitutional democracy. As a result, opposition political parties, CSOs and individuals actively resort to the Supreme Court whenever aggrieved by the measures taken by the government.¹⁶³

4.2. Experiences from Uganda

Perhaps a very good contemporary comparator to Ethiopia is Uganda. Both countries have had a comparable democratic trajectory. Freedom House classified both Uganda and Ethiopia as 'partly free' from since 2002, with more or less similar ratings as Ethiopia, except for 2011 during which Ethiopia regressed to 'not free'. Just like Prime Minister Meles Zenawi in Ethiopia, President Ywori Museveni has been leading the country since the overthrow of the previous dictatorial regime in Uganda.¹⁶⁴ Both countries have thus been led by one head of government since their democratic constitutions were adopted in 1995. They can both be described as dominant party systems where a single political party

¹⁶² As above, 368 – 369.

¹⁶³ The two cases discussed here were instituted by the main opposition political party at the time, the New Patriotic Front. A cursory look at the many decisions of the Supreme Court reveals the range of actors that bring constitutional cases before the Supreme Court. For an extensive discussion of the role of the Ghanaian Supreme Court in the realization of human rights and generally development of constitutional law, see Bimpong-Buta (n 143 above).

¹⁶⁴ Zenawi served as the Ethiopian head of government between 1991 and 2012; Museveni has been leading Uganda since 1986.

dominates the political space. There are no term limits for the position of the head of government in Ethiopia and the term limit on the office of the President in Uganda were scrapped in 2005 through a constitutional amendment to enable Museveni to run for presidency without limits. Both leaders were seen in the 1990s as the new breed of leaders hoped to change the political and economic destiny of their respective countries, but now criticised for stifling independent voices including particularly opposition political activities and the media.¹⁶⁵

When it comes to the role of constitutional review in the realisation of human rights, Ethiopia lags far behind Uganda. Jurisdiction on matters involving constitutional interpretation in Uganda lies with the Court of Appeal (sitting as a Constitutional Court) subject to appeal to the Supreme Court.¹⁶⁶ Based on their power of constitutional review, the Constitutional Court and the Supreme Court of Uganda have on several occasions invalidated laws and executive decisions that can reasonably be considered to be politically sensitive.

In a judgment in January 2004, the Ugandan Supreme Court invalidated a proposed amendment to the Constitution for failure to comply with the provisions governing constitutional amendment.¹⁶⁷ The proposed amendment sought to reverse a previous decision of the Constitutional Court which invalidated a law that denied access to parliamentary documents to accused persons, because it unreasonably restricted the right to fair trial. The constitutional amendment was intended to give constitutional status to the legal provision which was invalidated by the Constitutional Court. The Court ruled that the amendment amended the explicitly listed articles. It also ruled that they amended some other provisions indirectly – ‘amendment by infection’. The Constitution required a referendum and a two-third parliamentary majority support to amend the provisions that were amended indirectly. Since no referendum was held, the indirect amendment was deemed to be unconstitutional.

In a landmark judgment in February 2004, the Supreme Court upheld a constitutional challenge, based on the constitutional right to freedom of expression and the press, against the crime of ‘publication of false news’.¹⁶⁸ The appellants were journalists who were charged with the offence of ‘publication of

¹⁶⁵ R Dibia and S Rashid ‘The politics in Uganda’ in R Dibia (ed) *The politics and policies of Sub-Saharan Africa* (2001) 180 – 181. See also ‘New generation of African leaders’ http://en.wikipedia.org/wiki/New_generation_of_African_leaders (accessed 31 October 2011).

¹⁶⁶ Constitution of the Republic of Uganda (1995), articles 132(3) & 137. Where any question as to the interpretation of the Constitution arises in any proceedings in a court of law other than a field court martial, such court should refer the question to the constitutional court for final decision (article 137(5)).

¹⁶⁷ *Ssemogerere and others v Attorney General*, constitutional appeal no 1 of 2002, Supreme Court of Uganda (29 January 2004).

¹⁶⁸ *Obbo and Mwenda v Attorney General*, constitutional appeal no 2 of 2002, Supreme Court of Uganda (11 February 2004).

false news’ after writing a newspaper article entitled ‘Kabila paid Uganda in gold, says report’. The Court held that the crime of ‘publication of false news’ ‘lacked sufficient guidance on what is, and what is not, safe to publish, and consequently placed the intending publisher, particularly the media, in a dilemma’.¹⁶⁹ Given the importance of the media in any democracy, the Court concluded that the limitation on freedom of the press in the form of the crime of ‘publication of false news’ was not justifiable in a free and democratic society as required by the Ugandan Constitution. In similar vein, a constitutional challenge to the crime of sedition was upheld by the Constitutional Court as the government did not adduce evidence to show that the restriction on freedom of expression that the crime of sedition entails was justifiable in a free and democratic society.¹⁷⁰ The charges against the journalists based on the crime of publication of false news and sedition were consequently dropped.

Perhaps one of the most sensitive and controversial judgments in Uganda’s recent history was the decision of the Constitutional Court that invalidated the Referendum (Political Systems) Act, 2000, as well as the referendum which was conducted based on this law.¹⁷¹ The referendum was organised to decide whether Uganda would continue to be ruled under the Movement Political System – a purported no-party system – or whether multiparty democracy would be introduced. The Constitution required that the referendum should be conducted one year after legislation authorising such a referendum was enacted. The one year period was intended to enable the people of Uganda to ‘freely canvass for public support for a political system of their choice’.¹⁷² However, the referendum on the choice of the political system was conducted less than a month after the Referendum Act was enacted. The Act was made effective retroactively to have taken effect one year earlier than the date of publication – the date of entry into force of the law was backdated with a view to comply with the constitutional requirement. In its 2004 judgment, the Court ruled that the backdating of the legislation denied the people of Uganda the opportunity to canvass for support toward an informed choice of the political system they wished for. The Court also held that the Referendum Act had the effect of indirectly amending the Constitution without following the proper constitutional amendment procedures. The Court, therefore, invalidated not only the Referendum Act but also, retrospectively, the outcome of the referendum.¹⁷³

¹⁶⁹ As above 31.

¹⁷⁰ *Mwenda and The Eastern African Media Institute (U) Ltd v Attorney General*, constitutional petition nos 12 of 2005 and 3 of 2006, Constitutional Court of Uganda (25 August 2010).

¹⁷¹ *Ssemogerere and Olum v Attorney General*, constitutional petition 3 of 2000, Constitutional Court of Uganda (25 June 2004).

¹⁷² Ugandan Constitution, article 271(2).

¹⁷³ The outcome of the referendum had favoured the Movement Political System and rejected a proposal to introduce a multi-party system. Museveni was the principal proponent of the Movement Political System.

The decision of the Constitutional Court created a huge uproar in the government. President Museveni launched a scathing attack on the judiciary accusing members of the Constitutional Court of usurping peoples' power and being opposition sympathisers.¹⁷⁴ He declared on national television that '[t]he government will not allow any authority, including the courts, to usurp people's power in any way. We shall not accept this. It will not happen. This is absurd and unacceptable'.¹⁷⁵ In June 2004, the government also mobilised its supporters to protest the ruling and the judiciary. The supporters demonstrated and called on government to dismiss or take disciplinary measures against the judges.

On appeal, although the Supreme Court upheld the decision of the Constitutional Court to declare the Referendum Act invalid, it reversed the ruling of the Constitutional Court that invalidated the outcome of the referendum.¹⁷⁶ The Supreme Court held that the absence of a law – Political Organisations Law – allowing political parties to campaign prior to the referendum did not necessarily significantly taint the validity of the referendum. It also ruled that there was no evidence that sufficiently proved that the referendum was not free and fair. The Supreme Court further observed that 'the circumstances warranted the exercise of the court's discretion to decline granting the declaration [invalidating the outcome of the referendum]'.¹⁷⁷

In yet another very controversial case in 2006, the invasion by security forces of the High Court to prevent the release on bail of a group of accused persons – which included twice presidential candidate Kizza Besigye – and the subsequent criminal proceedings in the General Court Martial against them on charges based on the same facts were found to be in violation of the Constitution.¹⁷⁸ The Constitutional

¹⁷⁴ M Kirya 'The independence and accountability of the judiciary in Uganda: Opportunities and challenges' http://www.kituoachakatiba.org/index2.php?option=com_docman&task=doc_view&gid=369&Itemid=36 (accessed 8 February 2012).

¹⁷⁵ Cited in Kirya (n 174 above).

¹⁷⁶ *Attorney General v Ssemogerere and Olum*, appeal no 3 of 2004, Supreme Court of Uganda (2 September 2004).

¹⁷⁷ In his separate opinion, Justice Mulenga identifies several factors that he considered were pertinent to justify refraining from invalidating the outcome of the referendum, even if the referendum was found not to be free and fair: 'The pertinent circumstances were that the respondents' petition, which had pre-emptively challenged the referendum, was not tried and concluded until four years after it was filed. Meanwhile the referendum was held in which the majority of the electorate voted in favour of the movement political system and the system was duly adopted. The following year, Presidential and Parliamentary elections were conducted in accordance with that system. Later the same was done in respect of local governments, and generally the political affairs of the state were for more than four years conducted on the basis of that system. A declaration that the referendum was null and void would in all probability nullify not only the referendum but also all that had been done in consequence of its result. Needless to say, that would have created political and constitutional instability and uncertainty, unproportional [sic] to the benefit the country would have derived from such remedy. In our view those were compelling circumstances, where the court would judicially exercise its discretion to refrain from granting the declaration'.

¹⁷⁸ *Uganda Law Society v Attorney General*, constitutional petition no 18 of 2005, Constitutional Court of Uganda (January 2006). The sequence of events was as follows: the accused persons were in prison pending trial in the High Court on charges of treason and concealment of treason. On 16 November 2005, 22 of the accused persons appeared before the Kampala High

Court held that the acts violated the right to fair trial and the prohibition of double jeopardy of the accused. On appeal, the Supreme Court upheld the decision of the Constitutional Court.¹⁷⁹ Besigye and some of the co-accused were released from prison subsequently after some legal wrangling. However, the ruling was not complied with fully. Despite the ruling, most of the accused persons were released long after the decision, and one of the arrested, a brother of Besigye, died in prison.¹⁸⁰

The Constitutional Court and the Supreme Court have also protected the rights of women,¹⁸¹ and the right to bail, including of those who are tried by military courts.¹⁸² Clearly, Ugandan courts have contributed their share of responsibility in the realisation of constitutional rights. They have demonstrated their willingness and ability to discharge their constitutional authority and duty to protect constitutional rights. Encouraged by this judicial record of protecting rights, members of opposition political parties, CSOs, human rights advocates and journalists have on several occasions sought judicial intervention to challenge laws and other government decisions.

4.3. Experiences from Malawi

The 1994 Constitution of Malawi formally dissolved the one-party dictatorial regime and laid down the pillars of a multi-party democratic state. This Constitution sets out the values, aspirations and parameters of operation of the Malawian State. It ushered in a new era based on constitutionalism, human rights and democratic governance. Since the transition to constitutional democracy, Malawi has

Court for bail hearings. The Court granted the accused persons conditional bail. Before the accused persons could be released from custody, however, a group of heavily armed security agents invaded the High Court premises and interrupted the processing of release papers. As a result, the accused persons were returned to Luzira prison instead of being released. On 17 November 2005, they were taken to the General Court Martial where they were jointly charged with the offences of terrorism and unlawful possession of firearms based on the same facts. For a detailed narration of how the case unfolded, see Widner and Scher (n 44 above) 238 – 248. Widner and Scher indicate that the courts largely stood their ground. The efforts of the courts were complemented significantly by the out of court activities of the Ugandan Law Society, Ugandan Human Rights Commission and newspapers, and donors and other international actors.

¹⁷⁹ *Attorney General v Uganda Law Society*, constitutional appeal no 1 of 2006, Supreme Court of Uganda (20 January 2009).

¹⁸⁰ 16 of the accused took the case to the East African Community Court of Justice (EACJ) to challenge the refusal of the government of Uganda with the decision of the courts. The EACJ ruled that the refusal to respect the court order violated the independence of the judiciary. See *Katabazi and Others v Secretary-General of the East African Community and Another* (2007) AHRLR 119 (EAC 2007) para 49.

¹⁸¹ *Uganda Association of Women Lawyers and Others v Attorney General*, constitutional petition no 2 of 2003, Constitutional Court of Uganda (10 March 2004) on the right to equality of both sexes in relation to divorce.

¹⁸² *Attorney General v Joseph Tumushabe*, constitutional appeal no 3 of 2005, Supreme Court of Uganda (9 July 2008).

achieved significant political progress in ‘institutionalizing democratic freedoms and promoting and protecting human rights’.¹⁸³ Freedom House classified Malawi as ‘partly free’ from 2002 – 2011.¹⁸⁴

The role of Malawian courts in the democratisation process prior to the enactment of the 1994 Constitution was rather limited and ineffective primarily due to ‘the narrow mandate of the court, restrictive laws, lack of guarantees for human rights and the repressive political climate’.¹⁸⁵ Their role was further constrained by the fact that the previous Constitution of 1966 did not specifically guarantee justiciable human rights. However, since the adoption of the 1994 Constitution, Malawian courts have been playing an increasingly robust role in the realisation of human rights.¹⁸⁶ The 1994 Constitution empowers the High Court, subject to appeal to the Supreme Court of Appeal, to ‘review any law and any action or decision of the Government for conformity with the Constitution’.¹⁸⁷ On this basis, constitutional review ‘has been used effectively to reverse government decisions made at various levels’.¹⁸⁸ This section looks at selected cases related to constitutional rights that were decided by Malawian courts.

In a case decided in 2002,¹⁸⁹ in his speech during a rally on 28 May 2002, the then President of the Republic of Malawi, Bakili Muluzi, banned all forms of demonstration for or against a proposed constitutional amendment to scrap presidential two-terms-limit. He also ordered the Minister of Home Affairs, the Inspector General of Police and the Army Commander ‘to deal’ with anyone violating his

¹⁸³ United National Development Programme: Malawi

http://www.undp.org.mw/index.php?option=com_programme&view=democratic%20governance&task=project&area=project%20area&id=3&58930effcf1f629ed28c9ca6846cfdcd=hzmynhin (accessed 9 February 2012).

¹⁸⁴ The ratings from 2002-2011 are available at <http://www.freedomhouse.org/report/freedom-world/2002/malawi> (accessed 4 June 2012).

¹⁸⁵ Justice L Chikopa (High Court of Malawi) ‘The role of the judiciary in promoting constitutionalism, democracy, economic growth and development in Sub-Saharan Africa: The Malawi experience’ (2007) presented at The stakeholders’ conference on constitutional adjudication in Sub-Saharan Africa, Bagamoyo, Tanzania 5 – 9 June 2007 <http://www.kas.de/rspssa/de/events/26377/> (accessed 28 June 2011).

¹⁸⁶ K Van Donge ‘Kamuzu’s legacy: The democratisation of Malawi’ (1995) 94 *African Affairs* 375; and Chikopa (n 185 above). Chikopa cites several cases where the courts were actively involved during the 1993 referendum process, which was intended to decide whether Malawi was to become a multi-party democratic state: in *Nkhwazi v Referendum Commission* (1993) the High Court reversed the Referendum Commission’s decision barring members of the army from voting; in *National Consultative Council v Attorney General* (1994) the High Court restrained the police from operating permanent roadblocks; in *Aaron Longwe v Attorney General* (1993) the High Court set aside a police order banning certain persons from speaking at public rallies; in *Mhone v Attorney General* (1993) the High Court set aside a police order banning arrested or detained persons from meeting their lawyers without the permission of the Inspector General of Police.

¹⁸⁷ Constitution of the Republic of Malawi (1994), sections 104(2) & 108.

¹⁸⁸ Open Society Foundation ‘Malawi: Justice Sector and the rule of law’ (2006) 55 (A review by AfriMAP and Open Society Institute for Southern Africa) (written and researched by F Kanyongolo).

http://www.sarpn.org.za/documents/d0002236/Malawi_Justice_Kanyongolo_2006.pdf (accessed 25 October 2010).

¹⁸⁹ *Malawi Law Society, Episcopal Conference of Malawi and Malawi Council of Churches et al v The State et al*, High Court, Civil Cause 78 of 2002 (22 October 2002).

directive on the ban.¹⁹⁰ The applicants challenged the ban arguing that it constituted a violation of the rights to freedom of association, assembly and demonstration, expression, conscience and opinion and other political rights as enshrined in the 1994 Constitution.

The High Court noted that the directive to 'deal' with demonstrations was dangerously vague and wide with negative connotations and that the President needed to be clear in his directives. However, the Court observed that constitutional rights are not absolute trumps and may be limited in order to ensure peaceful human interaction. There was disagreement between the parties on whether the directive constituted an acceptable limitation under the Constitution. Section 42(2) outlines the clause that governs the justifiable limitation of rights:

No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society.

The applicants contended that any possible limitation must fail as it was not 'prescribed by law', which renders the consideration of reasonableness and necessity immaterial. The Court observed that it was not clear in what capacity – whether as a Head of State or as a head of his political party – the President made the directives. It held that

... if he made the directive as Head of Government, he would subsequently have initiated legislation which would have been passed on to Parliament to become law. In the absence of any evidence to the contrary, at law, it would be that the President made the directives as a politician.

The Court concluded that the President did not have the power to make laws that restrict fundamental rights. That power belongs to the Parliament, which may not, under the Constitution, delegate legislative powers that substantially and significantly affect the fundamental rights and freedoms recognised in the Constitution. Hence, the directive of the President at a political rally to limit such rights did not amount to law. The limitation was, therefore, not justifiable.

The ruling of the Court was not complied with fully. The President was reported to have vowed to ignore the injunction as 'irresponsible and insensitive' and pledged to 'instruct both the army and police that demonstrations should not take place for the sake of 'peace and stability'.¹⁹¹ In fact, Amnesty International reported that the President was serious about his vows as the police subsequently

¹⁹⁰ As above, 2.

¹⁹¹ 'Muluzi and judiciary clash over third term', *BBC News* 4 June 2002 <http://news.bbc.co.uk/1/hi/world/africa/2024844.stm> (accessed 25 October 2010). The BBC reported that students were prevented from conducting anti-third-term amendments.

dispersed anti-third-term demonstrations.¹⁹² A delegation of the International Bar Association also disparaged the government for non-compliance with court orders that are labelled ‘politically unpopular’ including the case discussed.¹⁹³

In another case decided in 1998, the Supreme Court of Appeal declared illegal and unconstitutional a decision of Parliament to suspend (1) salaries of some members of the Malawian Parliament, and (2) state funding of some political parties who boycotted parliamentary proceedings and walked out of Parliament after protesting the parliamentary understanding of the purpose and interpretation of the constitutional provision governing floor-crossing.¹⁹⁴ The Court ruled that payment of salary to members of parliament as enshrined in the Constitution did not depend on attendance. It held that the State has an unqualified constitutional duty to provide funds to political parties that have secured more than one-tenth of the national vote in any parliamentary elections to enable such parties to have sufficient funds to be able to continue to meaningfully represent their constituency. The Court held that there was no express provision ‘either in the Constitution or any statute, or in the Standing Orders [of Parliament] for that matter, which sanctions the suspension of salaries of Members of Parliament or the suspension of State funding to political parties’.¹⁹⁵ The government complied with the decision.

Also, in a case decided in 1999,¹⁹⁶ the High Court ruled that the fact that the Malawi Broadcasting Corporation (MBC) provided live coverage only to rallies addressed by the presidential candidate of the ruling party on the run up to the 1999 elections constituted discrimination against other presidential candidates in violation of section 20 of the Constitution and other laws which require that all political parties should be given equal or equitable access to media coverage.

These examples indicate that Malawian courts have demonstrated their willingness to assert their role as the ultimate arbiters of constitutional disputes eking out the challenges. However, government compliance with the decisions of courts has been inconsistent. Compliance has generally depended on the ‘subject matter in question’ with government defying orders especially when it stands to ‘lose politically’.¹⁹⁷ Despite compliance challenges, the courts have shown courage in fearlessly declaring

¹⁹² Amnesty International ‘Report 2003: Malawi’ cited in Open Society Foundation (n 188 above).

¹⁹³ International Bar Association ‘Report of visit to Malawi’ (London 2002) 81 <http://ibanet.org/images/downloads/HRIIMalawiReport.pdf> (accessed 25 October 2010); Open Society Foundation (n 188 above).

¹⁹⁴ *Attorney General v SG Masauli*, Supreme Court of Appeal, MSCA, civil appeal no 28 of 1998 (25 August 1998).

¹⁹⁵ As above.

¹⁹⁶ *Kafumba and Others v The Electoral Commission and Another* (Misc. Cause 35 of 1999) (6 October 1999).

¹⁹⁷ Open Society Foundation (n 188 above) 53. The document identifies several reports that accused government of defying court orders. In February 2006, for instance, the government reportedly ignored a court order that ‘required it to restore the

certain politically sensitive government decisions unconstitutional. It has been suggested that personal criminal liability of government officials who instigate or encourage non-compliance for contempt of court may contribute to reducing instances of defiance of court orders.¹⁹⁸

Malawian courts have shown encouraging interest and commitment in upholding the Constitution in instances where unconstitutional behaviour was challenged. They have played their role in restraining legislative and executive excess detrimental to opposition political parties and other critical voices.¹⁹⁹ The inconsistency in the level of compliance calls for measures to address the challenge. It does not in any way indicate that constitutional review has failed or that its contribution has been insignificant. A concerted action by all stakeholders including the judiciary, the media, civil society, academics and other domestic and international actors can contribute towards improving the immediate and ultimate impact of and compliance with judicial decisions against the government.²⁰⁰

In conclusion, in the countries considered, the power of constitutional review lies with courts whose independence is constitutionally guaranteed. The constitutional adjudicators have demonstrated their willingness to enforce justiciable human rights guarantees and other constitutional restraints. The courts in these countries have clearly contributed to the realisation of human rights and the democratisation process. Although the courts may not have consistently favoured human rights claims, they have upheld constitutional standards in what can be considered politically sensitive cases.²⁰¹ This possibility has encouraged opposition political parties, the media, CSOs and other aggrieved parties to resort to courts to defend their rights and ensure compliance with constitutional limits on power. In the absence of an independent constitutional adjudicator, individuals and interest groups would have been reluctant to

security and other entitlements of the vice-president after these had been withdrawn on the grounds that the vice-president had by implication resigned from his position' – *The State v The President and Others*, Malawi High Court, Miscellaneous Civil Cause 22 of 2006. On 23 June 2003, 'the government defied a court order when it decided to deport to the United States five persons suspected of links with terrorism' regardless of a court injunction to block the deportation.

¹⁹⁸ Open Society Foundation (n 188 above).

¹⁹⁹ 'Malawi' in L Van de Vijver (ed) *The judicial institution in Southern Africa: A comparative study of common law jurisdictions* (2006) 90 – 91 observing that 'the judiciary is seen in most cases to stand firm in the face of pressure'. However, there are criticisms that Malawian courts, especially the Supreme Court of Appeal, do at times bow down to political pressure – see H Meinhardt and N Patel *Malawi's process of democratic transition* (2003) 22 observing that in certain instances 'the Supreme Court, out of political expedience, overturned rulings of the High Court which were in line with the Constitution'.

