A TWO-STAGE ANALYSIS TOWARDS INTRODUCING JUDICIAL REVIEW IN ETHIOPIA:

LESSONS FROM THE EXPERIENCE OF SOUTH AFRICA

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Abstract

The presence of the power of judicial review by independent judiciary is the greatest, though not the sole, institutional safeguard for the translation of decisive, abstract constitutional norms to constitutional commands. Ethiopia has adopted a 'novel' approach to judicial review by entrusting this power to the House of the Federation, 'a political' organ also referred to as the upper house of the Parliament lacking the required proficiency to undertake constitutional scrutiny. The system has been the subject for lingering academic and scholarly muses regarding its practical challenges since its foundation. By comparing the judicial review mechanism of Ethiopia with the South African counterpart and beyond, this paper seeks to explore the policy reasons behind the assignment of the power of judicial review in Ethiopia to a rather singular body (the House of the Federation) but not to the judiciary or an *ad hoc* court and examines an alternative thought.

The work involves two stages: the first determines the irrationality of the reasons advanced by the framers of the Constitution when adopting such unique model. In the second stage, it concludes by examining the need for and possibility of involving regular courts in the business of constitutional litigation in Ethiopia.

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LIST OF ABBREVIATIONS

CCI: Council of Constitutional Inquiry

FDRE: Federal Democratic Republic of Ethiopia

HoF: The House of the Federation

HPR: The House of People's Representatives

SA: South Africa

INTRODUCTION

Written constitutions and courts with power to test the validity of statutes exist today in major nations of diverse political and cultural backgrounds. The presence of the power of judicial review either by independent judiciary or by an *ad hoc* constitutional court is the greatest institutional safeguard for the translation of decisive abstract constitutional norms to constitutional commands as a result of which States in the modern world have turned to written constitutions as expressions of values which the legislative and executive branch must not defy.[1] The experiences of countries, however, vary greatly not only in terms of the procedures to be followed, but also institutions designed to adjudicate constitutional disputes.

It is important to note here that none of these systems can claim "absolute rightness for itself". The bottom line, borrowing the words of Jutta Limbach, is what mechanism "best suits the relevant legal system, political culture and historical experience."[2] Regardless of different approaches to solutions, it is rewarding to consider from a comparative law view point how these different approaches work and serve to alleviate the problem within a specific legal culture. Irrespective of the taxonomy and "even if it is called something", judicial review, Professor Cappelletti emphatically asserted, has a universal appeal.[3]

[1] Jellhorn, Walter, "Mauro Cappelletti, Judicial Review in a Contemporary World," *The American Journal of Comparative Law* (1972) 20 (2): 351-355.
[2] Jutta Limbach, "The concept of the supremacy of the constitution", *The Modern Law Review* (2001) 64 (1): 1 at 9.
[3] Abraham, Henry J., "Mauro Cappelletti, Judicial Review in the Contemporary World," *The American Political Science Review* (1972) 66 (4): 1373- 1375.

From the Ethiopian legal system perspective, the theory of judicial review[4], in its proper sense, is missing. The House of the Federation (HoF) that represents the nations and nationalities of the polity[5] is made an eventual interpreter of the Constitution with technical assistance from the Council of Constitutional Inquiry (CCI).[6] The system appears to be unique not only because the task of constitutional interpretation is given to a purely political upper chamber of the parliament but also the CCI is established to give technical assistance to the HoF.

Examination of the philosophical background reveals that there are some central reasons that the framers to pursue this rather unique model of constitutional adjudication. First, the founders of the Constitution considered the Constitution as the reflection of the free will of the nationalities, and a political contract among the nationalities, which warrant vesting its interpretation in the nationalities themselves.[7] Second, the framers were of the fear that the judges may grab the very political pact among the nationalities by pursuing their own personal philosophy in the course of interpretation of the Constitution should constitutional interpretation be perceived as mere technical exercise to be left to legal professionals.[8]

[4] Throughout this work, the term judicial review, constitutional review, constitutionality review or unconstitutionality review are used interchangeably connoting judicial review of legislations as opposed to judicial review of administrative decisions.