²⁰⁰ For a discussion of the role of civil society in the enhancement of democratic development in Malawi, see O Mwalubunju 'Civil society' in N Patel and L Svasand *Government and politics in Malawi* (2007).

²⁰¹ It should be noted that, even when judicial decisions have not been complied with, winning a court case has its own intrinsic advantages. As noted earlier in this Chapter, court victories have indirect or ancillary benefits, such as legitimating and publicising a cause, inspiring political mobilisation and awareness creation. These indirect outcomes are as important as the direct outcome, the specific remedies granted. Sometimes, the indirect outcomes may even be more significant than the direct outcome – M McCann *Rights at work: Pay equality reform and the politics of legal mobilization* (1994) 10 observing that legal mobilization helps to 'building a movement, generating public support for new rights claims, and providing leverage to supplement other political tactics'.

invest their time and resources in constitutional litigation. In short, the cursory discussion of the experiences in constitutional litigation of human rights in the selected countries reveals the existence of the minimum preconditions that determine the success of constitutional review in all the three countries. Despite some differences in the political realities in these countries, the existence of the preconditions has visibly contributed to the encouraging role of the courts in ensuring the realisation of human rights. Political commitment in these countries may not have been ideal, considering the inconsistency in the level of compliance with constitutional decisions. This inconsistency does not in any way undermine the contribution of independent constitutional adjudicators in ensuring the realisation of constitutional rights.

5. Limitations of and challenges to employing litigation

It has been argued that constitutional litigation has the potential to play a role in the realisation of human rights even in countries that are not fully democratic. Nevertheless, even when all the main preconditions for the success of human rights litigation as discussed in section 3 above exist, there are certain limitations of and challenges to employing litigation as a strategy to ensure the realisation of human rights. The existence of such limitations and challenges necessitates a sparing resort to litigation and the need to employ other alternative and complementary mechanisms such as lobbying within the democratic process. The limitations do not in any way suggest that constitutional litigation is an impotent strategy. Quite to the contrary, litigation does present colossal opportunities to ensure the realisation of human rights and facilitate legal and, at times, social change. The limitations are identified with a view to help explore ways of circumventing them while benefitting from the advantages litigation offers. It should be noted that these limitations apply to constitutional litigation as well as other forms of litigation involving human rights.

5.1. Litigation is cost and time inefficient

One of the main criticisms of resorting to litigation is the fact that it is costly and time-consuming. Litigation costs can often be beyond the means and capacities of most beneficiaries of human rights.²⁰² Litigation has been criticised because it diverts resources from other potentially more productive

²⁰² J Cassels 'Judicial activism and the public interest litigation in India: Attempting the impossible?' (1989) 37 *American Journal of Comparative Law* 495, 496 noting that costs of litigation militate against litigation strategies.

advocacy strategies.²⁰³ The materially costly nature of litigation can create a situation whereby access to justice only benefits the haves.²⁰⁴ It can take years, with accompanying unbearable economic and psychological costs, before judicial proceedings are finalised. Interest groups should, therefore, generally avoid resorting to litigation as the first resort. Resort to constitutional litigation should generally be limited to the absolute minimum.

However, the costly and time-consuming nature of litigation may not justify completely avoiding resort to litigation. It should rather induce the innovation of subtle ways of subverting the expenses such as via, *inter alia*, public interest litigation, and *amicus curiae* intervention. In any case, even other alternative mechanisms such as lobbying for change within the democratic process may cost even more and tend to be equally time-consuming. In addition, sometimes the democratic process does not simply respond adequately to advocacy initiatives.²⁰⁵ In such cases, litigation becomes the only alternative.

5.2. Courts depend on others to be set in motion

Another major limitation of constitutional review is the fact that most legal systems do not empower courts to be seized of a constitutional case on their own motion without the request or application of others. The principle of juridical passivity requires that courts and other judicial bodies may not act *suo moto*. Unlike the executive and legislature, courts 'can only answer a question asked by another protagonist in the juridical system'.²⁰⁶ Simply stated, courts cannot determine or select their agenda.

²⁰³ M McCann and H Silverstein 'Rethinking law's allurements: A relational analysis of social movement lawyers in the United States' in A Sarat and S Scheingold (eds) *Cause lawyering: political commitments and professional responsibilities* (1998) 261–292.

²⁰⁴ The model of litigation courts adopt can also impact the role courts can play in the realisation of the human rights of all, particularly the disadvantaged. In the context of socio-economic rights litigation in Brazil, for instance, the focus on individual rather than collective rights litigation has meant that mainly the middle-class, and not the needy lower socio-economic classes, have been able to benefit from the burgeoning right to health litigation. This has worsened, rather than improved, health inequities – see O Ferraz 'The right to health in the courts of Brazil: Worsening health inequities?' (2009) 11 *Health and Human Rights Journal* 33, 38 – 41. In India, as well, there have been criticisms that the mitigation of the problems of the poor, which underlay the liberalisation of *locus standi* in the 1970s, has increasingly been defeated. Rajamani, for instance, observes that three decades after, 'it is the problems of the middle-class ... that are most likely to be viewed sympathetically by the Courts' – L Rajamani 'Public interest environmental litigation in India: Exploring issues of access, participation, equity, effectiveness and sustainability' (2007) 19 *Journal of Environmental Law* 293, 303. See also M Galanter 'Why the "haves" come out ahead: Speculations on the limits of legal change' (1975-1976) 9 *Law and Society Review* 95, 103 observing that traditionally, litigation, which treats the poor and the rich according to the same legal propositions, generally benefits the haves and repeat-players (litigants). Socio-economic rights litigation, in as much as these rights primarily benefit the have-nots, need more civil society engagement than other rights that primarily benefit capable claimants.

²⁰⁵ In the context of LGBT rights litigation in South Africa, for instance, the resort to courts was in reaction to the delay and reluctance of the parliament to respond to advocacy initiatives within the democratic process.

²⁰⁶ P Pasquino 'Constitutional adjudication and democracy. Comparative perspectives: USA, France, Italy' (1998) 11 *Ratio Juris* 38, 46; A Mikva 'How well does Congress support and defend the Constitution?' (1983) 61 *North Carolina Law Review* 587, 606 observing that 'the judiciary is the one branch that is not able to set its own agenda'; R Heffner (ed) Alexis de Tocqueville:

Their agenda is rather determined by the demand side – the submission of constitutional complaints. This is in line with the long standing legal principle that ‘no one may be a judge in their own case’. Judges may not sit in a case they have instituted.

The inability of a court to act by itself can be a major limitation especially in countries where access to courts is a challenge, such as where public interest litigation is not recognised and standing rules are strictly based on direct injury. The problem is particularly acute as victims or claimants may not always become interested in the outcome of a particular proceeding, or may not have the necessary awareness, time and resources to embark on litigation. In some cases, claimants may avoid to resort to courts for fear of reprisal due to unequal power relationships between the victim and the violator.²⁰⁷ The diffused nature of the impacts of human rights violations often leads to the lack of interest on the part of the primary victims in the potential outcomes of litigation.

This limitation may be circumvented by relaxing access or standing rules to allow organised CSOs and human rights advocates to institute action on behalf of indigent claimants and in relation to cases that do not attract private action because of the diffused impact of violations on society, rather than specifically on an individual or a group. The provision of legal aid also helps to ameliorate resource constraints on access to justice. The ‘epistolary jurisdiction’ created by the Indian Supreme Court, where complaints may be instituted through letters addressed to the Court or its members and even based on newspaper articles, provides another innovative alternative.²⁰⁸ Moreover, some states have established procedures that entitle the highest courts to act *suo moto* in certain circumstances, particularly in cases concerning the potential unconstitutionality of laws.²⁰⁹

Democracy in America (2001) 73 observing that ‘rights must be contested in order to warrant the interference of a tribunal; and an action must be brought before the decision of a judge can be had’.

²⁰⁷ Barber (n 90 above) 77.

²⁰⁸ The Indian Supreme Court has been considered as the most active and most creative judiciary in the world – Cassels (n 202 above) 498.

²⁰⁹ Benin’s Constitutional Court, for instance, can act on its own motion to determine the constitutionality of laws and regulations that threaten fundamental rights – Constitution of Benin, article 121(2). Rotman identifies this feature as a peculiar and commendable feature of Benin’s Constitutional Court – see A Rotman ‘Benin’s Constitutional Court: An institutional model for guaranteeing human rights’ (2004) 17 *Harvard Human Rights Journal* 281, 292.

5.3. Litigation is reactive and contentious

Litigation is generally reactive in that it comes to salvage the situation only after a violation has occurred. It does not generally prevent violations of human rights.²¹⁰ This creates a situation whereby victims may not always be reinstated to the situation that existed prior to the violation. Remedies may not always fully redress the violation. Moreover, litigation is a contentious procedure which almost always results in a winner and a loser or even at times both or all losers. Win-win scenarios in judicial pronouncements are at best, if any, scanty. This is mainly because the level of participation of litigants in the ultimate decision making is not ideal and their control of or influence on the outcome is none or minimal at best. The level of participation in judicial proceedings is low particularly compared to other alternative dispute resolution mechanisms such as mediation, consensus building and arbitration that often produce win-win scenarios.²¹¹ Political compromise may also produce results that satisfy a relatively larger number of individuals than judicial decisions. This calls for the need to employ all the strategies complementarily and avoid overreliance on litigation as the sole or primary strategy.

5.4. Difficulty of reversing judgments

Litigation is also criticised for producing rigid outcomes that are hard to reverse.²¹² The problem is particularly acute in states that follow the principle of *stare decisis*. There is an understanding in such states that judges are authorised and generally bound to follow a precedent, even when the precedent is not the best possible constitutional interpretation.²¹³ Unlike the political arena, litigation does not allow political engagement and compromise. Litigation often generates fixed judgments based on the applicable law. Such fixed, generally unchangeable stances are rare in the political field. Of course, courts may reverse, or rather 'rectify', their own decisions over time. However, such instances are rare compared to political resolutions that are modified and adapted regularly. The irreversible nature of

²¹⁰ However, it should be noted that judicial pronouncements can have deterrent effect on future individual and state behaviour, in a sense preventing violations. Moreover, in some states, there is a procedure whereby legislation may be challenged before it is given effect – a priori judicial review – in which case litigation becomes preventive. Note also that applications in courts for injunction orders against acts that are potentially incongruent with constitutional rights prevent violations. In the international and regional human rights systems, as well, the issuance of preventive/special/interim measures to stop, for instance, execution of death convicts provides a good example of the preventive role of litigation.

²¹¹ See generally Menkel-Meadow (n 25 above).

²¹² The final decisions of the highest judicial organ may be reversed often only through constitutional amendment, and in rare circumstances by a subsequent judicial decision.

²¹³ See generally R Fallon 'Legitimacy and the constitution' (2004-2005) 118 *Harvard Law Review* 1787, 1821; M Paulsen 'Abrogating *stare decisis* by statute: May Congress remove the precedential effect of *Roe and Casey*?' (2000) 109 *Yale Law Journal* 1535, 1538; T Lee '*Stare decisis* in historical perspective: From the founding era to the Rehnquist Court' (1999) 52 *Vanderbilt Law Review* 647.

judicial determinations is particularly deplorable in cases that involve value determination on sensitive social, economic and political issues.

Hence, when courts pass judgment on issues upon which there is reasonable public disagreement, they might be imposing fixed social, economic or political policies over a society that is naturally evolving. Abraham Lincoln's reflections in his 1861 inaugural address embody this concern:²¹⁴

I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to the suit, as to the object of that suit, while they are also entitled to the very high respect and consideration, in all parallel cases, by all other departments of government. ... [A]t the same time, the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent, practically resigned their government, in the hands of that imminent tribunal.

Bickel similarly cautioned that 'the tendency of a common and easy resort to this great function [of judicial review] . . . is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility'.²¹⁵ The finality of judicial decisions, unlike political decisions, creates a fixed stance on some value judgments, and the principle of precedence ensures the continuous application of such decisions no matter how bad they are. There is, therefore, need for courts to subtly adapt their decisions with current developments in the social and human rights field.

In summary, constitutional litigation must be seen as part of a wider collective advocacy strategy to advance legal and social change and rearrange power relations within the state and society. Resort to constitutional litigation should not weaken or otherwise discourage social mobilisation and advocacy and other forms of collective action.²¹⁶ Constitutional litigants should have in mind the limits of law and courts in effecting social and political change.²¹⁷ Litigants should also strategically consider in advance the undesirable precedent that losing cases can set and their potential to legitimise and reinforce unjust systems and practices.

²¹⁴ Quoted in D Kommers and J Finn *American constitutional law: Essays, cases, and comparative notes* (1998) 729 – 730. The statement was in reaction to the decision of the Supreme Court in *Scott v Sandford* 60 US How 393 (1856) where the Court held that Congress could not interfere with the slave trade because doing so would infringe upon the property rights of slave owners.

²¹⁵ A Bickel *The least dangerous branch* (1986) 147.

²¹⁶ Litigation has been criticised as it might discourage collective action – M McCann *Taking reform seriously: Perspectives on public interest liberalism* (1986) 200.

²¹⁷ For a discussion on whether litigation can, directly or indirectly, bring about or facilitate social change, see Nejaime (n 16 above) 948 *et seq*; C Albiston 'The dark side of litigation as a social movement strategy' (2011) 96 *Iowa Law Review Bulletin* 61.

6. Conclusion

This Chapter reaffirms that constitutional litigation offers significant opportunities for the realisation of human rights. However, constitutional litigation does not always lead to outcomes favourable to human rights. The Chapter, therefore, enters a call of caution as losing cases may provide symbolic legitimacy to unacceptable government decisions and serve personal or regime interests.²¹⁸ Even when winning a court case is likely, the possibility of social and political backlash requires a sparing resort to constitutional litigation, generally as a last resort and complementary to other strategies in the political struggle.²¹⁹ Constitutional review should not be considered as an end itself. It rather sets the foundation for and reinforces advocacy strategies and future litigation initiatives, if necessary.

The success of constitutional review in any country broadly requires the existence of justiciable rights, independent constitutional adjudicators, and vibrant litigation support structures, particularly organised groups such as CSOs, human rights advocates, and opposition groups. In the absence of justiciable rights, courts will lack the basis to invalidate government decisions. Even when a constitution guarantees justiciable rights, the organ in charge of constitutional review might be made under the control of the organs it is designed to control – political organs. And even when there are justiciable rights and a formally independent constitutional adjudicator, rights-holders might not actively resort to constitutional litigation for different reasons. Constitutional review has the potential to ensure the realisation of human rights only when all the three preconditions exist. The existence of one generally facilitates the emergence and strength of others. For instance, if a constitution guarantees justiciable rights and establishes an independent constitutional adjudicator, individuals and organised groups will likely resort to constitutional review to challenge the state. The politico-legal context influences the existence of the three factors and therefore the potential success of constitutional review in ensuring the realisation of human rights.

It should be noted that this chapter presents the basic minimum normative and institutional conditions that determine the success of constitutional review in ensuring the realisation of human rights. The existence of these conditions does not necessarily guarantee the success of constitutional review. Even

²¹⁸ Indeed, most courts in Africa have in the past been ‘passive instruments of legitimating authoritarian regimes’ – N Udombana ‘Interpreting rights globally: Courts and constitutional rights in emerging democracies’ (2005) *African Human Rights Law Journal* 47, 68. According to Scheingold, ‘rights, like the law itself, do cut both ways – serving at some times and under some circumstances to reinforce privilege and at other times to provide the cutting edge of change’ – S Scheingold ‘constitutional rights and social change’ in M McCann and G Houseman (eds) *Judging the Constitution: Critical essays on judicial lawmaking* (1989) 76.

²¹⁹ McCann (n 201 above) 292. The other more traditional strategies for social change include education and awareness creation campaigns, advocacy within the democratic process and social mobilization. Litigation complements these strategies.

when there are justiciable rights, an independent constitutional adjudicator and organised human rights groups that actively resort to litigation, constitutional review might fail for reasons beyond the scope of this work. However, the lack of one of these basic conditions makes the success of constitutional review in ensuring the realisation of human rights difficult, if not impossible.

Experiences from Ghana, Uganda and Malawi indicate that independent constitutional adjudicators can play a role, despite enormous legal and political challenges, in ensuring the realisation of human rights and controlling legislative and executive excesses. To the extent the courts in the discussed countries have been able to render relatively important decisions, constitutional review has been successful not only in ensuring the realisation of human rights but also in the wider goal of transition to constitutional democracy. In all the countries considered, in addition to the normative basis provided by justiciable human rights guarantees, courts whose independence is constitutionally guaranteed have the final say on constitutional disputes. Because of the existence of an independent constitutional review system, which boosts the prospect of success, CSOs, human rights advocates, opposition parties and members of the media have actively resorted to constitutional litigation. The encouraging role of constitutional review in these counties is partly attributable to the existence of the necessary normative and institutional framework.

The Ethiopian Constitution establishes the necessary normative basis for rights-based constitutional adjudication. Despite this, the contribution of constitutional review to the realisation of rights has been insignificant. The normative basis, although important, is not sufficient to determine the success of constitutional litigation. It is argued in the subsequent chapters that the absence of an independent constitutional review system and, as a result, the reticence of opposition parties, CSOs, the media and other human rights advocates to resort to constitutional litigation have limited the potential contribution of constitutional adjudication in ensuring the realisation of human rights. The subsequent chapters identify and analyse the main factors that have contributed to the insignificant contribution of constitutional review in Ethiopia. The chapters particularly assess the (non)existence of an independent constitutional adjudicator anchoring Ethiopian constitutionalism and the reluctance of CSOs, human rights advocates and opposition groups to resort to the constitutional review system to challenge the state.

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

1. Introduction

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

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

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

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

2. Who guards the Ethiopian Constitution?

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

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

¹ FDRE Constitution, articles 78 and 79.

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

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

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

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

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

⁴ FDRE Constitution, article 62(1).

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

⁶ FDRE Constitution, article 83(1).

⁷ FDRE Constitution, article 84(2).

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

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

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

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

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

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

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

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

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

¹⁴ Fiseha (2005) (n 8 above) 21.

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

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

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

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

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

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

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

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

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

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

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

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

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

²³ Assefa (n 19 above) 169.

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

²⁵ Haile (n 21 above) 55.

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

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

3. The process of constitutional review

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

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

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

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

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

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

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

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

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

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

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

³³ Proclamation no 250/2001, article 23.

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

³⁵ Proclamation no 251/2001, article 13.

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

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

³⁸ Proclamation no 250/2001, article 29.

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

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

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

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

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

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

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

⁴² Proclamation no 251/2001, article 11.

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

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

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

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

5.1. Implications for independence and impartiality

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁵⁷ FDRE Constitution, article 68.

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

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

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

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

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

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

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

⁶¹ Bulto (n 15 above) 122.

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

⁶³ Mgbako (n 62 above) 285.

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

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

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

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

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

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

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

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

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

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

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

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

⁷⁰ FDRE Constitution, article 93.

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

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

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

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

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

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

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

5.2. Competence and composition of the HoF and the Council

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

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

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

⁷⁷ See generally A Mikva ‘How well does Congress support and defend the Constitution?’ (1983) 61 *North Carolina Law Review* 587 concluding that majoritarian organs tend to fill the perceived needs of the moment and that the large size of the US Senate makes the process of effectively engaging in complex arguments difficult; in large institutional arrangements, the urgency of the issues, the reliance of members on others for guidance and the complexity of the problems presented often prevent meaningful constitutional analysis.

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

⁷⁹ Fessha (n 56 above) 75.

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

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

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

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

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

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

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

⁸⁴ Fessha (n 56 above) 76.

⁸⁵ Twibell (n 48 above) 420.

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

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

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

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

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

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

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

⁸⁸ FDRE Constitution, article 67. Fessha argues that the fact that the HoF can only hold very few sessions in a year ‘obviously does not give enough time for the House to engage in a detailed discussion of the findings of the Council. Moreover, one should not forget that constitutional interpretation is not the only business of the House. ... the House is also charged with other important tasks – tasks which equally require the attention and time of the House. The House does not hold meetings for the sole purpose of deciding matters of constitutional interpretation. Members of the House are also saddled with a variety of tasks in the regional states and federal government in their legislative and executive capacities. With such tight schedule, it is obvious that the House does not have enough time to engage in the necessary constitutional debate unless we expect it to serve as a rubber stamp for the findings of the Council’ – Fessha (n 56 above) 76.

⁸⁹ Proclamation no 250/2001, article 13.

⁹⁰ See section 5.5. below.

⁹¹ Twibell (n 48 above) 449.

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

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

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

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

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

⁹³ Fiseha (2005) (n 8 above) 16.

⁹⁴ Idris (n 11 above) 68.

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

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

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

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

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

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

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

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

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

5.4. Implications for the protection of individual rights

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

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

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

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

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

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

5.5. Implications for the constitutionality of measures the HoF takes

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

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

¹⁰³ FDRE Constitution, article 62.

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

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

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

6. Conclusion: Which institutional design for Ethiopia?

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

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

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

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

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

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

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

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

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

¹⁰⁹ Fessha (n 56 above) 80 – 81.

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

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

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

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

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

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

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

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

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

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

The Council is composed of representatives from the two Houses, the judiciary and other legal professionals. The composition of the Council, which more or less reflects the representation of different interests, makes it a good candidate for the task. The presence of elected representatives in the Council mitigates to a certain extent the potential contention that the Council is anti-democratic. The presence of legal professionals, on the other hand, provides the Council with the necessary legal expertise required to adequately enforce constitutional norms.

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

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

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

¹¹⁵ Fessha (n 56 above) 49.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chapter 4: The Ethiopian constitutional review system and the counter-majoritarian difficulty

1. Introduction

The drafters of the Ethiopian Constitution clearly believed in the importance of a constitutional review system to reinforce the supremacy of the Constitution. However, the institutional design for constitutional review is atypical of most other systems where such power is vested in either ordinary courts or in a constitutional court or council established specifically to exercise the power of constitutional review.¹ It is, therefore, necessary to unravel the reasons that prompted the drafters of the Constitution to exclude the regular courts from exercising constitutional review and explore whether the underlying policy justifications are normatively and practically defensible. It can be gathered from the minutes of the drafting committee and discussions during the ratification process of the Constitution that the issue of which particular organ should be granted the power of constitutional review had attracted lively debates.²

One of the main reasons that justified the granting of the power of constitutional review to the HoF was the desire to keep the final say on what the Constitution says to ethnic groups. However, it was argued in Chapter 3 that the current constitutional review system cannot ensure the effective protection of the rights of ethnic groups. In any case, there is only one provision in the Bill of Rights, article 39, which deals with the rights of ethnic groups. Another reason that prompted the drafters of the Ethiopian Constitution to insulate the Constitution from the judiciary was to preclude potential ‘judicial activism or adventurism’, the fear that courts might substitute their own judgments, preferences and philosophies for that of the drafters under the guise of interpreting the constitution, a document made short, broad and vague by design. It was believed that judicial review would result in the judiciary ‘hijacking’ the great ‘compact’ between the ethnic groups.³ It was also argued that granting the power of constitutional review to the courts will militate against the principle of separation of powers and undermine the public

¹ For an analysis of the institutional and procedural mosaic of constitutional review around the world, see M Sachor ‘Mapping comparative judicial review’ (2008) 7 *Washington University Global Studies Law Review* 257; P Navia and J Ríos-Figueroa ‘The constitutional adjudication mosaic of Latin America’ (2005) 38 *Comparative Political Studies* 189; N Tate and T Vallinder *The global expansion of judicial power* (1995).

² See *Ye Ethiopia Hige Mengist Gubae, Kale Gubae* [Minutes of the Constitutional Commission] (1994) vol. 4, 21 – 27, discussions on articles 59, 61 and 62.

³ A Fiseha ‘Federalism and the adjudication of constitutional issues: The Ethiopian experience’ (2005) *Netherlands International Law Review* 1, 16.

will as expressed in grand terms in the Constitution.⁴ The observations of the Secretary of the Constitutional Commission, the body which drafted the Constitution, demonstrate the dilemma and the final resolve to keep the Constitution away from courts which are constituted of unelected judges.⁵

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

Assefa observes that it was

... persuasively argued by the vocal members of the [Constituent] Assembly (and it appears to have swayed the decision finally made) that if courts (ordinary or constitutional) are made to interpret the Constitution, they may through interpretation fundamentally change the Constitution ... According to them, such 'rewriting' of the Constitution by the Courts may result in dire consequences for Ethiopia if group rights fall prey to such a judicial activism by our courts.⁶

Idris similarly notes that the Constituent Assembly, which finally endorsed the Constitution, believed that 'constitutional issues were more than just judicial matters that can be left to judicial interpretation'.⁷ Granting the final power of interpretation to a political organ, the HoF, with the support of the Council was considered the best institutional design in line with constitutional and democratic theories.

Essentially, the principal objection was ideological: if the judiciary is given the final say on constitutional issues, the wishes of ethnic groups, the populace and the political majority will be trumped. The fear that unelected and unaccountable, and, therefore, undemocratic, judges might 'rewrite' the Constitution, a political as much as a legal document, provided one of the main reasons for granting the power of constitutional review to the HoF.⁸ The allegedly undemocratic nature of judicial review

⁴ A Meaza 'Ethiopia: Process of democratization and development' in A An-Na' im (ed) *Human rights under African constitutions* (2003) 30.

⁵ Transitional Government of Ethiopia, Constitutional Commission, Newsletter no 3 (1994). Newsletters were used to inform the public about the constitutional drafting process.

⁶ G Assefa 'All about words: Discovering the intention of the makers of the Ethiopian Constitution on the scope and meaning of constitutional interpretation' (2010) 24 *Journal of Ethiopian Law* 139, 161.

⁷ I Idris 'Constitutional adjudication under the 1994 FDRE (Federal Democratic Republic of Ethiopia) Constitution' (2002) 1 *Ethiopian Law Review* 62, 67 – 68.

⁸ Meaza (n 4 above) 30. The HoF was preferred to the HPR as the former represents the ethnic groups in whom sovereign power, as expressed in the Constitution, resides. Whether or not the arrangement actually addresses the counter-majoritarian challenge is, however, debatable and will be discussed in further detail. Fessha observes that the system does not 'represent an adequate response to the counter-majoritarian dilemma' – 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, 72 – 73.

justified the decision of the drafters of the Constitution to keep the judiciary at arm's length with constitutional review.

This Chapter argues that the Ethiopian constitutional review system can be challenged on democratic grounds. Despite the fact that the constitutional review system was intended to elude the counter-majoritarian difficulty, the system has not been really absolved from challenges based on democratic theory. In addition, and most importantly, this Chapter argues from a theoretical perspective that constitutional review by independent adjudicators does not undermine democracy. Constitutional review rather reinforces democracy. With this view, section two presents the arguments to the effect that the Ethiopian constitutional review system suffers from counter-majoritarian charges. Section three states the counter-majoritarian problem at the theoretical level. Section four outlines the various theoretical and practical justifications of rights-based constitutional review. It argues that rights-based constitutional review does not undermine democracy. This section further argues that rights-based constitutional review is instrumental in ensuring the realisation of human rights, which are essential components of any plausible democratic theory. To that extent, rights-based constitutional review is compatible with democracy. Nevertheless, the article recognises that there is an apparent tension between constitutional review and democracy. Therefore, section five explores the interpretative tools and structural designs crafted by courts and legislatures – in recognition of both the counter-majoritarian implications of constitutional review and the opportunities it presents in ensuring the effective protection of rights – in an attempt to reconcile the tension. Section six concludes the chapter.

It should be noted that this chapter does not delve into the normative and empirical tussle surrounding the constitutionalisation of human rights, or whether human rights should be given a constitutional or higher-law status. Most countries around the world have chosen to constitutionalise rights, while some states guarantee rights in legislative statutes. Moreover, this Chapter assumes that the constitutionalisation of rights inherently requires some sort of constitutional review to ascertain the constitutional validity of laws and other measures.⁹ The absence of a constitutional review system reduces constitutional restraints on government power to mere moral standards of behaviour. The purpose of this Chapter is to present arguments to the effect that the exercise of constitutional review by independent adjudicators does not undermine democracy.

⁹ See, however, J Waldron 'The core of the case against judicial review' (2005-2006) 115 *Yale Law Journal* 1346. Waldron argues that a commitment to rights does not necessarily demand commitment to constitutional rights and much less judicial review. Waldron further argues that legislatures are better placed to resolve rights issues, which are often riddled with disagreement, as legislatures are more representative and, hence, more participatory than the judiciary.

2. Democratic challenges to the current constitutional review system in Ethiopia

Despite the fact that the Ethiopian Constitution empowers the HoF, and not courts, with the power of constitutional review mainly with a view to address the counter-majoritarian difficulty, it has not been successful in establishing a system free from democratic challenges. Fessha has argued that the HoF suffers from democratic deficiency as its members have never been directly elected and are, therefore, not directly accountable to the people.¹⁰ Similarly, Twibell observes that the HoF 'exists less democratically' than the House of Peoples' Representatives (HPR).¹¹ According to the Ethiopian Constitution, members of the HoF are nominated by state legislative councils. Rather than nominating the members of the HoF, the regional legislative councils have the option to organise elections to select the members.¹² In practice, all the members of the HoF have since its establishment been nominated by the regional legislative councils without organising elections. Federal judges are similarly appointed by the HPR upon nomination by the Prime Minister with the advice of the Federal Judicial Administration Council.¹³

Therefore, the HoF is composed of appointed members and is, consequently, vulnerable to democratic objections that haunt the courts. Moreover, there is no constitutional duty on the HoF or its members to account to any other organ or the people or even ethnic groups. Members of the HoF are, just like members of the judiciary, neither elected by nor directly accountable to the people. In addition, members of the HoF are not representatives of individuals as such. They represent ethnic groups. If democracy is defined in terms of the equal status of individuals secured through electoral accountability, the HoF falls short of the requirements of democratic legitimacy. Given that the members of the HoF are not directly elected, it is not a classical majoritarian organ. Hence, it does not escape democratic objections. Empowering the HPR with the power of constitutional review would have been more appropriate from the perspective of the counter-majoritarian difficulty.

This failure to absolve the HoF of democratic deficiency is a paradox that turns the theoretical foundations of constitutional review in Ethiopia on its head. The drafters of the Constitution simply traded, in a manner that appears to be a desperate experimentation, one unelected body for another.

¹⁰ See Y Fessha *Ethnic diversity and federalism: Constitutional making in South Africa and Ethiopia* (2010) 218.

¹¹ T Twibell 'Ethiopian constitutional law: The structure of the Ethiopian government and the new Constitution's ability to overcome Ethiopia's problems' (1999) 21 *Loyola of Los Angeles International and Comparative Law Review* 399, 447.

¹² FDRE Constitution, article 61(3).

¹³ FDRE Constitution, articles 81(1 & 2).

Eshete observes in this regard that the source of legitimacy of the HoF lies in the fact that it represents ethnic groups which, the Constitution proclaims, are supreme.¹⁴ According to this argument the source of legitimacy of the power of the HoF is the Constitution. The HoF cannot, therefore, claim any inherent democratic legitimacy that justified the original constitutional choice to grant it the power of constitutional review. The legitimacy of the HoF does not emanate from democratic theory. The fact that the Constitution declares the supremacy of ethnic groups does not change the fact that the members of the HoF are unelected and, therefore, democratically unaccountable.

Even if one assumes that the drafters of the Ethiopian Constitution have actually designed a system of constitutional review that is democratically legitimate, at least democratically more legitimate than the judiciary, the weight given to the counter-majoritarian dilemma by the drafters of the Ethiopian Constitution was unjustified.¹⁵ It is argued in section 4 below that rights-based constitutional review does not undermine democracy; it rather reinforces democracy. The fact that independent constitutional adjudicators are not directly accountable to the people does not justify the complete rejection of constitutional review, at least in the context of human rights as constitutional review offers additional protection to human rights. The instrumentality of constitutional review to keep the legislature and the executive within the pathway set by constitutional human rights explains and justifies its worldwide recognition.

The Ethiopian Constitution guarantees electoral winners the right to govern, but it also outlines restrictions or prohibitions, such as those embodied in the human rights guarantees, on those who govern. Given that the Constitution establishes a parliamentary form of government, which naturally blends the legislative and executive branch precluding potential checks and balances between the two organs,¹⁶ the exclusion of judicial review undermines any possibility of inter-institutional control within the state structure. The HoF is designed to be part of and work in harmony with the political group that is in power. The absence of an independent organ in charge of preventing and remedying unconstitutional measures gives the political organs a free-ride to unknot through ordinary legislation any constitutional constraint, thereby undermining the very constitutional and democratic nature of the Ethiopian State.

¹⁴ Comments by A Eshete on the Draft Constitution (22 November 1994) 5 cited in Fessha (n 8 above) 35.

¹⁵ Bulto observes that 'while judicial review seeks to judicialise politics, subjecting political processes to constitutional procedures, in Ethiopia the Constitution seems to have been overly politicized' – T Bulto 'Judicial referral of constitutional disputes in Ethiopia: From practice to theory' (2011) 19 *African Journal of International and Comparative Law* 99, 123.

¹⁶ See in this regard Assefa (n 6 above).

Moreover, even if one assumes that democratic theory justifies the exclusion of courts from quashing laws made by popularly elected bodies, the relevance of the objection should not be overstated especially in countries that do not have established and reliable democratic culture, institutions and procedures to effectively protect human rights. The democratic objection to judicial review cannot be insensitive to context. Indeed, the democratic legitimacy objection has almost always been discussed in the context of established democracies in North America and Europe. Many of the scholars who have actively argued against the institution of judicial review do so conditionally. These scholars often assume the existence of democratic institutions that are in reasonably good working order and a serious political and social commitment to individual and minority rights.¹⁷ Waldron, the most prominent critic of judicial review, concludes that ‘rights-based judicial review is inappropriate for *reasonably democratic societies* whose main problem is not that *their legislative institutions are dysfunctional* but that their members disagree about rights’ (emphasis added).¹⁸ For Waldron, therefore, judicial review is not justified except when ‘other channels of political change are blocked’.¹⁹ Freeman similarly observes that ‘in the absence of widespread public agreement on these fundamental requirements of democracy [maintaining equal rights of democratic sovereignty], there is no assurance that majority rule will not be used, as it often has, to subvert the public interest in justice and to deprive classes of individuals of the conditions of democratic equality. ... It is in these circumstances that there is a place for judicial review’.²⁰

Hence, in countries with a questionable democratic pedigree and that lack a social and political culture of rights, the democratic objection to judicial review is less tenable. Governments that lack the prerequisite democratic pedigree do not have the moral legitimacy to play the anti-majoritarian card against the institution of judicial review. Quite simply, the counter-majoritarian objection has been raised in countries with significant claims to democracy and a firm commitment to fundamental rights. A democratic and rights culture is still in its infancy in Ethiopia. The counter-majoritarian dilemma cannot, therefore, provide the sole or primary justification for the exclusion of judicial review in Ethiopia.

In addition, the democratic legitimacy deficit has been propounded to justify the exclusion of the judiciary from reviewing the constitutionality of laws made by elected representatives – primary

¹⁷ Waldron notes that the argument against judicial review is ‘conditional’ on, among others, the existence of a society with (1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; and (2) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights’ – Waldron (n 9 above) 1360 *et seq.*

¹⁸ Waldron (n 9 above) 1406.

¹⁹ Waldron (n 9 above) 1395.

²⁰ S Freeman ‘Constitutional democracy and the legitimacy of judicial review’ (1990/1991) 9 *Law and Philosophy* 327, 355.

statutes. The relative democratic deficit involved in judicial review of regulations, directives and other executive measures is obviously less than that involved in the judicial review of primary statutes made by elected representatives.²¹ Indeed, even in countries with a strong tradition of parliamentary supremacy with no constitutional review, such as the Netherlands, courts can annul secondary legislation and other executive measures if contradictory to the Constitution.²² However, in the Ethiopian context, the judiciary is excluded from invalidating not only primary statutes but also regulations, directives and other executive or administrative measures and practices. The counter-majoritarian dilemma cannot justify the complete exclusion of the judiciary in controlling the constitutionality of secondary legislation and other executive measures.

Moreover, international judicial and quasi-judicial bodies which Ethiopia has subscribed to, namely, the African Commission on Human and Peoples' Rights, the African Committee on the Rights and Welfare of Children and the Common Market for Eastern and Southern Africa (COMESA) Court of Justice, have the power to invalidate Ethiopian laws for inconsistency with the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child and the COMESA Common Market Law, respectively.²³ Excluding Ethiopian courts from determining the constitutionality of laws while allowing international bodies, which enjoy lesser democratic legitimacy,²⁴ to invalidate Ethiopian laws is a paradox. These new international developments may not have been considered during the drafting of the Constitution. There is, therefore, need to reform the constitutional system to accommodate these developments. The international developments necessarily 'blow a hole' through the middle of the original understandings of constitutional review in Ethiopia.²⁵

²¹ In Germany, for instance, ordinary courts are only excluded from questioning the constitutionality of primary legislation. Questions on the constitutionality of primary legislation must be referred to the Constitutional Court. In relation to cases not involving the constitutionality of primary legislation, however, courts have to resolve the issue themselves and cannot refer the constitutional issue to the Constitutional Court.

²² Article 120 of the 1983 Constitution of the Netherlands explicitly forbids courts from reviewing on the constitutionality of 'Acts of Parliament and treaties'.

²³ Ethiopia ratified the African Charter on Human and Peoples' Rights on 15 June 1998, and the African Charter on the Rights and Welfare of the Child on 2 October 2002. Ethiopia has also ratified the COMESA Treaty. Article 6 of the Treaty recognizes the promotion and protection of human rights in accordance with the African Charter on Human and Peoples' Rights as one of its fundamental principles. This provision can potentially provide a basis to challenge domestic laws.

²⁴ J Mayerfeld 'The democratic legitimacy of international human rights law' (2009) 19 *Indiana International and Comparative Law Review* 49; J McGinnis and I Somin 'Should international law be part of our law?' (2007) 59 *Stanford Law Review* 1175 noting that most international law is made through highly undemocratic procedures.

²⁵ It should be noted that recent changes in the constitutional review systems of many countries in the European Union such as France, the UK, Finland and other Scandinavian countries, which have led to relative empowerment of courts, are directly related to the prominence of the European Court of Human Rights and European Court of Justice which review decisions taken by domestic systems. For discussions on how the European Court of Human Rights has impacted the constitutional reform in France, see – P Pasquino 'The new constitutional adjudication in France: The reform of the referral to the French Constitutional Council in light of the Italian model' 18 http://www.astrid-online.it/Dossier--R2/Studi--ric/Pasquino_New-Constitutional-

3. Stating the counter-majoritarian problem

Perhaps one of the main theoretical challenges to constitutional review by independent adjudicators is the counter-majoritarian difficulty, an objection that entrusting unelected judges with the power of constitutional review undermines democracy. Although constitutional review has become an accepted means of controlling the constitutionality of legislative and executive action around the world,²⁶ the theoretical debate concerning the extent to which courts may quash decisions of democratically elected and accountable bodies continues. With growing levels of judicial activism worldwide, discussions concerning the counter-majoritarian dilemma – an objection to the institution of constitutional review from the vantage point of majoritarian or pluralistic democratic theories – have routinely surfaced particularly in instances where constitutional adjudicators make public value choices and invalidate primary statutes enacted by elected bodies.

The ‘democratic objection’ continues to be one of the main theoretical challenges to the institution of judicial review.²⁷ Hook observes that ‘those who defend the theory of judicial supremacy cannot easily square their position with any reasonable interpretation of democracy’.²⁸ The major challenge to constitutional adjudication, it has been indicated, is the need to ‘reconcile protection of fundamental rights [leading to judicial review] with democracy’.²⁹ Judicial review generates the formidable problem of ‘the role and democratic legitimacy of relatively unaccountable individuals (the judges) and groups (the judiciary) pouring their own hierarchies of values or "personal predilections" into the relatively

[adjudication-France.pdf](#) (accessed 6 December 2011); in England, N Bamforth ‘Current issues in United Kingdom constitutionalism: An introduction’ (2011) 9 *International Journal of Constitutional Law* 79 observing that ‘the United Kingdom’s membership of the European Union has also had continuing deep-level significance for debate about the ongoing viability of Parliamentary sovereignty as the bedrock constitutional rule or principle of the domestic constitution’; in Finland, J Lavapuro *et al* ‘Rights-based constitutionalism in Finland and the development of pluralist constitutional review’ (2011) 9 *International Journal of Constitutional Law* 505. See also R Hirschl ‘The Nordic counternarrative: Democracy, human development, and judicial review’ (2011) 9 *International Journal of Constitutional Law* 449, 451 observing that the emergence of a pan-European rights regime enforced by the European Court of Human Rights has influenced the changes in the judicial review systems in the Scandinavian region.

²⁶ Tushnet, an uncompromising critic of the institution of judicial review, observes that even if the US Supreme Court was to say it did not want to exercise judicial review, there would be a legislative response requiring the Court to exercise judicial review – M Tushnet *Taking the Constitution away from the courts* (1999) 154. This, Tushnet notes, reflects the commitment of America to judicial review.

²⁷ Domingo observes that the ‘democratic objection’ may reasonably be considered to be the main objection against constitutional review – P Domingo ‘Introduction’ in R Gargarella *et al* (eds) *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006) 2.

²⁸ S Hook *The paradoxes of freedom* (1952) 95.

²⁹ G Mendes ‘New challenges of constitutional adjudication in Brazil’ (2008) 5, Woodrow Wilson International Centre for Scholars, Brazil Institute, Special Report <http://www.wilsoncenter.org/topics/pubs/brazil.gilmarmendes.constitution.pdf> (accessed 2 February 2011).

empty boxes of such vague concepts as liberty, equality, reasonableness, fairness, and due process'.³⁰ Some democratic theorists, therefore, suspect and challenge the institution of judicial review especially when courts or other unelected bodies invalidate legislation enacted through a presumptively legitimate democratic process.³¹

Bickel famously coined the 'counter-majoritarian difficulty',³² which has since become one of the most controversial 'academic obsessions' in constitutional law.³³ Because it is counter-majoritarian, judicial review is, Bickel notes, a 'deviant institution in American democracy'.³⁴ He observes that

[t]he root difficulty is that judicial review is a counter-majoritarian force. ... When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.³⁵

Kairys similarly observes that since courts, as non-majoritarian entities, are not expected to express or implement popular whims, they have trouble justifying their power and legitimacy in societies that value democracy.³⁶ The fear is that judicial review can lead to the 'judicialization of politics'.³⁷

The kernel of the argument is that courts should not be allowed to thwart the will of the democratic majority representing the people – 'the will of the majority ought to prevail in the fashioning of law and policy',³⁸ particularly in cases that involve value determinations.³⁹ According to Ely, the central problem, and at the same time the central function, of judicial review is that 'a body that is not elected or otherwise politically responsible in any significant way is telling the people's representatives that they

³⁰ M Cappelletti 'The "mighty problem" of judicial review and the contribution of comparative analysis' (1980) 53 *Southern California Law Review* 409, 409 – 410.

³¹ R Cover 'The origins of judicial activism in the protection of minorities' (1981-1982) 91 *Yale Law Journal* 1287, 1287.

³² A Bickel *The least dangerous branch: The Supreme Court at the bar of politics* (1986) 16.

³³ B Friedman 'The birth of an academic obsession: The history of the counter-majoritarian difficulty, part five' (2002) 112 *Yale Law Journal* 153.

³⁴ Bickel (n 32 above) 18.

³⁵ Bickel (n 32 above) *ivi*.

³⁶ D Kairys 'Introduction' in D Kairys (ed) *The politics of law: A progressive critique* (1998) 1.

³⁷ J Ferejohn 'Judicializing politics, politicizing law' (2002) 65 *Law and Contemporary Problems* 41; M Tushnet 'Policy distortions and democratic debilitation: Comparative illumination of the counter-majoritarian difficulty' (1995-1996) 94 *Michigan Law Review* 245, 247 observing that '[n]ot only would judicial review *displace* majoritarian decisionmaking; it might also *distort* and *debilitate* it. First, judicial review might distort decisionmaking by injecting *too many* constitutional norms into the lawmaking process, supplanting legislative consideration of other arguably more important matters. Second, judicial review might debilitate decisionmaking by leading legislatures to enact laws without regard to constitutional considerations, counting on the courts to strike from the statute books those laws that violate the Constitution, leading to the problem of debilitation'.

³⁸ One of the main proponents of this argument against judicial review has been Jeremy Waldron – see J Waldron *Law and Disagreement* (1999) Part III.

³⁹ Zurn classified the democratic objections to judicial review into two related but different concepts: 'counter-majoritarian' and 'anti-paternalistic' – C Zurn *Deliberative democracy and the institutions of judicial review* (2007) 2 – 8.

cannot govern as they'd like'.⁴⁰ Judicial review, it is argued, creates a system where a court usurps legislative and policy making powers and allows judges to paternalistically determine political and moral values as 'philosopher king[s], sitting in judgment on the wisdom and morality of all society's social policy choices'.⁴¹ Judicial review is said to lead to 'government by judges'.⁴² The objection is closely linked to the requirements of judicial independence: judges should be independent, and 'the more independent they are, the less accountable they are to the people or to the majority of the people and their representatives'.⁴³

The democratic legitimacy deficit is invoked not just in relation to socio-economic rights litigation but also equally concerning judicial challenges against legislative or executive measures for incongruence with traditional civil and political rights.⁴⁴ The objection is particularly acute in states where the judicial power to declare laws unconstitutional does not have a clear constitutional mast. In the context of the US, for instance, Tushnet, described judicial review as a 'false god' that 'stands in the way of self-government'.⁴⁵ In States that have constitutional rights and where the constitution unequivocally grants the power of constitutional review to courts, the question of legitimacy of judicial review is less contested. The Canadian Supreme Court observed as follows:⁴⁶

It ought not be forgotten that the historic decision to entrench the *Charter* in our Constitution was not taken by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy.

It is of no wonder that the debate has profound ground in the US, where the power of judicial review is an arrogation by the judiciary itself,⁴⁷ than in most other countries of the world where constitutions explicitly grant the power of judicial review of legislation to the judiciary.

⁴⁰ J Ely *Democracy and distrust: A theory of judicial review* (1980) 4 – 5.

⁴¹ M Redish *The Constitution as political structure* (1995) 8.

⁴² L Aucoin 'Judicial review in France: Access of the individual under French and European law in the aftermath of France's rejection of bicentennial reform' (1992) 15 *Boston College International and Comparative Law* 443, 446 – 448.