[5] See Proclamation n. 1/1994, *Constitution of the Federal Democratic Republic of Ethiopia*, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, Year 1, n. 1, Addis Ababa, 1995, article 61, according to which "the House of Federation is composed of representatives of nations, nationalities and peoples and elected by the state councils. Article 62 of the Constitution makes interpretation of the Constitution its number one power."

[6] See article 82 which establishes a Council of Constitutional Inquiry. The President of the Federal Supreme Court serves as its president and the Vice President of the Court serves as its Vice president. It is also composed of six legal experts appointed by the President of the country and three persons represented by the House of Federation. Article 84 of the Constitution empowers the Council to investigate constitutional disputes and pass to the House with its recommendation should it find constitutional dispute.

[7] See Minutes of the Constitutional Assembly, November 1994 regarding the discussions held on articles 62 and 63.

[8] *Ibid*.

The Ethiopian Constitution is proven to lack original legitimacy and the legal system of the country is distinguished by absence of both constitutionalism and constitutionism.[9] One of the few reasons why the Constitution was believed to be divisive is the fact that a political organ, the HoF, is made the final authority to interpret the Constitution instead of the judiciary.[10]

Nearly all scholars agree that the current constitutional review in Ethiopia is encircled by far more complex questions albeit only some of them tried to challenge the policy behind the espousal of the unique mechanism in some of its aspects and none looked into and tested the possibility of judicial review per se in Ethiopia.

The current research aims at examining whether or not the rationales behind the policy choices advanced by the framers of the constitution are strong enough to strip the power of courts to review constitutionality of legislations and also examines an alternative thought.

The work involves two stages: the first determines the irrationality of the reasons advanced by the framers of the Constitution. In the second stage, it concludes by examining the need for and possibility of making the regular courts partaker in the business of constitutional litigation in Ethiopia. The work mainly draws upon the jurisprudence of South Africa for its constitutional adjudication constitutes a unique experience and has become one of the most interesting episodes at a global level.[11]

Framework wise, the work starts with fleshing out theoretical backdrops in relation to judicial review and touches upon the genesis, development, rational and purpose of judicial review. Then

[9] Tsegaye, Regassa, "The Making and Legitimacy of the Ethiopian Constitution: Towards Bridging the Gap between Constitutional Design and Constitutional Practice", *Africa Focus* (2010) 23 (1): 85- 118.
[10] *Ibid*.
[11] Lollini, Andrea, "The South African Court Experience: Reasoning Patterns Based on Foreign Law," *Utrecht Law Review* (2012) 8 (2): 55.

follows is the normative discourse pertaining to judicial/constitutional review in a contemporary South Africa and Ethiopia. An examination of the justifying grounds for the adoption of the current mode of constitutional review in Ethiopia makes another part followed by The speculation of the need for and possibility of judicial review reform and some recommendations at the end.

CHAPTER ONE

JUDICIAL REVIEW: GENESIS, DEVELOPMENT, RATIONALES AND MODELS

Literature corroborates that some 164 out of 193 countries have provided for some form of constitutional review by an independent body in their constitutions.[12] This chapter will ponder the genesis and brief historical development of judicial review and its manifestations: defused, concentrated or the hybrid of the two. It also probes into the rationales for judicial review. The purpose is not to repeat what myriad of literature already dealt with nicely. Nor is it to fill the hiatus of the literature done so far. The intent is merely to refresh the reader with central thoughts quite relevant to the present discourse.

1.1. Genesis and development of Judicial Review

The question how to achieve a balance between constitutionalism and majoritarian democracy has been a preoccupation of many nations throughout history. While most judicial review discourses begin and end with John Marshall's Marbury v. Madison, there are scholars including Larry Kramer, a preeminent constitutional thinker, who argue that the notion of judicial power of constitutional review was originally accepted even before Marbury, albeit exercised so rarely unless statutes have clearly violated the Constitution.[13] There are also who argue that both the text and the structure of the US Constitution have intended for the authorization of judicial review whereas still others contend that judicial review was present in the words of the founders

[12] Ramos Romeu, Francisco "The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions", *Review of Law and Economics* (2006) 2 (1): 103.
[13] Perrone, Lawrence Joseph, "The Fundamental and Natural Law 'Repugnant Review' Origins of Judicial Review: The Synergy of Early English Corporate Law with Notions of Fundamental and Natural," *BYU Journal of Public Law* (2009) 23 (1): 66.