⁴³ M Cappelletti *The judicial process in comparative perspective* (1989) 40.

⁴⁴ The objection based on democratic theory is, however, particularly acute in relation to social rights litigation – see, for instance, Domingo (n 27 above). Some consider the judicial determination of socio-economic rights as a massive expansion of judicial review – C Starch 'Europe's fundamental rights in their newest garb' (1982) *Human Rights Law Journal* 116 arguing that making socio-economic rights justiciable amounts to a necessary breach of the principle of separation of powers.

⁴⁵ M Tushnet 'Democracy and judicial review' (2005) *Dissent Magazine* <http://www.dissentmagazine.org/article/?article=248> (accessed 7 December 2010).

⁴⁶ *Motor Vehicle Act (B.C.) Reference* [1985] 2 SCR 486, 497.

⁴⁷ See *Marbury v Madison* 5 US (1 Cranch) 137 (1803) where the Supreme Court established its power to review laws for constitutionality based on the inherent power of courts to interpret every law, including the Constitution, and the need to choose the applicable law when two or more laws with different status contradict.

Another closely related argument is that judicial review of legislation undermines the principle of separation of powers. According to this argument, judicial review erodes legislative and executive powers leading, *inter alia*, to unacceptable ‘blending of judicial with legislative power’.⁴⁸ All organs of the state are somehow involved in the determination of the constitutionality of their measures. When enacting a law, the legislature is implying a judgment that the law is in line with the constitution. This flows from ‘the prevailing notion that government institutions act rationally to achieve their goals’, an assumption that ‘their actions correspond to the common good’ as these institutions are accountable to the populace.⁴⁹ Hence, it is argued, there is nothing inherent in the judiciary that gives it the final say on constitutional issues.⁵⁰ According to Waldron, perhaps the most opponent of judicial review, given that there is always to be a reasonable and good faith disagreement on the content of rights, only a representative and majoritarian entity in which ‘everyone affected by a problem has a right to a say in its solution’ should be allowed to settle issues of rights – ‘action-in-concert in the face of disagreement’.⁵¹ Waldron provided a succinct summary of the democratic objections to judicial review.⁵²

Judicial review is vulnerable to attack on two fronts. It does not, as is often claimed, provide a way for society to focus clearly on the real issues at stake when citizens disagree about rights....And it is politically illegitimate, so far as democratic values are concerned: by privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality.

In summary, Waldron, and other critics of judicial review, argue that the judiciary is not electorally accountable. As such, judicial review is democratically illegitimate and violates the right to democratic participation of individuals. They further argue that judicial review cannot be justified as it is impossible to determine whether the judiciary is better than the legislature in protecting rights. In fact, according to the Condorcet Jury Theorem,⁵³ ‘majority rule is more likely to result in better decisionmaking than are insular institutions isolated from democratic control when determining what rights are actually in the

⁴⁸ P Lenta ‘Judicial restraint and overreach’ (2004) 20 *South African Journal on Human Rights* 544, 546.

⁴⁹ E Rubin ‘The new legal process, the synthesis of discourse, and the microanalysis of institutions’ (1995) 109 *Harvard Law Review* 1393, 1397.

⁵⁰ L Alexander ‘Is judicial review democratic? A comment on Harel’ (2003) 22 *Law and Philosophy* 277, 278.

⁵¹ Waldron (n 9 above) 108 – 110. Waldron and other anti-judicial review political theorists support some form of ‘popular/majoritarian constitutionalism’. For Waldron, given the inherent and persistent diversity and plurality of opinion (reasonable disagreement), majoritarianism is the only decision-making procedure that can ensure the full respect of the equal autonomy and worth of each citizen and each individual’s right to fair and equal political participation. For a summary of Waldron’s views, see Waldron (n 9 above).

⁵² Waldron (n 9 above) 1353.

⁵³ The theorem assumes that any two alternatives from which voters choose have an equal *a priori* chance of being true. It then holds that when individuals in a group make decisions independently of one another about the correctness of propositions and each has a greater than 50% chance of accuracy, the decision reached by the majority is likely to assess the truth of the proposition more correctly.

public interest'.⁵⁴ The legislature is argued to be the most appropriate body to determine the content of rights because of its overwhelming procedural superiority, emanating from its democratic character, to courts. Therefore, critics of judicial review call for the abolishing or drastic limitation of the power of judicial review and a move towards 'popular constitutionalism' where elected political organs and the people, rather than the courts, define the meaning of and enforce constitutional provisions.⁵⁵

4. Justifications for rights-based judicial review

It was argued in section 2 above that, although the Ethiopian system of constitutional review was designed in response to the counter-majoritarian difficulty, the system has not been completely absolved from similar criticisms. It was also pointed out that, even assuming that constitutional review by independent adjudicators undermines democracy, the extent of exclusion of courts from constitutional review in Ethiopia is unacceptably pervasive. This section argues that constitutional review does not undermine democracy. Constitutional review rather reinforces democracy by protecting rights that are essential components of any acceptable democratic theory. As such, the failure to establish an independent constitutional review system in Ethiopia cannot be justified based on the counter-majoritarian difficulty.

Justifications for judicial review take different forms. The first form of justifications criticise the fact that counter-majoritarian challenge on judicial review is founded in pure majoritarian conceptions of democracy. It is argued that a pure majoritarian or procedural conception of democracy that does not recognise human rights as one of its essential elements has lost ground. A majoritarian conception of democracy is inherently contradictory to the idea of constitutionalisation and constitutional democracy. Secondly, judicial review can be in line with deliberative conceptions of democracy. Thirdly, judicial review provides a neutral and independent forum to adjudicate constitutional rights which are designed to bind democratic majorities. Judicial review is in line with the idea of constitutionalisation, which is counter-majoritarian by design. Even if judicial review can be said to be undemocratic, it is legitimised by its instrumental role in protecting individual and minority rights. Fourthly, it is argued that the democratic objection to judicial review is based on unwarranted assumptions that legislatures always represent popular views while judicial review always annuls the popular view. Legislatures can be democratically more unrepresentative and judiciaries more representative than it is often assumed. It is

⁵⁴ J McGinnis and I Somin 'Democracy and international human rights law' (2009) 84 *Notre Dame Law Review* 1739, 1754.

⁵⁵ See generally L Kramer *The people themselves: Popular constitutionalism and judicial review* (2004); C Sunstein *One case at a time: Judicial minimalism on the Supreme Court* (1999) (talking about 'judicial minimalism'); Tushnet (n 26 above); Waldron (n 9 above).

also noted that the recognition of the institution of judicial review worldwide indicates the rejection of the democratic objection.

4.1. Democratic objections to judicial review are based on majoritarian conceptions of democracy

Tamanaha observes that '[majoritarian] democracy is a blunt and unwieldy mechanism that offers no assurances of producing morally good laws'.⁵⁶ The counter-majoritarian challenge is founded on a reductionist procedural understanding of democracy, which is, as Fuller critically pointed out, an 'impoverished conception of democracy'.⁵⁷ Democracy does not simply mean, as Nietzsche believed, an 'easily exploitable populism'.⁵⁸ Majoritarianism is not 'a shorthand description for democracy'.⁵⁹ The idea of democracy cannot, therefore, be reduced to a simple majoritarian idea.⁶⁰ Lemieux and Watkins observe that virtually all modern approaches to democratic theory 'do not simply equal democracy with majoritarianism'.⁶¹ Democracy has evolved from the limited idea of representative government for the majority to 'one in which human dignity and the rights which have evolved therefrom are effectively protected from majority tyranny'.⁶² The democratic challenge to judicial review is, therefore, based on 'unwarranted theoretical assumptions about the relationship between democracy and majoritarianism'.⁶³

⁵⁶ B Tamanaha *On the rule of law: History, politics and theory* (2004) 101. Bedner similarly observes a procedural understanding of democracy 'can never guarantee a substantially just outcome' – A Bedner 'An elementary approach to the rule of law' (2010) 2 *Hague Journal on the Rule of Law* 48, 62.

⁵⁷ L Fuller 'The forms and limits of adjudication' (1978/1979) 92 *Harvard Law Review* 353, 367.

⁵⁸ T Shaw *Nietzsche's political skepticism* (2007) 135. Nietzsche believed that 'since collectivities are even less epistemically reliable than individuals, the collective power of the people is unlikely to be a good guarantor of legitimacy'; hence, democracy cannot be a sufficient condition for legitimacy. He believed that 'unless the people could not be relied on to be an infallible source of truth, or were reliably guided by some genuine normative authority, they could not systematically impose valid normative constraints on state power'.

⁵⁹ S Macedo 'Against majoritarianism: Democratic values and institutional design' (2010) 90 *Boston University Law Review* 1029, 1037.

⁶⁰ Cappelletti (n 43 above) 46.

⁶¹ S Lemieux and D Watkins 'Beyond the counter-majoritarian difficulty: Lessons from democratic theory' (2009) 41 *Polity* 30. Zurn similarly observes that 'no sensible theory [of democracy] will claim that the legitimacy of any and every state decision or action hangs entirely or exclusively on a matter of either substance or procedure' – Zurn (n 39 above) 80.

⁶² J Klaaren (ed) *A delicate balance: The place of the judiciary in a constitutional democracy: Proceedings of a symposium to mark the retirement of Arthur Chaskalson* (2006) 8; D Beatty 'The forms and limits of constitutional interpretation' (2001) 49 *American Journal of Comparative Law* 79, 79 observing that in Africa and everywhere, democracy is 'understood as something more than mere majority rule'.

⁶³ Lemieux and Watkins (n 61 above) 30.

The concept of constitutionalisation,⁶⁴ with its emphasis on pre-existing limits – among others in the form of human rights guarantees – on the range of choices available to democratic majorities, is in inherent tension with any form of democracy committed to unqualified simple majoritarian rule.⁶⁵ The constitutionalisation of rights implies an understanding of democracy ‘as something more than majority rule’.⁶⁶ No modern constitution, and the constitutional democracies such constitutions constitute, accepts unfettered majoritarianism as the only governing constitutional mantra. Nor does constitutional democracy always insist that all decisions be made by elected representatives directly accountable to the people in periodic elections. A form of democracy that propagates that the majority should always win and the minority should always lose cannot provide the basis for a constitutional democratic state. In a constitutional democracy, majoritarian elected representatives have the right to determine those values that have not been pre-empted by counter-majoritarian constitutional prescriptions.⁶⁷ However, very few critics who question the legitimacy of judicial review of majoritarian decisions doubt the appropriateness and legitimacy of constitutionalisation and constitutional limits on democratic majorities. There is nothing intrinsic to constitutional democracy that precludes judicial review.⁶⁸ Quite to the contrary, the existence of judicial review is ‘logically dictated by the concept of a constitutional democracy’.⁶⁹ Therefore, judicial review is compatible with constitutional democracy.

A majoritarian conception of democracy is particularly deficient with respect to the protection of the rights of minorities and the underprivileged segments of society who do not often have proper and equal access to and influence on decisions of political actors. The fallibility of any form of democratic organisation that relies on majority rule poses a real threat to the rights and interests of minorities. Cover observes that ‘a discrete and insular minority cannot expect majoritarian politics to protect its members as it protects others’.⁷⁰ Also Chemerinsky concludes that ‘[f]undamental human rights, the rights of minorities, and the rights of those unpopular in society should not depend on the wishes of the

⁶⁴ Indeed, historically constitutionalism has provided the main justification for constitutional review. Cappelletti observes that constitutionalism especially in the form of limits on government through guarantees of human rights ‘has demanded a body, or a group, sufficiently independent from the “political” power, both legislative and executive, to protect a higher and relatively permanent rule of law against the temptations which are inherent in power’ – Cappelletti (n 30 above) 430.

⁶⁵ S Issachnaroff ‘Constitutionalizing democracy in fractured societies’ (2003/2004) 82 *Texas Law Review* 1861, 1861.

⁶⁶ Beatty (n 62 above) 79.

⁶⁷ M Redish ‘Judicial review and the ‘political question’’ (1984-1985) 79 *Northwestern University Law Review* 1031, 1059 – 1060.

⁶⁸ Cappelletti (n 43 above) 46.

⁶⁹ M Redish *The constitution as political structure* (1995) 8.

⁷⁰ Cover (n 31 above) 1297; Cortner similarly argues that litigation is particularly attractive to politically disadvantaged interest groups – those whose small numbers, disenfranchised constituencies, or unpopular causes militate against their exercising much influence in the legislative or executive arenas – see R Cortner ‘Strategies and tactics of litigants in constitutional cases’ (1968) 17 *Journal of Public Law* 287.

majority'.⁷¹ The history of Black Americans and of Jews in Nazi Germany offer sufficient evidence. Reliance on a purely procedural conception of democracy can lead to the 'tyranny of the majority' whereby those in power abuse their powers, violate rights and entrench themselves, endangering democracy itself.⁷² As seductive as majoritarian democratic theory can be, in real life, experience shows that legislative majorities do enact laws, out of convenience or otherwise, that violate rights. Judicial review plays a desirable role in mitigating the impacts of this deficit in relation to minority rights.⁷³

Tocqueville identified as one of the basic tools that can minimise the threat of majority tyranny in the US context 'the role of the courts in restraining exaggerated movements of public opinion'.⁷⁴ In justifying the institutional of judicial review, Cover posits that

[i]f all or most substantive interests were to be subordinated to the process principle of popular government, to majoritarianism, the [Supreme] Court would have to explain how the virtues of popular government were to triumph in the age that had seen the rise of bolshevism and fascism, the orchestration of mass oppression of minorities, the cynical manipulations of elections, and the ascendancy of apparatus and party over state and society.⁷⁵

The fear of minority exclusion is particularly legitimate in relation to sensitive issues such as controversial minority religious practices.⁷⁶ The purpose of constitutional protection of rights and judicial review is to protect the interest of those minorities 'who could not be expected to prevail through the orthodox democratic procedures'.⁷⁷ The US Supreme Court, in exclaiming the role of constitutional litigation and pointing out the deficiencies of a majoritarian democratic system, held that

[g]roups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. ... [A]nd under the condition of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.⁷⁸

Judicial review provides the powerless and excluded entry points into politically and legally contested public issues.⁷⁹ Holmes, therefore, concludes that '[c]onstitutional limits on majoritarian rule do not

⁷¹ E Chemerinsky 'In defense of judicial review: A reply to Professor Kramer' (2004) 92 *California Law Review* 1013, 1025.

⁷² Tocqueville believed that 'the greatest danger attending a democratic form of government was not instability but the tyranny of the majority' – L Siedentop Tocqueville (1994) 61. See also R Heffner (ed) Alexis de Tocqueville: Democracy in America (2001) 111 et seq.

⁷³ See generally Cover (n 31 above).

⁷⁴ Tocqueville identifies three major general features of the US political system that help minimise the threat of majority tyranny: the federal form of government, the strength of social institutions, and the role of courts – Siedentop (n 72 above) 63.

⁷⁵ Cover (n 31 above) 1289.

⁷⁶ For instance, in a 2009 referendum, voters in Switzerland banned the building of minarets on mosques – see N Erangler 'Swiss ban building of minarets on mosques' *The New York Times*, 29 November 2009 <http://www.nytimes.com/2009/11/30/world/europe/30swiss.html> (accessed 1 June 2012).

⁷⁷ J Choper *Judicial review and the national political process* (1980) 64 – 65.

⁷⁸ *NAACP v Button*, 371 US 415, 429-30 (1963).

undermine democracy but bolster it by protecting minority rights. In other words, the protection of minority rights by limiting majority rule has the net effect of broadening inclusiveness and autonomy within the democratic process'.⁸⁰ To the extent it broadens the inclusiveness of the democratic process judicial review becomes 'representation-reinforcing'.⁸¹ Independent constitutional adjudicators should, therefore, be empowered to when necessary reverse the malfunctioning of the democratic process, particularly when the latter systematically impairs the interest of marginalised groups and distorts the democratic process to exclude those outside government.⁸²

In sum, democratic theories should 'look beyond majoritarianism to definition of democracy that recognizes the fundamental value or point of democracy'.⁸³ In this regard, the European Court of Human Rights has held that 'although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position'.⁸⁴ Since democracy is not exhaustible in mere procedural terms, there is nothing inherently undemocratic about judicial review: '[d]emocracy does not insist on judges having the last word, but it does not insist that they must not have it'.⁸⁵ Macedo likewise observes that 'there is no insult or affront – either to the voters or to the democratic principle of political equality – if, in designing and adopting popular constitutions, additional mechanisms are adopted to further improve the quality of collective deliberation'.⁸⁶ Judges need not have a monopoly of giving meaning to the constitutional values, 'but neither is there reason for them to be silent'.⁸⁷ A constitutional conception of democracy does not, therefore, necessarily reject judicial review.

⁷⁹ A Kavanagh 'Participation and judicial review: A reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 451 arguing that judicial review can itself become a valuable channel of political participation, especially for those who are marginalised and disempowered who are often shut out of considerations in the normal political process.

⁸⁰ Cited in W Piotrowski 'Democracy and constitutions: One without the other?' (2005) 37 *Connecticut Law Review* 854, 856. Ackerman similarly observes that '[t]he first rationale for fundamental rights derives from the concept of democracy itself' – B Ackerman 'The new separation of powers' (2000) 113 *Harvard Law Review* 633, 712.

⁸¹ J Ely *Democracy and distrust: A theory of judicial review* (1980); J Ely 'Foreword: On discovering fundamental value' (1978) 92 *Harvard Law Review* 5; J Ely 'Toward a representation-reinforcing mode of judicial review' (1978) 37 *Maryland Law Review* 451.

⁸² Ely (1980) (n 81 above) 39.

⁸³ D Blichitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 108.

⁸⁴ *Bączkowski and Others v Poland*, application no 1543/06, ECHR 2007-VI para 63.

⁸⁵ R Dworkin *Freedom's law: The moral reading of the American Constitution* (1996) 7.

⁸⁶ Macedo (n 59 above) 1037.

⁸⁷ O Fiss 'The Supreme Court 1978 term: Foreword: The forms of justice' (1979) 93 *Harvard Law Review* 1, 2.

4.2. Judicial review can be in line with deliberative democracy

Although electoral accountability is at the core of any democratic theory,⁸⁸ judicial review can be in line with the legitimacy requirements of deliberative conceptions of democracy.⁸⁹ A deliberative conception of democracy is argued to be ‘normatively and conceptually superior’ to traditional pluralistic or majoritarian conceptions.⁹⁰ Judicial proceedings represent paradigmatic deliberative decision-making as they are often, if not always, accompanied by supporting reasons.⁹¹ Habermas argues that juridical discourse can claim a ‘comparatively high presumption of rationality’.⁹² Adjudication ‘assumes a burden of rationality not borne by any other form of social ordering’.⁹³ We expect, from judicial decisions, ‘a kind of rationality we do not expect of the results of contract or of voting’.⁹⁴ Of the different kinds of law-making, ‘adjudication is, or supposed to be, the most reflective and self-conscious, the most grounded in reasoned arguments and justification, and most constrained and structured by text, rule, and principle’.⁹⁵ As such the judicial ascertainment of rights serves the value of democratic deliberation.⁹⁶ Given that the judiciary has the institutional advantage to articulate abstract values to a unified and coherent public morality, judicial review and reasoning ‘does not detract from but rather adds to the scope and intensity of democratic deliberation’.⁹⁷

⁸⁸ Choper (n 77 above) 4 observing that majority rule is conceived as the ‘keystone of a democratic political system in both theory and practice’.

⁸⁹ The basic theme of deliberative democracy is that democratic legitimacy does not depend solely on votes (electoral accountability) but also on effective deliberation (‘reason-responsiveness’). Thus deliberative democratic theories ‘deemphasise voting as the paradigmatic democratic action, while celebrating deliberative reason-responsive cooperation as the ideal of democratic citizenship’. It endorses ‘a legitimacy criterion that combines an ideal of the equal political influence of each with an ideal of the reasons-responsiveness of government institutions’ – Zurn (n 39 above) 163 & 165. Sunstein similarly observes that ‘a constitution should promote deliberative democracy, an idea that is meant to combine political accountability with a high degree of reflectiveness and a general commitment to reason giving’ – C Sunstein *Designing democracy: What constitutions do?* (2001) 6 – 7. See also R Forst ‘Rule of reasons: Three models of deliberative democracy’ (2001) 14 *Ration Juris* 345. Theories of deliberative democracy generally accommodate judicial review – see D Estlund ‘Introduction’ in D Estlund (ed) *Democracy* (2002) 5; J Dryzek *Deliberative democracy and beyond: Liberals, critics, contestations* (2000) Chapter 1.

⁹⁰ C Zurn ‘Deliberative democracy and constitutional review’ (2002) 21 *Law and Philosophy* 467, 473.

⁹¹ For an excellent examination of the justifications of judicial review based on deliberative conceptions of democracy, see Zurn (n 39 above) Chapter 6.

⁹² J Habermas *Between facts and norms: Contributions to a discourse theory of law and democracy* (trans William Rehg) (1996) 266. See also R Bellamy *Political constitutionalism: A republican defence of the constitutionality of democracy* (2007) 84 observing that, unlike judicial decisions, legislative decisions are uninformative and the grounds of legislation are notoriously hard to determine.

⁹³ Fuller (n 57 above) 366.

⁹⁴ Fuller (n 57 above) 367.

⁹⁵ K Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146, 147.

⁹⁶ H Spector ‘Judicial review, rights and democracy’ (2003) 22 *Law and Philosophy* 285, 286. Spector justifies judicial review based on conceptions of deliberative democracy arguing that ‘representative democracy does not deliver a robust conception of political equality; in particular, it does not realize equality of influence or equality of chances to take political decisions’; he concludes that ‘judicial review is a reasonable interpretation of the moral powers of people to contest the exercise of force in an impartial deliberative setting. Such powers do not offend democracy’.

⁹⁷ Spector (n 96 above) 320.

Since society is built on fundamental political issues over which ‘overlapping consensus’ is imperative, an organ subject to reason and principle, and not mere head-counting, should be empowered to see their ultimate interpretation and enforcement.⁹⁸ Rawls observes that the ideals of public reason apply

... in a special way to the judiciary and above all to a supreme court in a constitutional democracy with judicial review. This is because the justices have to explain and justify their decisions as based on their understanding of the constitution and relevant statutes and precedents. Since acts of the legislative and the executive need not be justified in this way, the court's special role makes it the exemplar of public reason.⁹⁹

For Rawls, therefore, constitutional review provides an impartial deliberative forum. The rationalisation and juristic discourse involved in judicial review reflects the principled moral and political debate that underlies the legitimacy requirements of deliberative democracy.¹⁰⁰ By making democracy more deliberative particularly on matters of principle and fundamental values, the counter-majoritarian nature of judicial review becomes an ‘opportunity’, and not a ‘difficulty’.¹⁰¹ Judicial discourse and deliberation enriches, rather than undermines, public and legislative deliberation. Deliberative conceptions of democracy, therefore, accommodate the institution of judicial review.¹⁰² Judicial review is compatible with deliberative democracy.¹⁰³

4.3. Judicial review is instrumental in protecting rights

The main justification of judicial review lies in its potential role in protecting rights. There are two main scholarly approaches to justifying rights-based judicial review. One group composed of Ely, Dahl, Habermas, and Dworkin, argues that rights are integral to the definition of democracy and judicial review protects these rights.¹⁰⁴ To that extent, judicial review does not hinder democracy; rather it

⁹⁸ J Rawls *Political liberalism* (1996) 235. For Rawls, the basis of democratic legitimacy is the use of public reason.