of the US Constitution as well as the practice of the States.[14] However, the subject of judicial review acquired considerable attention only after 1803 when the US Supreme Court asserted its power in Marbury v. Madison to review the constitutionality of legislations and to reject a law that is not in conformity with the constitution.[15]

Before the First World War and as of 1942, only the US and Norway had a judiciary capable of setting aside laws made by the national legislature. This judicial power in US in 1803 and in Norway 1866 came from court precedent not from explicit provision or text of the Constitution.[16] Although some scholars are of the supposition that some form of centralized judicial review existed in Latin America (Venezuela) in 1858, the commonly understood notion is that[17] the prototype Constitutional court, with centralized power of judicial review, as envisaged in the contemporary world, was first introduced by the Austrian Constitution of 1920 under the influence of Hans Kelsen.

On the other hand, the Weimar Republic, Austria, Spain, and some states in Eastern Europe, had had constitutional courts of differing effectiveness during the interwar period.[18] Austria, Italy, Germany, France and Japan instituted judicial review during the postwar era of 1940s and 1950s. The German Basic Law (1949) and the Italian Constitution (1947) marked the milestone in the beginning of a contemporary era of Constitutional development of the Roman-Germanic

[14] *Ibid*.
[15] Marbury v Madison, 5 U.S. 137 (1803).
[16] Guarnieri, Carlo, and Pederzoli, Patrizia, *From Democracy to Juristocracy? The Power of Judges: a Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002): 3.
[17] Frosini, Justin, O., et al., "Constitutional Courts in Latin America: a Testing Ground for New Parameters of Classification?", *Journal of Comparative Law* (2008) 3 (2): 42.
[18] *Supra* note 16 at p.3.

countries by establishing the German Constitutional Court in 1951 and the Italian Supreme Court in 1956 respectively.[19]

By the same token, independence constitutions of 1950s and 1960s introduced judicial review following the decolonization of Africa and Asia.[20] The wave of democratization in the Southern Europe ensued in the adoption of judicial review in Spain, Portugal and Greece in 1970s. Several Latin American countries, Soviet and Yugoslavian Republics, the Republic of South Africa and many other countries all adopted constitutions that embodied judicial review in 1980s and early 1990s.[21]

1.2. Constitutions: Legal or political Documents?

The Constitution of the United States was perceived from the very start as a legal document endowed with legal force and supremacy, capable of being applied by the judiciary directly and immediately.[22] "(T)he power of constitutional exposition", as Marbury notes, is thus "an incident of the court's obligation to decide the particular 'case or controversy' before it".[23] Accordingly, constitutional litigation was viewed as no different from any ordinary form of adjudication and the Constitution should be applied just as ordinary law by courts in deciding the litigants' claims.[24]

[19] Barroso, Luis Roberto, "The Americanization of Constitutional Law and its Paradoxes: Constitutional Theory and Constitutional Jurisdiction in the Contemporary World," *ILSA Journal of International and Comparative Law* (2010) 16: 584.
[20] Ginsburg, Tom, *The global spread of Constitutional review: An Empirical Analysis*, available at http://www.law.northwestern.edu/colloquium/law_economics/documents/Spring2012_Ginsburg_Global_Constitutional.pdf, accessed on 15 March 2013.
[21] *Supra* note 16 at p. 4.
[22] *Supra* note 19, p. 584.
[23] Monaghan, Henry P., "Constitutional Adjudication: the Who and When," *The Yale Law Journal* (1973) 82 (7): 1364.
[24] *Ibid*.

At early stages, in France and the rest of Europe, the Constitution was basically political in nature and the Parliament not the judiciary who was responsible to interpret it.[25] The primacy of the law remained as an act of the legislative body rather than the Constitution and the principle was the idea of 'legislative rule of law' where the act of the parliament is not subject to judicial review.[26] In the last fifty or sixty years, however, in particular following World War II, civil law legal traditions underwent a chain of profound and extensive transformation in terms of the way the legal theory, positive law and case law are practiced and perceived.[27] Recognition of the Constitution as a binding text with legal force and mandatory provisions has become the basis of modern constitutional study in most countries following the civil law legal system.[28] Even France that has clung obstinately to the notion that the judiciary should not be given the authority to review the conformity with the higher law of statutes and constitutional review had been at best theoretical in France until recently, the task of Conseil Constitutionnel has changed dramatically towards recognizing the Constitution as legal document than purely political. Constitutional norms are accordingly endowed with the essential nature which is attributed to any law failure of which inexorably triggers forced compliance.[29]

[25] *Supra* note 19 at p. 584.
[26] *Supra* note 19 at p. 584.
[27] *Supra* note 19 at p. 584. In Italy for instance, the Italian Court of Cassation in its judgment of February 1948 (*Marcianò*), made a distinction between perceptive constitutional provisions and programmatic ones in which case only the former constitutional provisions are considered enforceable rendering repugnant statutes invalid while the latter type had to be implemented by the legislature before they could be enforced by the court. This restrictive construction of the Constitution as programmatic provision was however rejected by the Italian Constitutional Court in 1956 in its very first decision and hence constitutional provisions became preemptory legal norms enforceable by the Constitutional Court. See the details in Louis F. Del Duca (2010) "Introduction of judicial review in Italy-transition from decentralized to centralized review (1948-1956) – A successful transplant case study' The Pennsylvania State University The Dickinson School of Law Legal Studies Research Paper No. 44-2010, can be accessed from The Social Science Research Network Electronic Paper Collection: http:ssrn.com/abstract= 1713231 law.psu.edu.
[28] *Supra* note 19 at p. 585
[29] *Ibid.*

1.3. Rationales for Judicial Review

It may reasonably be asked that why courts would usurp power from the democratically elected officials? Or why elected powerful political actors bind themselves by adopting judicial review? A number of reasons, though not to the fullest understanding, may be presented to show the political vectors that spur the delegation of constitutional review authority from the legislative and executive branches to the judicial organ. In the first place, "the mission of constitutionalism is to channel political conflict, disagreements that would otherwise spill into the streets and be settled according to violence, into institutions that operate peacefully according to law and reach decisions that members of a political community accept as authoritative".[30] The ideal constitutionalism is often characterized by important elements such as judicial review by independent judiciary, constitutional supremacy, separation of powers, rule of law, fundamental rights and checks and balances. .[31]

Secondly, in the words of Choudhry, "political elites have adopted Bill of Rights to constitutionally entrench their narrow policy preferences and, more generally, to provide themselves with the legal resources to challenge future policy decisions in the event that they lost power, for example, through the electoral process."[32]

Realization of the rule of law, presumption of objectivity of court decisions, limited government, a need to depoliticize certain issues at stake, individual liberty, and political tolerance by promoting respect for minority rights are also underlined in many western courts.[33]

[30] Choudhry, Sujit, "After the Rights Revolution: Bills of Rights in the Post-conflict States," *Annual Review of Law and Social Sciences* (2010) 6: 308.
[31] Sajó, András, *Limiting Government: an Introduction to Constitutionalism* (Budapest: Central European University Press, 1999): 49.
[32] *Supra* note 30 at p. 305.
[33] Gibson, James L., et al., "Defenders of Democracy? Legitimacy, Popular Acceptance and the South African Constitutional Court," *The Journal of Politics* (2003) 65 (1): 6.

Another equally relevant question emerging from the foregoing discussion pertains to the choice by some states in favor of Constitutional Courts rather than ordinary courts. While there are a range of reasons engendering the creation of Constitutional Courts in the new democratic constitutions, the following are meant solely to present few of them.