⁹⁹ Rawls (n 98 above) 216. However, Rawls did not indicate that judicial review is a necessary element of his theory of ‘justice as fairness’. He only believed that judicial review is one of the preferable strategies for securing what he referred to as the ‘constitutional essentials’ – at 233. He certainly believed that his theory of justice does not reject judicial review.

¹⁰⁰ Zurn, however, argues that juristic discourse should not be equated with the ideal deliberation required by deliberative conceptions of democracy. He contended that ‘juristic discourse is well tailored to arguments concerning legal rules, but not those concerning the principles, ideals, and values that underwrite and justify the laws we give to ourselves as democratic citizens’ – Zurn (n 39 above) 163 *et seq.*

¹⁰¹ J Ferejohn and P Pasquino ‘The counter-majoritarian opportunity’ (2010) <http://www.law.uchicago.edu/files/file/Ferejohn.pdf> (accessed 31 October 2011).

¹⁰² Spector (n 96 above) 323 concluding that ‘[w]hen democracy is justified on this [its contribution to a robust public deliberation] ground, the charge that constitutional restrictions and judicial review are undemocratic is very weak. Since constitutional restrictions and judicial review could well be justified on the same grounds as democracy, there would be no deep tension to dissolve or dispel’.

¹⁰³ A Harel ‘Rights-based judicial review: A democratic justification’ (2003) 22 *Law and Philosophy* 247 positing that judicial review provides an alternative form of democratic participation.

¹⁰⁴ Almost all democratic theorists including those considered ‘minimalist’ such as Joseph Schumpeter, Robert Dahl, and Samuel Huntington include some human rights such as freedom of expression, association and assembly as part of the definition of democracy – for a summary of democratic theories and the extent to which these theories recognise or imply substantive elements in democracy, see G O’Donnell ‘Democracy, law, and comparative politics’ (June 2000) IDS Working Paper 118, *Law, Democracy and Development Series* <http://www.ids.ac.uk/files/Wp118.pdf> (accessed 12 January 2011).

maintains and reinforces democracy. The other group, consisting of Bickel and Choper, understands rights not as integral to democracy but as limits to it. From this perspective, judicial review is justified because of its instrumentality in protecting rights which are counter-majoritarian by design.

Defending a reductionist procedural theory of judicial review, Ely and Dahl argue that judicial review can be democratically legitimate only if it concerns the enforcement of rights that are integral to majoritarian or pluralist democracy.¹⁰⁵ According to Ely, the judiciary should intervene only to protect those rights that are absolutely necessary for a fair political process – those rights the violation of which compromises the fairness of the democratic process. In other words, judicial review serves to ‘clear the channels’ of political change to ensure the open and proper functioning democratic systems.¹⁰⁶ Dahl similarly argues that judicial review is legitimate only to the extent that it protects rights integral to or necessary for the proper functioning of democracy:

A supreme court should ... have the authority to overturn federal laws and administrative decrees that seriously impinge on any of the fundamental rights that are necessary to the existence of a democratic political system: rights to express one’s views freely, to assemble, to vote, to form and to participate in political organisations, and so on. ... But the more it [a court] moves outside this realm – a vast realm in itself – the more dubious its authority becomes. For then it becomes an unelected legislative body.¹⁰⁷

By protecting rights that are integral to democracy, judicial review ensures that temporary majorities behave according to constitutional rules of the game.¹⁰⁸ To that extent, judicial review becomes democratically legitimate, or at least democratically unobjectionable. Ely and Dahl justify rights-based judicial review in the context of pluralist or majoritarian conceptions of democracy.

Habermas’s theory of deliberative procedural democracy also identifies a wide range of rights that are inherent in democracy.¹⁰⁹ In describing the relationship between democracy and rights, he observes that ‘[o]ne is not possible without the other, but neither sets limits on the other’; substantive rights and democratic procedures are ‘cooriginal’.¹¹⁰ Democracy and human rights are closely connected and the

¹⁰⁵ Ely (1980) (n 56 above).

¹⁰⁶ Ely (1980) (n 56 above) 105.

¹⁰⁷ R Dahl *How democratic is the American Constitution?* (2001) 153 – 154.

¹⁰⁸ Cover observes that strong judicial review should be justified when ‘representatives enjoying office, its power, and its perquisites ... conspire to entrench themselves and to defeat the very majoritarian [democratic] processes’ – Cover (n 31 above) 1292 – 1294.

¹⁰⁹ Habermas (n 92 above) arguing that human rights are key ingredients of true democracy. For a summary of the views of Habermas on the relationship between human rights and democracy, see J Flynn ‘Habermas on human rights: Law, morality, and intercultural dialogue’ (2003) 29 *Social Theory and Practice* 431.

¹¹⁰ J Habermas ‘Constitutional democracy: A paradoxical union of contradictory principles?’ (2001) 29 *Political Theory* 766, 767.

‘protection of one at the expense of the other ... always runs the risk of being counter-productive’.¹¹¹ Like Ely and Dahl, Habermas’s conception of democracy recognises rights as necessary to secure the procedural fairness of democracy. Hence, arrangements designed to ensure the effective and efficient protection of human rights, of which judicial review is one, may not become incongruent with the ideals of deliberative democracy. Simply stated, judicial review assures adherence to the conditions that confer legitimacy on procedural democracy. Following Habermas, Zurn concludes that

... constitutional review discharges the function of procedurally protecting the political structures and the system of rights that make deliberative democracy possible, that is, protecting constitutional structures that ultimately ground the supposition that the decisional outcomes of democratic processes are legitimate.¹¹²

Ely, Dahl and Habermas base their justification of judicial review within a procedural conception of democracy. Judicial review is considered legitimate because it is important in protecting rights that are necessary for the effective and efficient refereeing of procedural democracy. It should be noted that Habermas’s theory of deliberative democracy recognises a more extensive array of rights, including social rights, as integral to democracy than Dahl and Ely’s. Because of this, and the deliberative orientation of democracy, judicial review will be more extensive in Habermas’s theory than in Ely and Dahl’s.

Dworkin builds his theory of judicial review on a substantive conception of democracy. According to substantive democratic theories, the legitimacy of any political procedure, including democracy, depends on the extent to which it promotes morally defensible outcomes. Dworkin defines democracy as

... government subject to conditions – we might call these the “democratic conditions” – of equal status for all citizens. When majoritarian institutions provide and respect the democratic conditions, then the verdicts of these institutions should be accepted by everyone for that reason. But when they do not, or when their provision or respect is defective, there can be no objection, in the name of democracy, to procedures that protect and respect them better.¹¹³

Given that a constitutional conception of democracy is concerned with ensuring the equal status of citizens, there is no reason that ‘some nonmajoritarian procedure should not be employed on special occasions when this would better protect or enhance the equal status that it declares to be the essence

¹¹¹ T Koopmans ‘Legislature and judiciary: Present trends’ in M Cappelletti (ed) *New perspectives for a common law of Europe* (1978) 337.

¹¹² Zurn (n 39 above) 254. Zurn shows why a normative theory of deliberative democratic constitutionalism yields the best understanding of the legitimacy of constitutional review. He argues that constitutional review is justified by its ‘function of ensuring the procedural requirements for legitimate democratic self-rule through deliberative cooperation’.

¹¹³ Dworkin (n 85 above) 17 – 18.

of democracy, and ... these exceptions are [not] a cause of moral regret'.¹¹⁴ Judicial review is justified because of its superior competence, compared to the political organs, in pursuing a principled approach, undistorted by political pressure, to the substantive conditions democracy is designed to achieve. Judicial review, it is argued, better protects human rights and other fundamental moral principles which constitute the democratic conditions.¹¹⁵ Because legislatures are subject to political influence and compromise, they are unsuitable for a principled approach that fundamental rights demand.¹¹⁶ Courts serve as 'forums of principle' while legislatures serve as 'forums of policy'. Dworkin concludes that

[i]ndividual citizens can in fact exercise the moral responsibilities of citizenship better when final decisions involving constitutional values are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence.¹¹⁷

The centre of the argument is that the fact that the majority is not always trustworthy when it comes to matters of fundamental principles necessitates placing the ultimate decision-making power concerning fundamental rights in the hands of independent, neutral and experienced constitutional adjudicators.¹¹⁸ Since rights are matters of principle, not policy, judicial review is argued to be better at protecting them.

The range of rights considered inherent in democracy in Dworkin's theory is wider than the theories of Ely and Dahl. It compares to the rights that inhere in Habermas's conception of deliberative democracy. The main difference between Ely, Dahl, Habermas on one side, and Dworkin, on the other is that the first three anchor their theories on a minimalist procedural understanding of democracy which considers democracy as intrinsically good, whereas Dworkin bases his theory in a substantive conception

¹¹⁴ Dworkin (n 85 above) 17.

¹¹⁵ Eisgruber similarly argues that insulation from the vicissitudes of political pressure gives courts the institutional advantage to serve as paradigmatic locations for principled moral argument about nonnegotiable and fundamental public issues – C Eisgruber *Constitutional self-government* (2001) 3 & 4. Eisgruber concludes that the US Supreme Court is 'a kind of representative institution well-shaped to speak on behalf of the people about questions of moral and political principle'. The fact that courts are insulated from political pressure enables them to 'pursue politics in a fashion that is principled than partisan'. See also F Michelman *Brennan and democracy* (1999) 22 – 23.

¹¹⁶ Bickel observes that 'courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government' – Bickel (n 32 above) 25 – 26. Wellington similarly observes that judges 'discern, better than others with narrow jurisdiction and, therefore, limited vision, the enduring principles and longer range concerns that tend to be forgotten where either the interests of factions collide or the perspectives of bureaucrats prevail' – H Wellington 'The nature of judicial review' (1981/1982) 91 *Yale Law Journal* 486, 493.

¹¹⁷ Dworkin (n 85 above) 344. See also R Dworkin 'The forum of principle' (1981) 56 *New York University Law Review* 469, 516 observing that courts 'should make decisions of principle rather than policy'.

¹¹⁸ Blichitz (n 83 above) 102. See also Heffner (n 72 above) identifying the role of lawyers in counterpoising democratic majorities and describing the judicial review function of American courts as the 'most favourable to liberty and to public order providing the most powerful barriers which has ever been devised against the tyranny of the political assemblies'.

of democracy which considers democracy as a means to achieving the ultimate good, that is to say equal status and participation.¹¹⁹

For some proponents of judicial review, rights are considered, not inherent to democracy, but as limits to democratic government. Rights are understood as inherently counter-majoritarian. Constitutional rights are designed to limit the vices and imperfections of potentially tyrannical majoritarianism.¹²⁰ They are considered as deontological trumps to democratic policy and politics – ‘one of the primary functions of the Constitution is to protect individual rights from majoritarian encroachment’.¹²¹ Bellamy observes that rights, upheld by judicial review, comprise ‘the prime component of constitutionalism’.¹²² Given that human rights transcend majority choices, their interpretation and enforcement should not depend on the outcomes of elections or the wishes of the legislative majority.¹²³ Therefore, despite being counter-majoritarian, judicial review is justified by its instrumentality in ensuring that decisions of democratic institutions are effectively constrained by rights. Judicial review is, therefore, in line with the commitment toward a limited legislative and political authority.¹²⁴

The constitutional protection of rights requires the existence of an independent entity which patrols their proper realisation and enforcement.¹²⁵ One of the main purposes of judicial review is to protect rights against decisions of the majority.¹²⁶ Choper argues that ‘the overriding virtue of and justification for vesting the [US Supreme] Court with this awesome power is to guard against government infringement of individual liberties secured by the constitution’.¹²⁷ Bickel and Choper argue that rights-based judicial review should be justified primarily because of, not despite, its counter-majoritarian

¹¹⁹ For a discussion of the difference between ‘substantive’ and ‘procedural’ conceptions of democracy, see C Brettschneider ‘Balancing procedures and outcomes within democratic theory’ (2005) 53 *Political Studies* 423.

¹²⁰ R Dworkin ‘Constitutionalism and democracy’ (1996) 3 *European Journal of Political Studies* 2. Dworkin defines constitutionalism in terms of human rights: ‘constitutionalism’ means ‘a system that establishes individual legal rights that the dominant legislature does not have the power to override or compromise’.

¹²¹ E Braman (Book Review) ‘The judiciary and American democracy: Alexander Bickel the counter-majoritarian difficulty and contemporary constitutional theory’ (2005) by K Ward and C Castillo (State University of New York Press) <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/ward-castillo0206.htm> (accessed 11 September 2011).

¹²² R Bellamy ‘The political form of the constitution: The separation of powers, rights and representative democracy’ (1996) 44 *Political Studies* 436, 436.

¹²³ Cover (n 31 above) 1289; Spector (n 96 above).

¹²⁴ M Bilder ‘Why we have judicial review’ (2007) 116 *Yale Law Journal Pocket Part* 215.

¹²⁵ Mildemberger argues in favour of the constitutional entrenchment of rights due to the ‘near-paramount value’ human agents attach to individual rights – J Mildemberger ‘Waldron, Waluchow and the merits of constitutionalism’ (2009) 29 *Oxford Journal of Legal Studies* 71, 72.

¹²⁶ R Share *et al* ‘Human rights: A new standard of civilization’ (1998) 74 *International Affairs* 1, 1.

¹²⁷ Choper (n 77 above) 64.

character.¹²⁸ In that sense, judicial review ensures that ‘politics is not the last word’ and poignantly establishes the superiority of constitutional rights to politics.¹²⁹ Bickel and Choper support judicial review based on a wide range of human rights and not just those rights that are integral to the democratic process. Their justification of judicial review covers a wider array of human rights than those anticipated by Ely and Dahl.¹³⁰

In sum, whether or not rights are considered as inherent elements of democracy, and although scholars might disagree on the list of rights that are considered inherent in democracy, the value and essence of rights-based judicial review lies in its insulation from democratic electoral pressure – the fact that it is detached from majoritarian politics. Insulation from political pressure gives courts the epistemic advantage to be able to contain not only the imperfections and failures of the democratic process but also its perversion and manipulation to systematically violate the rights of individuals or groups.

4.4. The need for an independent and neutral constitutional adjudicator

The main thrust of the arguments for judicial review is that the power of judicial review should reside in an entity that is independent, disinterested and sufficiently isolated from the political arena in a way that bolsters the confidence of even the vulnerable political minority.¹³¹ The organ in charge of constitutional review should be bound to render judgments based on reasons rather than mere hand-voting, political bargaining, compromise and trade-offs. The need for neutrality in constitutional adjudication provides the main justification for judicial review. The power to determine the constitutionality of laws should not be conflated with the powers of the same entities a constitution aims to limit.¹³² Redish observes that

[i]f the majoritarian branches could act as final arbiters of the limits of their own power, there would have been little purpose in imposing super-majoritarian constitutional limitations in the first place.¹³³

¹²⁸ Bickel (n 32 above); Choper (n 77 above).

¹²⁹ P Pasquino ‘Constitutional adjudication and democracy. Comparative perspectives: USA, France, Italy’ (1998) 11 *Ratio Juris* 38, 48.

¹³⁰ Choper (n 77 above) 7. Choper observes that constitutional democratic theory must recognise the normative value ‘of certain inalienable minimums of personal freedom (beyond the political rights of the ballot and free expression) that guard the dignity and integrity of the individual’.

¹³¹ A Lever ‘Democracy and judicial review: Are they really incompatible’ (2009) 7 *Perspectives on Politics* 805, 811; C Eisgruber ‘Democracy and disagreement: A comment on Jeremy Waldron’s *Law and disagreement*’ (2002) 6 *Legislation and Public Policy* 35, 44 arguing that judges are ‘capable of making decisions in a disinterested fashion. Judges’ personal interests are not at stake in the way that is true for both legislators, who have to worry about losing their office, or voters, who are invited to vote for whatever candidate will make them better off (in terms of income, career, or what have you)’; Spector (n 96 above); Harel (n 103 above).

¹³² J King *An activist manual on the International Covenant on Economic, Social and Cultural Rights* (2003) Chapter XV.

¹³³ Redish (n 67 above) 1045 – 1046.

An independent judiciary should have the final say on the constitutionality of the activities of the government 'primarily for the reason that the political branches should not be permitted to sit in final judgment on the constitutionality of their own actions'.¹³⁴ Tamanaha similarly notes that 'being anti-majoritarian by design, it appears logically required that rights not be entrusted to a democratically accountable body, for that would defeat their purpose'.¹³⁵ Hence, the determination of the content of rights, often initially done by the legislature and executive, may not be completely left to the democratic process. Judicial review ensures that the political branches do not become judges in their own cases.

Any legal system founded on constitutional values should be characterised by an independent constitutional adjudicator 'responsible for constitutional norms and solicitous of minority rights'.¹³⁶ The institution charged with ensuring the enforcement of constitutional limits should be located outside and beyond the political tussle. Independence is particularly important as far as human rights adjudication is concerned. Independence and disinterest can only be guaranteed in a judiciary or a judicial like structure, not in purely political institutions – legislatures or executives – which are unavoidably parties to any constitutional rights dispute. Legislative and executive organs of government are more susceptible to pressure from either political or other special interest groups than independent judiciaries.¹³⁷ 'Detachment from those it passes judgment upon' is the greatest strength of the judiciary.¹³⁸ Indeed, judges and the judiciary are 'deliberately removed from the pressures to which many other governmental actors are deliberately exposed'.¹³⁹ It is precisely this detachment that makes courts the most appropriate bodies to adjudicate constitutional rights issues. Courts are the best candidates for constitutional adjudication precisely because they are

insulated from political responsibility and un beholden to self-absorbed and excited majoritarianism. The Court's aloofness from the political system and the Justices' lack of dependence for maintenance in office on the popularity of a particular ruling promise an objectivity that elected representatives are not – and should not be – as capable of achieving. And the more deliberative, contemplative quality of the judicial process further lends itself to dispassionate decisionmaking.¹⁴⁰

¹³⁴ Redish (n 67 above) 1047.

¹³⁵ Tamanaha (n 56 above) 105.

¹³⁶ A Sarat 'Going to courts: Access, autonomy, and the contradictions of liberal legality' in Kairys (n 36 above) 97. Zurn similarly observes that a constitutional adjudicator and its members must be 'institutionally independent of political accountability' – Zurn (n 39 above) 276.

¹³⁷ Chemerinsky (n 71 above) 1019. Chemerinsky observes that, unlike the legislative process, 'judicial review is not the product of lobbying or direct pressure from special interest'.

¹³⁸ N Barber 'Prelude to separation of powers' (2001) 60 *The Cambridge Law Journal* 59, 75.

¹³⁹ For instance, as regards judicial tenure – see H Wellington 'Common law rules and constitutional double standards: Some notes on adjudication (1973) 83 *Yale Law Journal* 221, 248 – 249.

¹⁴⁰ Choper (n 77 above) 68. Wellington similarly posits that judicial insulation from the direct claims of special interest constituencies protects judges from the partisan views of other political actors – Wellington (n 116 above) 493.

It is submitted that democracy and separation of powers are not ends themselves.¹⁴¹ They are accepted not just for their appealing vocabulary but for their potential instrumentality to achieving the wider goal of ensuring freedom from fear and want. However, majoritarian conceptions of democracy excessively overstate the intrinsic value of process regardless of its outcomes to substantive rights. So long as judicial review has the potential to limit violations of substantive rights compatible with equality and autonomy, it is not undemocratic. Besides, democracy is not the only ‘beautiful’ principle or value – Pasquino asked why should we ‘deduce the totality of the institutions of a constitutional State and their legitimacy from a single principle and not from more than one?’¹⁴² Huntington similarly observes that ‘democracy is one public virtue, not the only one’.¹⁴³ Human rights have an intrinsic value in addition to the ‘instrumental function they can have for the exercise of the political rights of citizens [thus making democracy possible]’.¹⁴⁴ The propriety of decisions should not rest entirely on the process through which they are made and the accountability of the decision-maker to the electorate. Theories of democratic legitimacy cannot be oblivious to the ends decisions promote. Hence, when upholding pure democratic theory and separation of powers might constrain the achievement of the ultimate democratic goals of equality and autonomy, deviations from pure majoritarian democratic conceptions, such as in the form of judicial review, should be justified or at least unobjectionable.¹⁴⁵

The basis of legitimacy of judicial review lies in its formal independence and impartiality.¹⁴⁶ Moreover, judicial review is not entirely unrepresentative. Adjudication ensures constructive participation through

¹⁴¹ D Estlund ‘Beyond fairness in deliberation: The epistemic dimension of democratic authority’ in W Rehg and J Bohman (eds) *Deliberative democracy* (1997) 173 – 204.

¹⁴² Pasquino (n 129 above) 50.

¹⁴³ S Huntington *The third wave: Democratization in the twentieth century* (1991) 10.

¹⁴⁴ Habermas (n 110 above) 770 – 771.

¹⁴⁵ Brettschneider (n 119 above) 425 observing that ‘a good theory of democracy will embrace a commitment to democratic procedures while recognizing their limits’. Concerning judicial review, however, Brettschneider argues that ‘even when a democratic procedure results in an undemocratic outcome, judicial review is not automatically justifiable; the loss that would result from overturning a democratic procedure should never be greater than the gain to democracy that would result from ensuring against an undemocratic outcome’.

¹⁴⁶ M Shapiro and A Stone Sweet *On law, politics and judicialization* (2002) 3 & 6 observing that in democratic states, judges ‘claim their legitimacy by asserting that they are non-political, independent, neutral servants of ‘the law’ and comparing it with government officials who achieve their legitimacy ‘by acknowledging their political rule and claiming subordination to the people through elections or responsibility to those elected’. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities also highlighted that ‘[t]he principles of impartiality and independence are the hallmarks of the rationale and the legitimacy of the judicial function in every State’ – L Singhvi ‘The administration of justice and the human rights of detainees: Study on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers’ (E/CN.4/Sub.2/1985/18 and Add.1-6) (Geneva, United Nations, 1985) para 75.

interest group representation and, therefore, is not inherently undemocratic.¹⁴⁷ Michelman observes that the exposure of courts to a wide variety of actors contributes to their democratic legitimacy.¹⁴⁸

It [legitimacy] is a condition of the interpreter's greater or lesser reliability and of what we can do to bolster it. And one condition that you think contributes greatly to reliability is the constant exposure of the interpreter - the moral reader - to the full blast of the sundry opinions on the questions of rightness of one or another interpretation, freely and uninhibitedly produced by assorted members of society listening to what the others have to say out of their diverse life stories, current situations, and perceptions of interest and need.

From a different perspective, Fallon distinguished between 'overall political legitimacy', which is the ultimate concern of democratic political theory, and 'democratic legitimacy'.¹⁴⁹ Judicial review contributes to the overall political legitimacy of a constitutional regime 'insofar as it helps to minimize fundamental rights violations, even if it lacks democratic legitimacy'.¹⁵⁰ Fallon concludes that '[w]hen other sources of political legitimacy enter the calculus, the possibility emerges that judicial review might actually promote, not detract from, the overall legitimacy of a governmental regime'.¹⁵¹

Judicial review is also justified because enables individuals the opportunity to voice their personal grievances against government decisions. Judicial review enables each person to demand a personalised justification as to why his or her distinctive claim based on a right is accepted or rejected. It addresses 'individual grievances with the degree of concreteness dictated by liberal and humanistic principles'.¹⁵² In contrast, legislative procedures can only provide general and abstract justifications to individual grievances. Judicial review is, therefore, more conducive to addressing grievances in a personal and contextualised manner.¹⁵³ Because it enables individuals to vindicate their rights against government in ways that parallel those they commonly use against each other, judicial review embodies and fosters 'democratic forms of representation, accountability, and participation'.¹⁵⁴

Besides, generally accepted principles of constitutional interpretation help confine judges within acceptable tracks. Although courts are not electorally accountable, they account because they explain

¹⁴⁷ C Peters 'Adjudication as representation' (1997) 97 *Columbia Law Review* 312.