One of the reasons advanced by Choudhry in this respect is that "judges may be partisans of the previous political regime, closely allied at a personal and professional level with executive and legislative officeholders or, more generally, part of the ruling party."[34] Where "these judges acted as agents for, rather than checks on, the wielders of power within the previous constitutional order", the issue, Choudhry adds, "is whether they can be trusted to adjudicate impartially under a new constitutional scheme…" that renders unconstitutional the conduct that was lawful under the previous constitutional order. Closely associated with this, in Choudhry's views is that "the judiciary as an institution might have an ideological commitment to the preexisting constitutional regime, which is reflected in its jurisprudence." The notion is that "the pre existing constitutional doctrine might have been built around robust notions of deference to executives and legislatures."[35] The idea is whether these judges together with the doctrinal framework that they set up, and within which they have been working, will react with the new constitutional dispensation.[36]

The alternative taken in a number of transitional democracies has thus been to establish a constitutional court with ultimate and exclusive power in interpreting the constitution with its judges newly assigned by the new government leaving "the pre existing judiciary in place".[37]

[34] Supra note 30 at p. 308.
[35] Id p. 310.
[36] Ibid.
[37] *Supra* note 30 at p. 312.

The second reason is associated with the theory of "institutional borrowing" that worked particularly for Central and Eastern European States that adopted the Italian and German model rather than the US model of constitutional review due mainly of geographic and cultural proximity.[38] The theory of the protection of the minority by introducing an institution that counters the opinion of the majority, limited trust in political institutions to protect constitutional values are also from among speculated reasons for the creation of Constitutional Courts.[39]

1.4. Models of Judicial Review

Comparative constitutional law scholars commonly distinguish between two major models (American and European) of judicial review. The decentralized or the diffused or dispersed system also known as the US model of judicial review exists in countries such as the United States, Japan, Australia and India, where "constitutional review is incorporated into the existing judicial hierarchy, with a single supreme court at the apex."[40] Here, the type of review is concrete because it is attached to an actual controversy among actual adversaries; judicial review is diffused because it is carried out by ordinary and all tiers of courts, not just by the Supreme Court and the declaration of unconstitutionality by a trial court is final as in between the parties to the case unless overturned by the appellate court and the law remains in force throughout jurisdiction; and this decision does not have the force of precedent to be followed by other courts.[41]

On the other side of the spectrum, the centralized or the European system of judicial review is a system where only one court is vested with a power to declare the unconstitutionality of

[38] Lach, Kasia, and Sadurski, Wojciech, "Constitutional Courts of Central and Eastern Europe: between Adolescence and Maturity," *Journal of Comparative Law* (2008) 3 (2): 218.
[39] Id p. 219
[40] Dugard, Jackie, "Court of First Instance? Towards a Pro-poor Jurisdiction for the South African Constitutional Court," *South African Journal on Human Rights* (2006) 22: 262.
[41] *Supra* note 17 at p. 41 as specified under footnote 9 of the article. See also infra note 162 at p. 30.

statutes.[42] Whatever name one attaches to it and however the sense in which the term 'constitutional' is used may vary from one jurisdiction to another, the essential characteristic of the constitutional court-based form of judicial review is that only one court (the constitutional court), which is separate from the ordinary judicial system, is vested with a power to adjudicate constitutional matters or review the constitutionality of acts of the parliament.[43] Judges of Constitutional Courts, as opposed to judges of ordinary courts, are often appointed for a limited period of time by the political branches of the government and exercise an ultimate review of the constitutionality of statutes and acts of government.[44] These Constitutional Courts also enjoy the power to conduct an abstract review, in which case they can review the constitutionality of legislation without a need for a concrete controversy to arise. Declaration of unconstitutionality of a statute or provision thereof is also not limited to the parties to the case but is valid against everyone.[45]

This dichotomy as centralized and decentralized is much debated and some scholars talk of a so called a hybrid model also referred to as the incidental form of constitutional review that combines both the US model and the European type.

Although there is no consensus concerning which country should be classified as having centralized or dispersed systems and which countries are to be considered as having hybrid model, scholars have identified some factors to be taken into account in the course of determination. For instance, the Italian model of constitutional adjudication is characterized as hybrid because the judge has a certain discretion in referring the matter to the Constitutional

[42] Harding, Andrew, Leyland, Peter, and Groppi, Tania, "Constitutional Courts: Forms, Functions and Practice in Comparative Perspective," *Journal of Comparative Law* (2008) 3 (2): 4.
[43] Id p. 4.
[44] *Supra* note 38 at p. 220.
[45] Id p. 219.