¹⁴⁸ Michelman (n 115 above) 59.

¹⁴⁹ R Fallon 'The core of an uneasy case for judicial review' (2008) 121 *Harvard Law Review* 1693, 1716.

¹⁵⁰ Fallon (n 149 above) 1716 concluding that '[i]f judicial review makes a contribution to the overall moral quality of a society's political decisions, then judicial review might actually enhance the overall political legitimacy of an otherwise reasonably democratic constitutional regime' - 1727 - 1728.

¹⁵¹ Fallon (n 149 above) 1718.

¹⁵² A Harel 'Notes on Waldron's *Law and disagreement*: Defending judicial review' (2006) 39 *Israel Law Review* 13, 21.

¹⁵³ Y Eylon and A Harel 'The right to judicial review' (2006) 92 *Virginia Law Review* 991 arguing that judicial review is justified based on its ability to provide each individual the opportunity to voice their grievances and demand a personalized justification. The authors argue that the justification of judicial review rests on the 'right to voice a grievance' or 'right to a hearing'.

¹⁵⁴ Lever (n 131 above) 807.

‘their decisions and make these explanations available to the litigants, the public, the academy, fellow judges, and the media’.¹⁵⁵ Klaaren observes that the judiciary is indeed accountable for its actions and inactions but its accountability is different in nature, form and execution from the accountability of the other branches of the state, one which does not undermine the independence of the judiciary.¹⁵⁶ It should also not be forgotten that judges are actually appointed by elected political actors. To this extent, the judiciary is not absolutely devoid of ‘democratic pedigree’.¹⁵⁷

4.5. Democratic objections are based on unwarranted assumptions

The legitimacy challenge to judicial review assumes that elected representatives represent the views of the electorate and that courts always paternalistically annul the choice of the people.¹⁵⁸ However, this assumption is not entirely true. Representative decisions may not always embody the consent of the governed, or at least the majority of the people, in any meaningful sense.¹⁵⁹ Legislative and executive leadership ‘is never a perfect paradigm of representative democracy’.¹⁶⁰ As much as there are instances in which policy decisions reflect and or result from majority sentiment, ‘there are many instances in which they do not’.¹⁶¹ Koopmans observes that, nowadays, ‘the thread between a vote cast for a member of parliament and the many decisions by public authorities affecting the voter has become very long and thin’.¹⁶² Pasquino similarly notes that regular elections – and connected mechanisms of accountability – do not necessarily produce ‘conformity of collective decisions to majority preferences’.¹⁶³

¹⁵⁵ S Abrahamson ‘Keynote Address: Thorny issues and slippery slopes: Perspectives on judicial independence’ (2003) 64 *Ohio State Law Journal* 3, 4.

¹⁵⁶ Klaaren (n 62 above) 9. See also S Noveck ‘Is judicial review compatible with democracy?’ (2008) 6 *Cardozo Public Law, Policy and Ethics Journal* 401; Lever (n 131 above).

¹⁵⁷ Eisgruber (n 115 above) 4 observing that judges ‘owe their appointments to their political views and their political connections as much as (or more than) to their legal skills’ which contributes to their democratic pedigree; Eisgruber (n 131 above) 45 claiming that democratic pedigree ensures that ‘judges will not be idiosyncratic political radicals, but rather will express moral judgments more or less consistent with some current of mainstream... political thought’.

¹⁵⁸ Waldron, for instance, criticises judicial review on the ground that it ‘do[es] not allow a voice and a vote in a final decision-procedure to every citizen of the society’ – Waldron (n 38 above) 299.

¹⁵⁹ Zurn observes that ‘legislatures can be said to effect the same paternalistic substitution under certain well-known conditions distorting representative processes’ – Zurn (n 39 above) 157; Cappelletti (n 43 above) 21 noting that the democratic legitimacy deficit is very much present in modern legislation and more so in administrative action.

¹⁶⁰ Cappelletti (n 43 above) 41.

¹⁶¹ M Shapiro *Freedom of speech: The Supreme Court and judicial review* (1966) 24 – 25.

¹⁶² T Koopmans ‘Legislature and judiciary: Present trends’ in M Cappelletti (ed) *New perspectives for a common law of Europe* (1978) 321.

¹⁶³ Pasquino (n 129 above) 41 arguing that law does not represent the popular will but rather the will of the temporary political majority in parliament.

Representative democracy does not always and effectively ensure the implementation of the principle of equal political participation that underpins conceptions of democratic theories. It is for these reasons that some scholars believe that elected representatives are aristocratic elites.¹⁶⁴ Representatives make different, inconsistent and at times conflicting choices *vis-à-vis* the expressed wishes of the electorate.¹⁶⁵ Therefore, they can to a degree become unrepresentative or counter-majoritarian.¹⁶⁶ Laws and executive decisions do not, and should not, always represent capricious populist views.¹⁶⁷ Representatives do not, and should not, only consider the opinions but also the interests of their constituencies. The making of decisions ‘in derogation of the immediate or apparent wishes of the majority is peculiar neither to constitutional adjudication nor, more generally, to the courts’.¹⁶⁸

In contrast, although judges are not directly elected, by ensuring the extensive participation of individuals and various stakeholders, judicial review can serve to ‘maintain and promote the same ends that justify equal political rights and majority rule’.¹⁶⁹ Judicial review grants each person the right to challenge government decisions. In addition, public interest litigation and *amicus curiae* procedures ensure that a wide range of views and interests are represented before courts make final decisions. The counter-majoritarian objection is, therefore, based on unwarranted empirical assumptions about ‘the “majoritarianism” of legislative action and the “counter-majoritarianism” of courts’.¹⁷⁰ The objection ‘overstates at the same time the counter-majoritarian nature of courts and the majoritarian nature of legislatures’.¹⁷¹

¹⁶⁴ B Manin *Principles of representative government* (1997) 140 observing that elections are elitist and aristocratic tools. Lever similarly argues that voting, lotteries, and appointments are alternative devices that democracies can use to select people for positions of power and responsibility. Lever concludes that ‘the fact that legislatures are elected ... whereas judges are generally not is insufficient to show that the former are more democratic than the latter’ – Lever (n 131 above) 810.

¹⁶⁵ See generally J Schumpeter *Capitalism, socialism and democracy* (1942) observing that in reality, states are governed not only by the elected majority but also the unelected political party and bureaucratic attendants. See also F Cunningham *Theories of democracy: A critical reflection* (2002) 9 – 10.

¹⁶⁶ Cappelletti (n 43 above) 21; T Keck ‘Beyond backlash: Assessing the impact of judicial decisions on LGBT rights’ (2009) 43 *Law and Society Review* 151, 175 – 182.

¹⁶⁷ Harel (n 103 above) 259 observing that ‘representatives need not necessarily vote in the same way that their constituencies would have voted and designing an election system is not simply a mechanical process aimed at realising what public opinion dictates on any particular issues’.

¹⁶⁸ Wellington (n 116 above) 487. For similar arguments see Eisgruber (n 131 above) 40 – 41.

¹⁶⁹ S Freeman ‘Constitutional democracy and the legitimacy of judicial review’ (1990/1991) 9 *Law and Philosophy* 327, 328.

¹⁷⁰ Lemieux and Watkins (n 61 above) 30.

¹⁷¹ L Pierdominici ‘Constitutional adjudication and the ‘dimensions’ of judicial activism: Legal and institutional heuristics’ (2011) 3 *Sant’Anna Legal Studies, STALS Research Paper* 1, 12. Choper similarly argues, in the US context, that ‘Congress and the executive, the so-called political branches of our government, are by no means as democratic as standard belief would hold and... the Court is much more subject to the popular will than conventional wisdom would grant’ – Choper (n 77 above) 25.

Courts may even ensure that legislative organs adequately involve and consult the people and other stakeholders before enacting laws whenever participatory or inclusive law-making is a constitutional requirement.¹⁷² Individuals do not exercise effective control over their elected representatives in the period between elections. There should, therefore, be additional ways of controlling representatives in the intervening time. Vertical accountability through periodic elections should be complemented with continuous horizontal accountability in the form of checks and balances.¹⁷³ Constitutional review provides an opportunity for continuous, uninterrupted dialogue with government. Hamilton observes that '[i]t is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority'.¹⁷⁴ The South African Constitutional Court also held that litigation, more specifically socio-economic rights litigation, 'fosters a form of participatory democracy that holds government accountable and requires it to account between elections over specific aspects of government policy'.¹⁷⁵

Moreover, state institutions and decision-making procedures are replete with examples of institutions that do not necessarily overlap with majoritarian democratic and electoral accountability conceptions.¹⁷⁶ In almost all democratic states, 'value determinations are made, and are meant to be made, by many actors who cannot possibly be described as "our elected representatives"'.¹⁷⁷ Even if one concedes that judicial cannot be reconciled with democracy, it is only one of the many 'undemocratic' institutional designs.¹⁷⁸ There is nothing peculiar to judicial review that makes it particularly undemocratic distinct from several other procedures that do not equally fit in majoritarian or electoral democratic

¹⁷² See, for instance, *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) para 212. The Constitutional Court of South Africa invalidated two statutes because the legislature did not ensure the participation of the people. It held that if the conditions for public participation for law-making processes have not been complied with by the legislature, it has the duty to say so and declare the resulting statute invalid – para 211. Similarly, the Communal Land Rights Act was declared invalid for failure to consult the people during the enactment of the law – *Tongoane v Minister of Agriculture and Land Affairs* 2010 SA 214 (CC) para 104 – 110.

¹⁷³ Pasquino (n 129 above), 41. It should be noted that Pasquino recognises the value of elections. Elections matter; they 'are one among major technologies which produce both political obligation (for the citizens) and *limited power* concerning the elites in power'.

¹⁷⁴ A Hamilton 'The Federalist No 78: The judiciary department' *Independent Journal* (June 1788).

¹⁷⁵ *Lindiwe Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para 160.

¹⁷⁶ Eisgruber (n 131 above) 43 observing that there are, in the US context, 'many institutions that are insulated from directed electoral control'. Eisgruber believes that the insulation of these institutions and constitutional adjudicators from electoral politics is, although nondemocratic, instrumental as these institutions complement democratic decision-making: 'consequently there is reason to ask whether our government becomes more representative, and more democratic, if the judgment of legislators is supplemented by the judgment of other institutions less sensitive to electoral pressure' – 44.

¹⁷⁷ Wellington (n 116 above) 500; see also Pasquino (n 129 above) 40 observing that there are many independent authorities, such as heads of central banks, which are not elected and whose officials are not politically accountable to the citizens.

¹⁷⁸ N Komesar *Imperfect alternatives: Choosing institutions in law, economics, and public policy* (1994) 266.

conceptions.¹⁷⁹ Even in relation to directly elected organs, interest group theory has demonstrated that organised interest groups may ‘capture’ the democratic process to advance their own interests, at times at the expense of the interest of the general public.¹⁸⁰ Tamanaha observes that ‘the influence of special interests in securing favourable legislation is notorious’.¹⁸¹ There is, therefore, no guarantee that decisions of elected bodies always reflect the views of the electorate.

In conclusion, to be in line with constitutional democracy, electoral accountability mechanisms should be complemented through continuous inter-institutional accountability mechanisms. ‘[I]f democracy requires self-government, which is government by the people, then, since sometimes the legislature does not express the will of the people, sometimes the legislature needs to be restrained for the sake of democracy’.¹⁸² The mere fact that a particular procedure is not purely majoritarian and does not ensure direct electoral accountability does not necessarily make it illegitimate and inappropriate. The tension between majoritarian democracy and judicial review is as inherent as the tension between constitutionalisation and majoritarian democracy. This tension is part of the paradox in constitutional democracy. Of course, the legislature and executive enjoy relatively ‘superior [electoral] democratic credentials’ than courts with the tradition of judicial independence and insulation from direct popular vote;¹⁸³ and indeed, the judiciary is not infallible just as legislative supremacy involves risks and dangers;¹⁸⁴ yet constitutional adjudicators provide us with the only ‘imperfect alternative’ to put a brake on popular will.¹⁸⁵

¹⁷⁹ Wellington (n 116 above) 498.

¹⁸⁰ E Elhauge ‘Does interest group theory justify more intrusive judicial review?’ (1991) 101 *Yale Law Journal* 32, 35. Interest group theory rejects ‘the presumption that the government endeavors to further the public interest’; Wellington (n 116 above) 490 observing that ‘it is common for individuals who are neither elected nor recently appointed by elected officials to direct or influence significantly the course of government’. Zurn similarly observes that ‘substantial differences in the effective capacity of differently situated social groups to have their voices heard and opinions understood in formal parliamentary or congressional processes often lead to statute law that cannot be fairly considered as a result of a collection of the preponderance of opinion amongst the full citizenry concerning the proper scope and limits of rights – Zurn (n 39 above) 128. For a detailed discussion of the arguments on this point, see W Mitchell and R Simons *Beyond politics: Markets, welfare and the failure of bureaucracy* (1994) 102 – 75.

¹⁸¹ Tamanaha (n 56 above) 103.

¹⁸² W Sinnott-Armstrong ‘Weak and strong judicial review’ (2003) 22 *Law and Philosophy* 381, 387. Armstrong argues that ‘[d]emocracy is impossible if democracy requires that legislatures always get what they want’.

¹⁸³ Waldron (n 9 above) 1391 observing that ‘the system of legislative elections is not perfect either, but it is evidently superior as a matter of democracy and democratic values to the indirect and limited basis of democratic legitimacy for the judiciary’; and Cappelletti (n 43 above) 21.

¹⁸⁴ Kairys (n 36 above) 13 noting that to the extent that legislative supremacy can involve risks and dangers, rights-based judicial review furthers democracy.

¹⁸⁵ Komesar (n 178 above) 204. Sarat similarly notes that litigation can be the best of a series of not very good alternatives – A Sarat ‘Going to courts: Access, autonomy, and the contradictions of liberal legality’ in Kairys (n 36 above) 99.

Critics of constitutional review should ‘pay sufficient attention to the losses involved in an unrestricted majoritarianism’.¹⁸⁶ If democracy is not carefully designed to avoid undue concentration of power in any political branch through checks and balances, then the powerful branch accumulates power and entrenches itself, harming the free and fair competition for power – the core of democracy.¹⁸⁷ Judicial review helps to ensure that the majority does not, through violating rights, become too powerful and entrench itself, and that electoral victory does not become an ‘all or nothing’, ‘winner-takes-all’, ‘now or never’ game.¹⁸⁸

In any case, instances whereby courts invalidate legislation as unconstitutional are rare and exceptional.¹⁸⁹ In most instances, courts uphold legislation as constitutional thereby adding legitimacy to the democratic process.¹⁹⁰ Courts may also provide a legitimising shield to legislative or executive decisions that do not abrogate the Constitution but are nonetheless unpopular. Moreover, most decisions of independent constitutional adjudicators are often preceded by evolving changes in political and public perception over the issue in contention – ‘public opinion and judicial review are connected’.¹⁹¹ Also often times, the views on constitutional issues of constitutional adjudicators, elected representatives and the public tend to converge through time.¹⁹²

In connection with growing levels of constitutionalisation, with the consequent substitution of the notion of parliamentary sovereignty with constitutional supremacy, judicial review has proliferated since

¹⁸⁶ Blichitz (n 83 above) 102.

¹⁸⁷ U Preuss ‘Perspectives of democracy and the rule of law’ (1991) 18 *Journal of Law and Society* 353.

¹⁸⁸ See, for instance, F Morton ‘Judicial review in France: A comparative analysis’ (1988) 36 *American Journal of Comparative Law* 69.

¹⁸⁹ K Whittington ‘Legislative sanctions and the strategic environment of judicial review’ (2003) 3 *International Journal of Constitutional Law* 446, 461 – 462 observing that the judiciary is unlikely to diverge from the preferences of the legislatures on every issue and that the judiciary converges with the preferences of democratic institutions more often than it deviates. See also A Stone Sweet *Governing with judges: Constitutional politics in Europe* (2000) 64 observing that the German Constitutional Court, which had reviewed almost 20% of all federal laws only invalidated 4.6% of them.

¹⁹⁰ See R Dahl ‘Decision-making in a democracy: The Supreme Court as a national policy maker (1957) 6 *Journal of Public Law* 279, 294 arguing that the US Supreme Court is often supportive of the policy decisions of ruling majorities. Fallon similarly argues that ‘judicial review can actually contribute to the political legitimacy of a scheme of otherwise democratic government when the demands of political legitimacy are understood correctly’ – R Fallon ‘The core of an uneasy case for judicial review’ (2008) 121 *Harvard Law Review* 1693, 1715 *et seq.* In the South African context, as well, Roux argues that judicial scrutiny of certain political issues, political resource allocation in this case, further legitimises the policy choices of the government – see generally T Roux ‘Legitimizing transformation: Political resource allocation in the South African Constitutional Court’ (2003) 10 *Democratization* 92.

¹⁹¹ B Friedman ‘Mediated popular constitutionalism’ (2003) 101 *Michigan Law Review* 2595, 2632.

¹⁹² Friedman (n 191 above) 2597 observing, in the US context, that ‘judicial interpretations of the Constitution reflect popular will over time’. Tushnet similarly concludes in the US context that ‘looking at judicial review over the course of US history, we see the courts regularly being more or less in line with what the dominant national coalition wants’ – Tushnet (n 26 above) 15.

the Second World War and particularly after the end of the Cold War.¹⁹³ This expansion of judicial review, particularly on grounds of human rights guarantees, of the constitutionality of legislative and executive measures reflects the general consensus on the instrumentality of judicial review to guaranteeing fundamental rights and building, maintaining and reinforcing constitutional democracy.¹⁹⁴ Shapiro and Stone Sweet observe that '[t]oday, the rights and [constitutional] review tandem is an essential, even obligatory, component of any move toward constitutional democracy'.¹⁹⁵ Hirschl similarly notes that the incorporation of a bill of rights and some form of active judicial review characterise contemporary constitutions,¹⁹⁶ particularly in federal states and in states where the protection of human rights has been constitutionally entrenched.¹⁹⁷ Within the African context, the AU Assembly has expressed its satisfaction with the fact that African states have progressively provided for judicial mechanisms of control of the constitutionality of laws.¹⁹⁸ Similarly, the basic principles on the independence of the judiciary provide that the judiciary should have 'jurisdiction over all issues of a judicial nature'.¹⁹⁹

As such, it can fairly be concluded that a counter-majoritarian challenge which propounds an absolute rejection of the institution of constitutional review by politically independent arbiters has largely been

¹⁹³ For a comparative tabular presentation of the systems of constitutional review around the world, see A Mavric 'Constitutional/judicial review around the world' <http://www.concourts.net/comparison.php> (accessed 9 February 2012). The constitutions of most democratic states empower either the ordinary judiciary or establish independent constitutional courts or councils to review constitutionality of legislation, particularly as far as compliance with the human rights guarantees is concerned.

¹⁹⁴ Hirschl observes that the empowerment of the judiciary is an integral component of contemporary liberal constitutionalism – R Hirschl *Towards juristocracy: The origins and consequence of the new constitutionalism* (2004). Hirschl also notes that the sweeping trend in favour of constitutionalism stems from the notion that judiciaries are the most effective bodies for the protection of minority rights; Pasquino (n 129 above) 38 noting that constitutional control of laws is an essential character of the constitutional state. Dakolias also observes that 'a strong, more transparent, and independent judiciary is seen as a key factor in securing the rule of law, improving rights protection and encouraging investment, thereby facilitating democratic consolidation and development' – M Dakolias *Court performance around the world: A comparative perspective* (1999) (World Bank Technical Paper 430 (Washington DC)); G de Andrade 'Comparative constitutional law: Judicial review' (2001) 3 *University of Pennsylvania Journal of Constitutional Law* 977; J Utter and D Lundsgaard 'Judicial review in the new nations of Central and Eastern Europe: Some thoughts from a comparative perspective' (1993) 54 *Ohio State Law Journal* 559.

¹⁹⁵ Shapiro and Stone Sweet (n 146 above) 136.

¹⁹⁶ R Hirschl 'The new constitutionalism and the judicialisation of pure politics worldwide' (2006) 75 *Fordham Law Review* 721; R Hirschl "'Negative" rights vs. "Positive" entitlements: A comparative study of judicial interpretations of rights in an emerging neo-liberal economic order' (2000) 22 *Human Rights Quarterly* 1060, 1060; Cappelletti (n 43 above) 4. Cappelletti notes that 'one of the forceful reasons for the expansion of the scope of judicial review is the trend towards the adoption and judicial enforcement of declarations of fundamental rights'.

¹⁹⁷ W Newman 'Standing to raise constitutional issues in Canada' in S Kay (ed) *Standing to raise constitutional issues: Comparative perspectives* (2005) 195 noting that the capacity to challenge the validity of state action before the courts of the land is one of the cornerstones of modern constitutionalism.

¹⁹⁸ Decision on the Establishment of an African Framework for Constitutional Justice, Doc. Assembly/AU/17(XVII) Add. 5, (2010) para 4.

¹⁹⁹ Principle III, Basic Principles on the Independence of the Judiciary, UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. The Principles were originally adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Milan (August 1985) – see A/CONF.121/22/Rev.1 (1986) page 53.

rejected. This observation is further supported by the wide and growing recognition accorded at the international level to judicial and quasi-judicial organs in charge of controlling state action and inaction, including domestic legislative measures. Besides, the fact that most countries in the world have express constitutional provisions that confer the power of checking the constitutionality of laws and executive measures on independent courts or councils clearly indicates that legislative and executive flaws should, *inter alia*, be countered through the judiciary. Constitutionalisation and the judicial power of constitutional interpretation are considered as legitimate checks on the unfettered powers of representative organs. The theoretical objections to judicial review based on majoritarian conceptions of democracy have not, therefore, impeded the constitutional recognition of judicial review worldwide.²⁰⁰

Nevertheless, to the extent unelected judges might invalidate decisions of elected organs, judicial review is in apparent tension with democratic decision-making. Courts and legislatures around the world are alive to the tension and have crafted different mechanisms to address the potential challenge judicial review poses to the democratic process while maintaining the institution of judicial review as part of the complex democratic institutional matrix.

5. Soothing the tension between democracy and judicial review

Practices around the world reveal an interesting variety of ways of overcoming the counter-majoritarian dilemma, ways through which courts and legislatures have designed mechanisms to determine the extent to which courts may quash the decisions of elected representatives. Some countries have chosen to completely abolish judicial review of legislation. In the Netherlands, for instance, courts are explicitly prohibited from declaring a law unconstitutional.²⁰¹ Dutch courts are bound to apply the law as an

²⁰⁰ W Forbath and L Sager 'Comparative avenues in constitutional law: An introduction' (2004) 82 *Texas Law Review* 1653 observing that judicial review has flourished around the globe; Ferejohn (n 37 above) 41 observing that '[s]ince World War II, there has been a profound shift in power away from legislatures and toward courts and other legal institutions around the world'.

²⁰¹ Article 120 of the 1983 Constitution of the Netherlands explicitly forbids courts from reviewing on the constitutionality of 'Acts of Parliament and treaties'. Note, however, that article 94 allows courts to refuse to apply a law if the law is in conflict with treaty obligations of the Netherlands. It provides: Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions. Article 94 has ameliorated the impact of the exclusion of constitutional review on the realisation of human rights. For a discussion of the role of Dutch courts in ensuring the realisation of human rights see, J Uzman 'Netherlands: The Dutch Supreme Court: A reluctant positive legislator?' in A Brewer-Carias *Constitutional courts as positive legislators: A comparative law study* (2011) 645-692.

expression of the will of the majority, regardless of its constitutional implications. In the UK, as well, until recently, judicial review of primary legislation was not part of the functions of British courts.²⁰²

The theoretical justification behind excluding constitutional review of legislation in these countries lies in the concept of parliamentary supremacy. However, the European Court of Human Rights, which applies the European Convention on Human Rights, reviews laws and executive and judicial decisions of member states. The decisions are binding on states regardless of the domestic legislative or constitutional regime.²⁰³ Considering generally that international law and tribunals enjoy less democratic legitimacy than domestic law and courts,²⁰⁴ the justification behind the current exclusion of domestic judicial review of laws in these countries is ironic and historical and not based on democratic theory.

The following sections discuss the most common interpretative tools and structural designs through which courts and legislatures have attempted to assuage the tension between judicial review and the democratic process by making judicial review more responsive to democratic forces. The mechanisms are not mutually exclusive. As such, a combination of these mechanisms may be employed to achieve a fine balance. The political question doctrine and other interpretative tools and constitutional amendment procedures, for instance, are recognised in some way or another worldwide. Therefore, the mechanisms should not be seen as alternatives to each other but rather as alternatives in a range of choices between rejecting judicial review and establishing a form of judicial review where final judicial decisions are not reviewable.

²⁰² This is partly influenced by the philosophies of Dicey who proclaimed the sovereignty of parliament – A Dicey *Introduction to the law of the constitution* (1902). After the adoption of the Human Rights Act in 1998, English courts have been granted the power to declare laws that contradict the European Human Rights Convention incompatible with the Convention – see section 5.5 below.

²⁰³ See, for instance, D Amoroso ‘A fresh look at the issue of non-justiciability of defence and foreign affairs’ (2010) 23 *Leiden Journal of International Law* 933 arguing that the international and the European community legal orders are progressively eroding the scope of application of non-justiciability doctrines. Cappelletti observes that the growing recognition of judicial review in Europe is influenced by the power of the European Court of Human Rights to review the conformity of state action with the European Convention of Human Rights – Cappelletti (n 30 above) 432.

²⁰⁴ McGinnis and Somin (n 24 above) noting that most international law is made through highly undemocratic procedures. McGinnis and Somin argue that since ‘there is no global democratic process, international law lacks the structure to generate substantive rights more effectively than democracy’ as much of international human rights law is ‘made either by relatively unaccountable international elites or through processes in which the governments of oppressive dictatorships wield substantial influence’.²⁰⁴ They conclude that ‘the process for generating international human rights is currently inferior to the domestic process in well functioning democracies’. On the debates about the democratic legitimacy of international human rights law, see J Mayerfeld ‘The democratic legitimacy of international human rights law (2009) 19 *Indiana International and Comparative Law Review* 49.

5.1. The political question doctrine

The political question doctrine, as developed by the US Supreme Court, is a mode of judicial self-restraint that tends to ameliorate the presumptively non-democratic nature of judicial review. It is tailored by the judiciary itself and represents a discretionary exercise to defer to co-ordinate branches decisions on certain issues.²⁰⁵ This doctrine of judicial deference helps courts to avoid considering the merits of a particular case.²⁰⁶ However, it does not reject completely the institution of judicial review. It rather calls for a cautious judicial approach to ensure that certain decisions are finally determined by the ‘most appropriate’ political institutions rather than judicial organs.²⁰⁷ If an issue involves a ‘political question’, courts will not pronounce on it; instead courts will let the political process to take its course.²⁰⁸ The doctrine essentially recognises limits to the capabilities and competence of courts.²⁰⁹ Harris notes that decisions that require ‘access to empirical information and the benefit of the views of a wide range of people may not often be appropriate for judicial determination’.²¹⁰

The conditions that justify the invocation of the political question doctrine include cases where there is a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; a lack of judicially discoverable and manageable standards for resolving the matter at hand; it is impossible to decide without an initial policy determination of a kind clearly for non-judicial discretion; it is impossible for courts to undertake independent resolution without expressing lack of the respect due co-ordinate branches of government; there is an unusual need for unquestioning adherence to a political decision already made; or there is a potential of embarrassment from multifarious pronouncements by various departments on one question.²¹¹

Despite the established practice of invoking the doctrine in certain circumstances, the doctrine can hardly be grounded in any explicit constitutional provision; it is rather based in ‘a conviction that certain problems by their intrinsic nature fall beyond the proper limits of adjudication’.²¹² Several authors criticise the doctrine primarily for being grounded in purely pragmatic, result orientation and the lack of

²⁰⁵ Redish (n 67 above) 1032

²⁰⁶ P Daly ‘Justiciability and the ‘political question’ doctrine’ (January 2010) *Public Law* 160, 161.

²⁰⁷ *Baker v Carr*, 369 US 186, 226 (1962).

²⁰⁸ Redish (n 67 above) 1031.

²⁰⁹ B Harris ‘Judicial review, justiciability and the prerogative of mercy’ (2003) 62 *Cambridge Law Journal* 631. Harris related the issue of justiciability with notions of the political question doctrine.

²¹⁰ Harris (n 209 above) 640

²¹¹ *Baker v Carr*, 369 US 186, 226 (1962) at 217.

²¹² Fuller (n 57 above) 355.

a principled and consistent approach in its application.²¹³ Since there is no verifiable principle or formula to accurately determine in which cases the doctrine would be invoked, different judges may and have differed on exactly where the line should be drawn.²¹⁴ It has been argued, as a result, that the doctrine should be discarded, particularly concerning human rights adjudication.²¹⁵ Nevertheless, the doctrine helps courts to insulate themselves from the controversies that surround pronouncement on certain value laden and politically sensitive issues which might have implications to the legitimacy and security of the judiciary.²¹⁶

The relevance of the doctrine is very limited in countries with constitutions which expressly set out the power of independent courts to adjudicate all constitutional issues. The legitimacy of judicial review should not really be an issue in cases where the Constitution clearly grants the final say on constitutional matters to courts.²¹⁷ For instance, European constitutional courts, whose powers are constitutionally spelled out, are more involved in sensitive issues than the American Supreme Court, whose judicial review power over legislation was ‘invented’ by the Court itself in *Marbury v Madison*.²¹⁸ Moreover, any distinction between what is legal and political is often highly nebulous and the precise contours of the

²¹³ For criticisms of the doctrine, see Redish (n 67 above).

²¹⁴ Harris (n 209 above) 635.

²¹⁵ Redish (n 67 above) 1051. Redish argues that the political question doctrine ‘richly deserves’ ‘total and complete repudiation’ (1033). He further notes that ‘the political question doctrine should play no role whatsoever in the exercise of the judicial review power’. According to Redish, the vagueness or the absence of objective standards cannot justify declining judicial review as ‘ultimately, any constitutional provision can be supplied working standards of interpretation’. See also M Tigar ‘Judicial power, the “political question doctrine” and foreign relations’ (1970) 17 *UCLA Law Review* 1135, 1141 – 1152

²¹⁶ Bickel (n 32 above) 183 – 98. Bickel acknowledged the political question doctrine as prudential enabling the US Supreme Court to survive hostile political environments and to maintain its legitimacy.

²¹⁷ S Sathé ‘Judicial review in India: Limits and policy’ (1974) 35 *Ohio State Law Journal* 870.

²¹⁸ See, for instance, M Rosenfeld ‘Constitutional adjudication in Europe and the United States: Paradoxes and contrasts’ (2004) 2 *International Journal of Constitutional Law* 633, 634 & 652 – 653 – asking why charges of undue politicisation have been made ‘much more vehemently’ against the American practice of judicial review, when in fact the European constitutional courts exercise far more expansive and ‘political’ powers. Rosenfeld partly attributes this contrast to the lack of express textual authorisation for judicial review in the US Constitution; Ferejohn (n 37 above) 43 observing that European Constitutional Courts have avoided the kind of ‘politicization’ of judging that is characteristic of American courts; J Ferejohn ‘Constitutional review in the global context (2002-2003) 6 *New York University Journal of Legislation and Public Policy* 49, 55 noting that the American model is easier to reject on democratic grounds than the concentrated European model and that the tensions between democracy and legality are much less sharply drawn in the European model; V Comella ‘The consequences of centralizing constitutional review in a special court: Some thoughts on judicial activism’ (2003-2004) 82 *Texas Law Review* 1705 arguing that, all other things being equal, special constitutional courts are likely to be more activist than decentralised systems; D Kommers ‘German constitutionalism: A prolegomenon’ (1991) 40 *Emory Law Journal* 837, 842 noting that the jurisdiction of the German Constitutional Court is mandatory and that the Court ‘may not avoid decision in a case properly before it by invoking a “political question” doctrine or the “passive virtues” of Bickelian jurisprudence’; D Finck ‘Judicial review: The United States Supreme Court versus the German Constitutional Court’ (1997) 20 *Boston College International and Comparative Law Review* 123.

doctrine are blurred.²¹⁹ Very few share any precise sense of ‘where the boundary between political and legal questions should be drawn’.²²⁰

Some also argue that the ‘moral cost’ in leaving legal disputes unresolved necessitates a complete repudiation of the political question doctrine.²²¹ The doctrine ‘can cause the courts to fall short of upholding the ideal of the rule of law’.²²² The principle also runs the risk of compromising the right of access to justice.²²³ The exclusion of certain ‘category’ of disputes as political has particularly been severely criticised.²²⁴ The determination of whether an issue involves a political question should be made individually in each case and not generically based on whether a particular issue belongs to some ambiguous category.²²⁵ Courts should identify some constitutional barrier to relief or remedy in each individual case rather than avoid judicial review simply based on the category to which the issue belongs. The mere involvement, for instance, of foreign affairs issues in a legal dispute, which often leads to the invocation of the political question doctrine, should not automatically preclude judicial review.²²⁶

Other closely related interpretative tools employed by courts to avoid undesirable intrusion into legislative and executive functions are the ‘passive virtues’. Bickel coined the ‘passive virtues’ to describe the various strategies through which courts act by not acting, where judicial restraint is considered a virtue.²²⁷ The principle of constitutional avoidance, one of the passive virtues, requires courts to avoid engaging in constitutional adjudication except when resolving the constitutional issue is absolutely necessary.²²⁸ It is a self-imposed prudential principle whereby courts avoid engaging a

²¹⁹ P Lenta ‘Judicial restraint and overreach’ (2004) 20 *South African Journal on Human Rights* 544, 547 noting the difficulty of outlining a rigid dichotomy between law and politics.

²²⁰ L Sossin *Boundaries of judicial review: The law of justiciability in Canada* (1999) 133.

²²¹ T Allan *Constitutional justice: A liberal theory of the rule of law* (2001) 161 – 199.

²²² Harris (n 209 above) 633.

²²³ Amoroso (n 203 above) 934.

²²⁴ Allan (n 221 above) arguing that the search for theory or doctrine of deference is misguided and that ‘no coherent doctrine of deference is feasible’.

²²⁵ Daly (n 206 above) 164.

²²⁶ J Nzelibe ‘The uniqueness of foreign affairs’ (2004) 89 *Iowa Law Review* 941. Nzelibe, however, observes that ‘institutional competence considerations continue to warrant broad application of the doctrine in the foreign affairs context’.

²²⁷ Bickel (n 32 above) 111 – 129. For a discussion of the prudence theory that Bickel advocated for, see A Kronman ‘Alexander Bickel’s philosophy of prudence’ (1985) 94 *Yale Law Journal* 1567. In the US context, the passive virtues relate to the use of justiciability and standing doctrines to avoid judicial decisions that are considered too intrusive into the powers of the other branches. The principle of constitutional avoidance, avoidance of advisory or anticipatory opinions, and avoiding the formulation of constitutional principles broader than what is needed by the facts to which it is to be applied are some of them.

²²⁸ Currie referred to this principle, in the context of South Africa, as ‘judicious avoidance’ which represents ‘decisional minimalism’ whereby the South African Constitutional Court avoids decisions that do not have to be made; avoids first-order reasoning when decisions can be made on a deductive or analogical basis; and avoids large-scale theorising when substantive

constitutional issue if there also exists another ground based on which the question can be disposed of.²²⁹ The principle of constitutional avoidance restricts instances of judicial evaluation of the activities of democratically elected organs to the necessary minimum. The interpretive tools principles are, therefore, fundamental to the preservation of the legitimacy and credibility of unelected judges.²³⁰

5.2. Constitutional amendment procedures

Another possible procedure that can ameliorate the apparently non-democratic character of constitutional review is the power of political majorities to amend constitutions. Constitutional amendment procedures ensure that courts do not necessarily have the final word in determining constitutional issues and broadly public policy.²³¹ The existence of constitutional amendment procedures – even when amendments require super-majoritarian procedures – and their potential use to reverse judicial decisions ameliorates the overall democratic legitimacy deficit in the exercise of constitutional review by courts.²³² Decisions of independent constitutional adjudicators are ultimately subject to constitutional amendment. Constitutional amendment is ‘a perfectly viable option for most constitutional democracies displeased with court rulings’.²³³ As a result, constitutional review merely ensures the control of ‘political super-majorities over legislative majorities’.²³⁴ When courts invalidate laws as unconstitutional, they are merely telling legislatures that ‘its ordinary legislative process is insufficient to adopt the law and that the required procedure is constitutional amendment’.²³⁵ Constitutional amendments may even modify the power and competencies of a constitutional court or

decision-making is unavoidable – I Currie ‘Judicious avoidance’ (1999) 15 *South African Journal on Human Rights* 138 drawing from the theories championed by Sunstein – see C Sunstein ‘Leaving things undecided’ (1996) 110 *Harvard Law Review* 6, 6 – 7 who describes decisional minimalism as the practice of ‘saying no more than necessary to justify an outcome, and leaving as much as possible undecided’. Roux similarly observes that courts in new democracies act cautiously not to endanger their institutional security even if this sometimes means subtly compromising principled judicial approach – see generally T Roux ‘Principle and pragmatism on the Constitutional Court of South Africa’ (2009) 7 *International Journal of Constitutional Law* 106.

²²⁹ For the application of the principle in the US Supreme Court, see the case of *Ashwander v Tennessee Valley Authority*, 297 US 288, 347 (1936). For a discussion of the principle of constitutional avoidance, see E Chemerinsky *Constitutional law: Principles and policies* (2006) 49 – 53; L Kloppenberg ‘Avoiding constitutional questions (1994) 35 *Boston College Law Review* 1003, 1033 – 1034 referring to the principle as the ‘last resort’ rule.

²³⁰ For debates on whether courts should consistently follow the avoidance principle, see J Carter ‘Passive virtues versus aggressive litigants: The prudence of avoiding a constitutional decision in *Snyder v Phelps*’ (2010) 89 *North Carolina Law Review* 326, 339 – 345.

²³¹ Pasquino argues that constitutional control organs are not ‘supreme or sovereign in any sense of that word’ – Pasquino (n 129 above) 41.

²³² Fallon (n 190 above) 1723.

²³³ G Silverstein ‘Singapore: The exception that proves rules matter’ in T Ginsburg and T Moustafa (eds) *Rule by law: The politics of courts in authoritarian regimes* (2008) 81.

²³⁴ Pasquino (n 129 above) 38.

²³⁵ M Troper ‘The logic of justification of judicial review’ (2003) 1 *International Journal of Constitutional Law* 99, 119.

any other organ in charge of constitutional interpretation.²³⁶ To this extent, a constitution that can be amended more easily may serve as a constraining factor on judicial activism.²³⁷ Armstrong, therefore, suggests that democratic objections against judicial review should be directed against stringent amendment procedures rather than on the institution of judicial review itself.²³⁸

However, constitutional or legislative amendments of the law that provided the basis for the judicial determination to counteract certain unfavourable judicial determinations might constitute an undesirable political backlash. Constitutional amendments have, for instance, been used in the US by legislative bodies to counter progressive judicial decisions on gay rights.²³⁹ The main trouble with constitutional amendments is that in countries where there is no strong democratic culture and strong opposition, there is no real difference between legislative and constitutional amendment procedures, despite the fact that constitutional amendments have to pass through more stringent procedural hurdles. The problem in Zimbabwe and the frequent resort to constitutional amendments to reverse judicial decisions is rooted in the dominance of legislative organs by a single party. Even strict constitutional amendment procedures do not provide sufficient safeguards to ensure the effective functioning of the institution of judicial review, especially when powerful figures oppose the decisions.

With a view to counter regressive and reactionary constitutional amendments, the Indian Supreme Court developed the ‘basic structures’ doctrine whereby certain provisions of a constitution that outline the basic structure of the Indian state envisioned by the drafters of the Constitution may not be amended even following the procedure set out by the Indian Constitution.²⁴⁰ The South African Constitution similarly empowers the Constitutional Court to ‘decide on the constitutionality of any

²³⁶ Pasquino (n 129 above) 41.

²³⁷ D Solove ‘Constitutionalism and legitimacy’ <http://www.concurringopinions.com/archives/2008/05/constitutionali.html> (accessed 3 January 2011).

²³⁸ Sinnott-Armstrong (n 182 above) 387. Shapiro similarly observes that interpretation involves some law making and the extent to which ‘this law making interferes with democracy depends on how easy it is for the legislature to legislate’ – M Shapiro ‘The European Court of Justice: Of institutions and democracy’ (1998) 32 *Israel Law Review* 3, 3.

²³⁹ For such instances in the LGBT rights litigation in the US, see Keck (n 166 above).

²⁴⁰ *Keshavananda Bharati v State of Kerala*, 1973 A.I.R. 1461 (S.C.) where the Indian Supreme Court held that, although there are no express words in the Indian Constitution limiting the power conferred on Parliament to amend the Constitution, the power of constitutional amendment is not unlimited or unrestricted. The Court concluded that the Constitution does not entitle Parliament to amend constitutional provisions in such a way as to alter or affect the basic structure of the Constitution. Former Indian Chief Justice Bhagwati described this judgment as the ‘most remarkable instance of judicial activism, for it has gone the farthest extent in limiting the constituent power of Parliament’ – P Bhagwati ‘Judicial activism and public interest litigation’ (1984-1985) 23 *Columbian Journal of Transnational Law* 561, 562.

amendment to the Constitution'.²⁴¹ The application of the doctrine, however, begs several questions such as the standards to determine which provisions are basic and, therefore, cannot be amended. No wonder that this doctrine has not attracted the attention of courts around the world. For instance, the Tanzanian Court of Appeal has rejected the doctrine as inapplicable in Tanzania in a case that challenged the constitutionality of a constitutional amendment.²⁴²

5.3. A centralised system of constitutional review

In many European countries, the centralised or concentrated system of constitutional review, where only a constitutional court or council is granted the first and final power of constitutional review, is adopted with a view to ameliorate the counter-majoritarian difficulty emanating from constitutional review.²⁴³ It is for this reason that the concentrated system is more common in countries with a traditional emphasis on the principle of parliamentary supremacy and separation of powers.²⁴⁴ The concentrated form of judicial review is underpinned by the assumption that constitutional control is not merely a judicial but also a legislative and political function, which may not be conducted by every judge and every court.²⁴⁵ It sends a nominal message that not every ordinary court and judge is superior to and can decide on the constitutionality of laws representing the views of elected majorities.²⁴⁶ Moreover, in a concentrated system, it is not just legislative and executive action but also judicial decisions that can be the subject of constitutional review.

²⁴¹ Constitution of the Republic of South Africa Act no 108 of 1996, section 167(4)(d). However, it is not clear whether the Constitutional Court will assess compliance with the procedural prescriptions for constitutional amendment, or whether the Court may also establish its own version of the basic structures doctrine to invalidate even amendments that are entered in accordance with established procedures. In other words, the substantive grounds based on which the Constitutional Court will decide on the constitutionality of constitutional amendments are not explicitly provided. Perhaps the Bill of Rights can provide the substantive standard. In that case, international human rights law will be relevant based on article 39(1)(b) of the Constitution which requires the Court to consider international law in interpreting the Bill of Rights.

²⁴² The Court refused to assess the constitutionality of the amendment as the amendment is itself part of the Constitution – *Honorable Attorney General v Reverend Christopher Mitikila*, civil appeal no 45 of 2009 (17 June 2010). In Brazil, however, the Federal Supreme Court has accepted the doctrine to invalidate amendments 'that imply an effective violation of its essential core' – Mendes (n 29 above). There may also be countries that explicitly prohibit the amendment of certain provisions of the Constitution in which case courts may invalidate amendments to such provisions as unconstitutional. For a discussion of the judicial review of constitutional amendments, see K Gozler *Judicial review of constitutional amendments: A comparative study* (2008).

²⁴³ Shapiro and Stone Sweet (n 146 above) 147.

²⁴⁴ Finck (n 218 above) 126 noting that countries that prefer the centralised system of judicial review 'tend to adhere more rigidly to the doctrine of separation of powers and the supremacy of statutory law'.

²⁴⁵ Ferejohn (n 218 above) 52.

²⁴⁶ H Rupp 'Judicial review in the Federal Republic of Germany' (1960) 9 *American Journal of Comparative Law* 29, 32 observing that the decision to centralise judicial review in Germany was born out of the 'thought that the dignity of the legislative department of government would be put in jeopardy if a lower court judge had the power eventually to pass with finality on the question whether a certain statute violated the Constitution or not'; Ferejohn (n 218 above) 55 noting that the American or diffused model of constitutional review is easier to reject on democratic grounds than the concentrated European model and that the tensions between democracy and legality are much less sharply drawn in the European mode

The centralised form of constitutional review, therefore, partly ameliorates the counter-majoritarian effect of constitutional review by limiting the power of review of decisions resulting out of democratic deliberations to a single eminent constitutional adjudicator, which exists outside the ordinary judicial structure, or to the highest court in the country.²⁴⁷ Strong adherence to the principle of parliamentary supremacy and separation of powers ideologies, the absence of the principle of *stare decisis* coupled with the attending potential inconsistencies and even contradictions, and the traditional distrust of the judiciary have led to the prevalence of the concentrated system in civil law countries.²⁴⁸ The centralised system of constitutional review is, therefore, part of the structural tools designed to soothe the tension between democracy and constitutional review.