Court and he is not required to suspend the case should he is of the belief that the question that has been raised is unfounded. Hence, the fact that judges perform some preliminary review, something similar to the decentralized systems, renders the system hybrid.[46] Another criterion used for categorizing a system as hybrid is the object of review, i.e. whether the power of the Constitutional Court is strictly restricted to primary legislation while subsidiary laws come under the jurisdiction of ordinary courts. Still another standard used by some to catalog a system as hybrid is the fact that individuals, just like in the case of Latin American countries, Argentina being a typical example, can approach the Supreme Court directly without the need to going through the lower courts unlike the diffused system of judicial review of the United States.[47] In light of what we will see in the next chapter, the kind of judicial review mechanism adopted by South Africa is the hybrid one either because the regular courts share judicial review power with the constitutional court or inquiry into the constitutionality of subsidiary laws is kept under the mandate of regular courts.[48] What makes the system of South Africa more interesting is that regular courts can declare a statute unconstitutional though such needs to be confirmed by the Constitutional Court before its becomes effective. Albeit the power of Ethiopian courts when seized with constitutional matters is to refer it to the CCI, it may be categorized as a mixed type based on any one of the criterion of classifications pointed out above.

Penultimately, it is worth mentioning to say a word about the scope of jurisdictions of Constitutional Courts. As Victor Ferreres Comella confirms, constitutional review of legislation may not necessarily be the sole function that the Constitutional Court executes.[49]

[46] *Supra* note 17 at p. 43.
[47] Id p. 43.
[48] See Constitution of the Republic of South Africa, Act 108/1996, Republic of South Africa, S 170.
[49] Ferreres Comella, Victor, "The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism," *Texas Law Review* (2004) 82: 1709.

The Constitutional Courts' jurisdiction may cover a range of different spheres of judicial activity. These may include controlling constitution making or amendment process, reviewing the constitutionality of laws and legislative decisions as well as initiating or requiring legislation, reviewing executive actions, adjudication of jurisdictional disputes between branches and levels of government, hearing actions against government officials and jurisdiction over political parties and elections.

In general, constitutional review, albeit the body assigned to carry it out might vary from country to country, has become a worldwide institutional norm. By reason of political, historical, geographical or ideological factors, however, there is no consensus regarding why nations prefer one form of institution than another. Nor has agreement been reached as to which model has primacy over another. All can be said at this point is that nearly all democratic countries have perceived constitutional review as an integral part of their respective legal system. Constitutional courts also wield a number of authorities in addition to the constitutionality review power and serve as an arbiter on various matters.

CHAPTER TWO

JUDICIAL REVIEW IN SOUTH AFRICA AND ETHIOPIA: A NORMATIVE DISCOURSE

In this chapter, the constitutional review mechanisms adopted by the respective constitutions of South Africa and Ethiopia will be considered. A starting point will be to question why the foundation of an independent judiciary has been made part of the new dispositions of power in South Africa, in particular when the judiciary and the laws in general were an essential component of the prior regime. In other words, an inquiry will be made as to why a culture of judicial constitutionalism and a political framework that takes account of judicial review was accepted in post apartheid South Africa but not in Ethiopia.

Then follows the discussion on institutions entrusted with the power of judicial review, the degree of powers they are authorized to wield, and the extent of the powers of ordinary courts in constitutional settlement.

2.1. Historical backdrop of judicial review in South Africa and Ethiopia

South Africa has had a written Constitution since 1910 even though the theory of judicial review was rejected by apartheid to strengthen the supremacy of parliamentary sovereignty until 1994.[50] It is of historical importance to note here that when the Chief Justice of the High Court, at one time, tried to exercise the power of judicial review, the President dismissed the chief justice calling an emergency session of the legislature, and then warned the new chief justice not to

[50] Dickson, Brice, "Protecting Human Rights through a Constitutional Court: the Case of South Africa", *Fordham Law Review* (1997) 66 (2): 535.

think applying judicial review, because it was considered as "a principle of the devil".[51] As a result, the courts in South Africa, throughout the apartheid era of twentieth century, had no power to challenge or invalidate rules or policies promulgated by the government.[52]

In Ethiopia, the judiciary has been both legally and in practice subservient to the executive and judicial review of constitutional issues has been a notion lacking throughout history. While the 1931 first written and 1955 revised Imperial constitutions have no provision on judicial review, the third Ethiopian constitution of 1987 designated the State Council, which is purely a political organ, to review the Constitutionality of legislations.[53] Both Ethiopia and South Africa have made new constitutions in the mid of 1990s that deflected from the past in a number of aspects.