5.4. The Canadian approach: Inclusion of overriding clause

In Canada, legislatures are allowed to preclude judicial review of legislation by explicitly or impliedly excluding judicial review, or by explicitly indicating in a primary statute – not subordinate legislation – that the legislatures intended to deviate from the Canadian Charter of Rights. The ‘notwithstanding clause’ under section 33 of the Charter grants the legislature the power to override rights in the Charter.²⁴⁹ The clause offers the flexibility that is required to ensure that the last word is held by the elected representatives of the people rather than by the courts in the (unlikely) event of a decision of the courts that is clearly irreconcilable with profoundly embedded public values, or is otherwise absurd.²⁵⁰ Also generally, judicial decisions in Canada ‘usually left room for a legislative response, and usually received a legislative response’.²⁵¹ Canadian judges behave strategically in decision-making roles,

²⁴⁷ Shapiro and Stone observe that constitutional courts ‘occupy their own ‘constitutional’ space, a space neither ‘judicial’ nor ‘political’ – Shapiro and Stone Sweet (n 146 above) 344.

²⁴⁸ Cappelletti (n 43 above) 138.

²⁴⁹ Canadian Charter of Human Rights and Freedoms (Part I of the Constitution Act, 1982). Section 33 reads as follows:

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter. Any notwithstanding clause limiting rights must be renewed every five years; otherwise it expires. See D Gibson *The law of the Charter: General principles* (1986) 125 noting that this is a uniquely Canadian development with no equivalent in either international human rights law or western democratic human rights declarations.

²⁵⁰ Some describe statutes that include notwithstanding clauses as ‘in your face’ statutes – Sinnott-Armstrong (n 182 above) 381.

²⁵¹ P Hogg ‘Discovering dialogue’ (2004) 23 *Supreme Court Law Review* 3, 4&6; P Hogg and A Bushell ‘The Charter dialogue between courts and legislatures (or perhaps the Charter of Rights is not a bad thing after all)’ (1997) 3 *Osgoode Hall Law Journal* 75. Hogg notes that the political unpopularity and opposition to the inclusion of the overriding clause attracts – as opposed to the symbolic force of a very popular Charter of Rights – will presumably ensure that the clause is rarely invoked. The clause is, therefore, a safety valve to be used only on rare occasions – P Hogg ‘A comparison of the Bill of Rights and the Charter’ in W Tarnopolsky and G Beaudoin (eds) *The Canadian Charter of Rights and Freedoms: Commentary* (1982) 11. Indeed, the federal government has never invoked the notwithstanding clause.

‘taking into account not only legal constraints (such as precedence and legal coherence) but also political circumstances’.²⁵²

The override clause appeases the trepidation that some have against judicial review – or rather judicial adventurism – and unacceptably ‘political’ judicial decisions. The Canadian approach is, however, a very loose mechanism that subjects human rights particularly of the minorities to simple majorities and essentially establishes pure parliamentary supremacy. The approach provides an easy and quick way of revising or repudiating judicial determinations by the legislature through ordinary legislative procedures.²⁵³ Besides, the fact that the notwithstanding clause has generic effects on all future cases makes it inappropriate for individual analysis of and reaction to each case taking into account its own circumstances. An alternative to the Canadian approach could be to provide that the legislatures may overturn judicial decisions in each individual case but only after a decision has been taken by a court and through more rigorous procedures than simple majorities (such as a two-third majority requirement to reverse judicial determinations).²⁵⁴ This can discourage instances of rejection of judicial determinations. The ‘notwithstanding’ clause, if and when exercised in advance, excludes any possibility of judicial assessment of compliance with the Charter of Rights – and the attendant possibility of political dialogue judicial decisions could trigger. A determination on a case, after it has been decided, as to whether or not to ignore such decision, ensures that conflicts between judicial and legislative views are not merely assumed but are resolved only when they arise and if necessary. Constitutional amendment procedures also provide an after-the-fact alternative solution to the Canadian futuristic and generic approach.

5.5. The British approach: Declaration of incompatibility

With the domestication of the European Convention on Human Rights,²⁵⁵ British courts have been granted unprecedented power to declare a law – primary statutes and subordinate laws – incompatible with the Convention.²⁵⁶ However, such declaration is not binding on the legislature as the validity of the

²⁵² Navia and Ríos-Figueroa (n 1 above) 196.

²⁵³ M Tushnet ‘Forms of judicial review as expressions of constitutional patriotism’ (2003) 22 *Law and Philosophy* 353, 369.

²⁵⁴ Under the 1937 Constitution of Brazil, for instance, a declaration of unconstitutionality by the Supreme Court could be abrogated if the Congress approved the abrogation by a two-thirds majority in each house – M Sato ‘Judicial review in Brazil: Nominal and real’ (2003) 3 *Global Jurist Advances* 1, 4.

²⁵⁵ See UK Human Rights Act 1998.

²⁵⁶ Section 4 of the Human Rights Act 1998 provides: (4) Declaration of incompatibility

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

law remains intact. The approach was cautiously designed to maintain ‘democratic entrenchment’, that is to say, to ensure that the Human Rights Act and its application by courts do not compromise the supremacy of Parliament.²⁵⁷ To take effect, therefore, a declaration of incompatibility must be followed by an amendment to or repeal of the law which has been declared incompatible with the Convention. So far, a declaration of incompatibility has effectively meant a declaration of unconstitutionality as British law-makers have responded positively to declarations of incompatibility.²⁵⁸

The adoption of the principle of conventional incompatibility, and the consistency in compliance with declarations of incompatibility, is presumably developed to avoid appeals against decisions of incompatibility, which have not been complied with by British legislatures, to the European Court of Human Rights. There is nonetheless no guarantee that British legislatures will reform laws that have been declared incompatible in every single case. It should be noted that the British parliament is not required to take remedial action in cases of declaration of incompatibility. It can only do so of its own volition. If such a mandatory requirement – of consistent remedial action and, hence, compliance – had been anticipated, there would have been no need to limit the power of British courts to declaration of incompatibility and not of unconstitutionality.

While the British approach effectively dispels the dilemma by leaving the ultimate and final power to accept or reject judicial determinations of incompatibility to elected representatives, it leaves human rights and the institution of judicial review in a disadvantaged position as merely advisory or recommendatory. And although the system might work in the UK where the political costs of rejecting a

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied—

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility.

(6) A declaration under this section (“a declaration of incompatibility”)—

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.

²⁵⁷ The idea of ‘democratic entrenchment’ was initially suggested by *Liberty*, a prominent human rights NGO, with a view to convince British legislatures that domesticating the European Convention on Human Rights need not compromise parliamentary supremacy – see *Liberty ‘A People’s Charter’* (1991) 4, 86 – 87 (London). This was in rejection of ‘the conventional wisdom that a written bill of rights must go hand-in-hand with the politically unpalatable notion of judicial supremacy over Parliament’ – R Maiman “‘We’ve had to raise our game’: *Liberty’s* litigation strategy under the Human Rights Act 1998’ in S Halliday and P Schmidt (eds) *Human rights brought home: Socio-legal perspectives on human rights in the national context* (2004) 87 – 110. *Liberty* proposed that statutes found to be in breach of the bill of rights by the courts be scrutinised by a special parliamentary committee and voted on by Parliament itself to determine whether they should remain in effect.

²⁵⁸ In *A and others v Secretary of State for the Home Department* (2004), for instance, the UK House of Lords declared the indefinite detention provision of the Anti-Terrorism Act 2001 incompatible with the right to liberty and security (article 5) and the prohibition of discrimination (article 14) of the European Convention.

declaration of incompatibility are relatively high, it is unlikely that it will work in countries where legislatures are often recalcitrant even towards binding decisions of their own highest courts, let alone mere declarations of incompatibility.

5.6. The New Zealand approach: Indirect application of human rights

New Zealand has devised its own system of rights-based judicial review. In New Zealand, courts are not allowed to invalidate laws even if contradictory to the 1990 New Zealand's Bill of Rights Act. They are also not expressly allowed to declare laws incompatible with the Bill of Rights Act as is the case in the UK. The Bill of Rights Act is an ordinary statute which may be amended or repealed like any other ordinary statute and the provisions do not, unlike the Canadian Charter of Rights, override provisions in other laws. Courts may not, therefore, invalidate any statute for inconsistency with the Act.²⁵⁹ Nevertheless, the Act requires courts to interpret all other statutes consistently with the rights contained in the Act.²⁶⁰ New Zealand courts should mainstream the provisions of the Act into the interpretation and application of all other laws. The approach does not fit in classical definitions of constitutional review which involves the evaluation of government laws and other decisions based on constitutional standards. It rather constitutes an 'indirect' application of human rights.²⁶¹ The approach in New Zealand emanates from and strongly maintains parliamentary sovereignty more than the case in Canada and the UK.

It should be noted that the principle of constitutional avoidance generally requires that courts should attempt to interpret a law in line with the Constitution before invalidating such law as unconstitutional. The approach in New Zealand is, therefore, a general principle of constitutional interpretation in almost all jurisdictions that recognise constitutional review. Similarly, in countries whose constitutions only recognise non-justiciable directive principles of state policies as opposed to enforceable rights, as is often the case in relation to socio-economic rights, courts cannot invalidate laws based on the

²⁵⁹ 1990 New Zealand Bill of Rights, section 4. For a descriptive and analytical assessment of the system in New Zealand, see S Gardbaum 'Reassessing the new Commonwealth model of constitutionalism' (2010) 8 *International Journal of Constitutional Law* 167; S Gardbaum 'The new Commonwealth model of constitutionalism' (2001) 49 *American Journal of Comparative Law* 707, 727 – 732.

²⁶⁰ 1990 New Zealand Bill of Rights, section 6. It provides: Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

²⁶¹ For a discussion of the direct and indirect application of human rights in the South African context, see I Currie and J de Waal *The Bill of Rights handbook* (2005) Chapter 3. Section 39(2) of the South African Constitution number 108 of 1996 requires courts to apply human rights indirectly when interpreting statutes, the common law and customary law.

principles. Nevertheless, courts are generally allowed, sometimes required, to interpret laws in line with the directive principles.²⁶²

The indirect application of human rights is limited to the concrete case under consideration and does not imply any invalidation of laws enacted by democratically elected governments and, therefore, does not induce serious counter-majoritarian charges. To this extent, the indirect application of human rights is more democratically acceptable than direct application with the attendant power to strike down legislation.

6. Conclusion

The counter-majoritarian difficulty provided one of the principal reasons that justified the decision of the drafters of the Ethiopian Constitution to empower a political organ, the HoF, with the final power of constitutional interpretation. However, a close look reveals that the HoF itself can be challenged based on democratic theories. The current system of constitutional review in Ethiopia is not completely absolved from counter-majoritarian challenges. In addition, as argued in Chapter 3, the HoF lacks the requisite independence, impartiality and competence in adjudicating constitutional rights. The lack of independence and impartiality undermines its legitimacy. Most importantly, even if we assume that the structure and composition of the HoF is in line with democratic theories, it is argued that constitutional review by independent adjudicators does not undermine democracy. The fact that courts are not electorally accountable does not justify the complete politicisation of constitutional review in Ethiopia. The counter-majoritarian dilemma does not justify the repudiation of judicial review. With this view this Chapter discusses in detail the theoretical justifications of rights-based constitutional review by independent courts.

The most interesting aspect of the theoretical controversy surrounding judicial review and democracy is that the contention that constitutional judges in most jurisdictions are not democratically accountable forms at the same time the basis of objections to and justifications for judicial review. For those supporting pluralist or majoritarian conceptions of democracy, judicial review by unelected judges is democratically illegitimate, and, therefore, unacceptable. In contrast, for those who support judicial review, its value lies exactly in the fact that constitutional judges are not subject to popular vote and

²⁶² In some countries, such as India, despite a clear indication of their non-justiciability, the directive principles have been used to read-in several socio-economic rights in the right to life guarantee. For a detailed discussion of the activism of the Indian Supreme Court, see Bhagwati (n 240 above); U Baxi 'Taking suffering seriously - Social action litigation in the Supreme Court of India' (1979/1980) *Delhi Law Review* 93 positing that '[t]he Supreme Court of India is at long last becoming ... the Supreme Court of Indians'.

direct political influence. The core of the thesis in this Chapter is that, although it is objectionable based on majoritarian democratic theory, the exercise of constitutional review by politically independent constitutional adjudicators is normatively and practically justifiable and desirable. Rights-based constitutional review does not undermine democracy. It rather reinforces democracy. Quite simply, a country that recognises constitutional review by a politically independent body (whether judicial or non-judicial) is by no means less democratic than a country that does not.

Constitutional democracy does not insist that all decisions should only be made by directly elected bodies. It rather entails limits on the range of choices available to elected governments. Constitutional democracy is not merely about 'counting heads'. This Chapter argues that the theoretical objection that judicial review is counter-majoritarian is not well-founded. Constitutional democracy must be disentangled from obsolete majoritarian or populist understandings based merely on direct electoral accountability.²⁶³ The objections to the institution of judicial review excessively overstate the value of voting and electoral accountability as the only determinant of democratic legitimacy.²⁶⁴

Even if one concedes that judicial review is actually non-democratic, it is still the only neutral and practical mechanism that can ensure the effective protection of human rights which are necessary to maintain a level playing field for the proper functioning of democracy. Independent constitutional adjudicators serve as the principal constituencies for human rights. Political organs often tend to systematically undermine human rights in pursuance of other competing policies, or out of political convenience and self-interest. Independent constitutional review has the institutional advantage of protecting rights better than political actors and processes. Electoral accountability is but one – certainly not the only – of the competing values that underpin a constitutional state. Neutrality, independence and competence certainly enhance the legitimacy of courts and their decisions.

Empirically, as well, constitutional adjudicators often agree with representatives on what the constitution requires in particular instances, thereby reinforcing and further legitimising decisions of majoritarian organs. Judicial review is not always counter-majoritarian. Moreover, there is little evidence to support the claim that legislators consistently represent the will of the majority. Legislative decisions can, just like judicial decisions, at times be counter-majoritarian when seen against the views

²⁶³ Eisgruber (n 131 above) 47 observing that '[i]t is hard to believe that the only truly democratic form of government is an archaic version of parliamentary government that almost nobody wants and that may no longer exist anywhere in the world'.

²⁶⁴ See Lever (n 131 above) arguing that even appointment is in line with democratic theory especially when special skill or relationship is needed, and that judges are accountable although not through elections.

of the people.²⁶⁵ In practice, the proliferation of judicial review mechanisms which accompanied the emergence of constitutional democratic states has undermined the relevance of the theoretical objection to the institution of judicial review.²⁶⁶ A constitutional state necessarily implies a limitation on the power of transient electoral majorities. In a constitutional state, judicial review not only protects constitutional rights but also ensures that the rules of the democratic game remain fair and that current majorities do not abuse their powers to entrench themselves.²⁶⁷

It is nonetheless clear that courts and legislatures around the world acknowledge the democratic legitimacy deficit in the exercise of the power of judicial review. There is, therefore, a judicial tendency to use different interpretative tools, such as the political question doctrine, to avoid excessive intrusion into the functions of the democratically elected organs. The interpretative tools, which generally help courts either to moderate their decisions or even avoid deciding the issue altogether, are the most widely recognised mechanisms crafted by the judiciary itself to mitigate the counter-majoritarian implications of judicial review and avoid potential political and social backlash. Legislators, particularly in countries that uphold a strong tradition of parliamentary supremacy, also have attempted to design a system that empowers independent constitutional adjudicators to protect rights while at the same time retains the final say on the constitutionality of primary statutes with democratically elected representatives.²⁶⁸

Contrary to popular belief that judicial review leads to judicial supremacy, constitutional amendment procedures enable the democratic majority to overturn judicial determinations – thereby ensuring that

²⁶⁵ E Chemerinsky 'The vanishing Constitution' (1989/1990) 103 *Harvard Law Review* 44, 83 observing that all state institutions are 'in some senses majoritarian, and in some senses not'.

²⁶⁶ Brown observes that judicial review is now considered as a prerequisite to democratic development – see N Brown 'Judicial review and the Arab World (1998) 9 *Journal of Democracy* 85.

²⁶⁷ Issachnaroff identifies two major justifications for the idea of constitutionalism in the form of constraints on majoritarian rule, and constitutional review: to protect individual and minority rights including against majoritarian will, and also to ensure that 'majorities can change, that the rules of the game remain fair, and that those elected remain accountable to the electorate' – S Issachnaroff 'Constitutionalizing democracy in fractured societies' (2003/2004) 82 *Texas Law Review* 1861, 1862 – 1863.

²⁶⁸ In addition to the soothing mechanisms identified in this Chapter, many constitutions have adopted term limits on constitutional judges and supermajority appointment procedures with a view to enhance the continuous political accountability of judges – K Maleson and P Russell (eds) *Appointing judges in an age of power: Critical perspectives from around the world* (2006) 3. See also M Schor 'Squaring the circle: Democratizing judicial review and the counter-constitutional difficulty' (2006) *Suffolk University Law School Faculty Publications*, Paper 29 http://lsr.nellco.org/suffolk_fp/29/ (accessed 5 June 2012). In some states in the US, supermajority rules for judicial decisions have been introduced. In such cases, before a law can be invalidated as unconstitutional, the decision should be supported by a supermajority of the judges. The Nebraska Constitution, for instance, requires five out of seven judges to invalidate a state law. The North Dakota Constitution similarly requires five out of six judges to invalidate a state law – for a discussion of the history and practice of the supermajority rules in judicial systems in the US, see E Caminker 'Thayerian deference to Congress and Supreme Court supermajority rule: Lessons from the past' (2003) 78 *Indiana Law Journal* 73.

the democratic majority maintains the final say on constitutional issue. Super-majority constitutional amendment procedures provide the most effective procedural safeguard to ensure that judicial decisions on human rights issues transcend majority views and temporary political sentiment. In countries where democratic ideals have not taken root, however, even constitutional amendment procedures may merely camouflage authoritarianism and legitimise disregard to the judiciary. Constitutional amendments may not also provide the necessary brake against populism and demagoguery even in democratic states.²⁶⁹ The unique review systems in the UK and Canada create formal opportunities for dialogue between the different branches of government than systems that grant the final say to courts.²⁷⁰ The systems may be effective in ensuring the realisation of human rights in these countries given their context characterised by stiff electoral competitions and influential CSOs which make outright rejection of judicial determination of rights potentially politically costly.²⁷¹ However, the effectiveness of similar systems in countries with less democratic pedigree is questionable.

In the Ethiopian context, even if an independent constitutional adjudicator had been established, the constitutional amendment procedure could have provided a political mechanism to deal with instances of judicial adventurism. Similarly, as recommended in Chapter 3, the centralised constitutional review system provides another mechanism to mitigate the alleged undemocratic implications of judicial review. On top of this, the different interpretive tools could have been used by the constitutional adjudicator to avoid excessive intrusion into the legislative and policy sphere. A modified version of the Canadian system also provides an option. However, given the lack of a human rights culture in Ethiopia, the temptation to simply use laws to reverse judicial decisions is likely to be more rampant. In fact, as pointed out in Chapter five, the government has already enacted several laws with ouster clauses which have excluded courts from reviewing the legality of administrative agencies. As such, the Canadian system will likely fail to safeguard constitutional rights in Ethiopia. It is therefore recommended that

²⁶⁹ In the US, for instance, conservative citizen initiatives which provide for the inclusion of constitutional or statutory proposals on the ballot at an election have been used to reverse judicial decisions protecting the rights of sexual minorities – see generally T Keck ‘Beyond backlash: Assessing the impact of judicial decisions on LGBT rights’ (2009) 43 *Law and Society Review* 151.

²⁷⁰ Gardbaum (2001) (n 259 above). Gardbaum considered Canadian and British models of judicial review as ‘acceptable to both those who defend and challenge judicial review’ creating ‘institutional balance, joint responsibility, and deliberative dialogue between courts and legislatures in the protection and enforcement of fundamental rights’ – 710. See also J Hiebert ‘New constitutional ideas: Can parliamentary models resist judicial dominance when interpreting rights?’ (2003-2004) 82 *Texas Law Review* 1963 arguing that the new models of judicial review have the potential ‘to encourage critical reflection on the merits of legislation from a broader spectrum of institutional actors than is normally associated with a bill of rights’. Tushnet (n 253 above) and Waldron (n 9 above) also observe that weak-form judicial review, such as the one in the UK and Canada, can spur better inter-institutional engagement and deliberation, ensure easy compliance and help avoid majoritarian backlash.

²⁷¹ Gardbaum (2001) (n 259 above) 724.

Ethiopia should establish an independent centralised system of constitutional review. The constitutional amendment procedure provides an exceptional political tool to reverse decisions that are clearly unacceptable. However, an easy resort to the constitutional amendment process may constitute a violation of the independence of the constitutional adjudicator.

It can be concluded that the theoretical opposition to the institution of constitutional review by independent adjudicators has largely been rejected, as can be witnessed in the proliferation of the institution worldwide. Courts are seen as guarantors of rights and neutral referees of constitutional democracy. Nevertheless, the democratic legitimacy deficit does often provide the theoretical basis for opposition to and criticism of the outcomes of judicial decisions. But these instances of criticism are often objections to 'judicial activism' or the expansive exercise of the power of judicial review, and not to the institution of judicial review as such. There is a need to distinguish objections targeted at judicial review from those targeted at judicial activism or lack thereof (judicial restraint). The debate should, therefore, focus not on the legitimacy of constitutional review but on how courts exercise judicial review, that is to say, on how activist or restrained constitutional adjudicators should be in reviewing decisions of political organs. The debate should be on the principles and practices of constitutional interpretation.

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 conventionnalité* – 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.

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

1. Introduction

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

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

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

² UN Declaration on Human Rights Defenders, article 1.

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

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

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

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

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

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

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

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

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

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

⁸ Ginsburg and Moustafa (n 7 above) 20.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.1. Mandatory registration of CSOs

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

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

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

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

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

²⁵ CSO Proclamation, article 65(3).

²⁶ CSO Proclamation, article 65(3).

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

²⁸ CSO Proclamation, article 76(1).

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

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

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

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

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

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

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

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

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

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

³⁴ CSO Proclamation, article 104(2).

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

³⁶ CSO Proclamation, article 104(3).

³⁷ CSO Proclamation, article 14(5).

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

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

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

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

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

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

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

⁴¹ CSO Proclamation, article 91(1).

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

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

⁴⁴ CSO Proclamation, article 2.

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

2.3. Invasive supervisory oversight

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

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

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

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

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

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

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

⁵⁰ CSO Proclamation, article 91.

⁵¹ CSO Proclamation, article 61.

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

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

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

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

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

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

⁵⁴ CSO Proclamation, article 84.

⁵⁵ CSO Proclamation, article 85(1).

⁵⁶ CSO Proclamation, article 90.

⁵⁷ CSO Proclamation, article 102.

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

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

3. Declared objectives vs underlying reasons

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

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

⁵⁹ CSO Proclamation, article 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Actual impact of the CSO Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸² Ethiopian Human Rights Council (n 80 above).

⁸³ Ethiopian Human Rights Council (n 80 above).

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

⁸⁵ Human Rights Watch (n 66 above) 46.

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

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

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

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

5. Entry points for civil society

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

⁸⁶ Human Rights Watch (n 66 above) 45.

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

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

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

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

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

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

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

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

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

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

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

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

6. Human rights advocates and constitutional review

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

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

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

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

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

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

⁹⁶ Nejaime (n 93 above) 945.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹¹⁰ Yeshanew (n 109 above) 292.

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

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

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

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

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

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

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

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

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

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

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

7. Opposition political parties and constitutional review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³³ McCann (n 95 above) 144 & 145.

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

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

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

¹³⁷ Nejaime (n 93 above) 945.

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

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

9. Conclusion

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

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

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

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

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

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

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.

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