During the drafting stage of the South African Constitution of 1996, due to the fact that South Africa's apartheid policy became an issue of international humanitarian concern, international pressures influenced the African National Congress and the Apartheid government to accept constitutional norms and standards of real and democratic constitutionalism. The proposals of negotiating parties, however, remained apart apropos the structure and functioning of the new court albeit there was an agreement in the negotiations on the theory that there should be a competent, impartial and independent judiciary with a power and jurisdiction to preserve and enforce the Constitution and fundamental rights.[54] A number of issues such as whether the constitutional jurisdiction should remain parallel with or integrated into the existing court system; whether the judges to be appointed should be senior judges from the existing judiciary or

[51] Cooper, Allan D., "Heinz Klug, Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction," *Africa Today* (2003) 50 (2): 107.
[52] *Ibid*.
[53] Tesfaye Fessha, Yonatan, "Whose Power is it any Way: the Court and Constitutional Interpretation in Ethiopia," *Journal of Ethiopian Law* (2008) 22 (1): 131.
[54] Klug, Heinz, "South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition From Apartheid," *Journal of Comparative Law* (2008) 3 (2): 176.

new legal experts with less or no experience; whether it should be an appellate court or a court with first and last instance; whether it would have sole jurisdiction or serve as a final appellate court in a system of review integrated into the existing courts' jurisdiction; and whether the chief justice in an integrated court or the Constitutional Court itself decide whether a particular matter was constitutional in nature and thus who would exercise jurisdiction in such a case, continued to separate the parties.[55]

The apartheid government on its part argued for the establishment of a special bench within the Appellate Division of the Supreme Court.[56] Those who supported this position argued that a separate Constitutional Court would weaken the prestige and authority of the Appellate Division and also that the separate Constitutional Court would be considered political and thus undercut a culture of human rights in South Africa and the legitimacy of the supremacy of the Constitution. The Opposition Democratic Party was represented by an idea that advocated for the creation of a separate Constitutional Court with, however, cautioning that the Bill of Rights values should permeate every corner of the law of the country building a culture of justification in which every official and every law maker can be required to justify its actions in light of the values for which the Bill of Rights stands.[57] Despite these varying views, owing to the fact that the judiciary in 1994 was composed overwhelmingly of white and male and limited in its legitimacy as well as capacity in terms of drawing on the sense of justice of both sexes and all communities, a political agreement was reached as to the establishment of a new separate Constitutional Court with final

[55] Spitz, Richard, *The Politics of Transition a Hidden History of South Africa's Negotiated Settlement* (Oxford: Hart Publishing, 2000): 191-198.
[56] *Ibid*.
[57] *Ibid*.

jurisdiction on constitutional issues, which is more representative of the country's diverse population to safeguard the Constitution and the Bill of Rights.[58]

During the drafting and adoption of the 1995 FDRE Constitution, however, a single party dominated and controlled the whole process. Major opposition political parties were marginalized and finally ended up in withdrawal from the election process and hence there was no genuine negotiation among political factions which affected the popular acceptability of the Constitution.[59] Apart from this, there existed some debates as regards the form of constitutional review the country should take on. Originally, the Constitutional Assembly proposed the creation of Constitutional Court with a power to review the constitutionality of both parliamentary and executive actions.[60] At a certain time during the drafting of the Constitution, however, the founders changed their mind and considered that the court should rather possess a status of an advisory committee, the ultimate power of constitutional interpretation being reserved to the HoF.[61] As mentioned earlier, the framers of the FDRE Constitution opted to have the HoF as a final arbiter of the Constitution rather than the ordinary courts for several reasons. One of the reasons emerges from the creation of ethnic based federalism where the Constitution was viewed not as a legal text, rather as a political contract among the Nations, Nationalities and Peoples and only the HoF that represents them that should possess the power to interpret the contract.[62] Another equally important consideration that the framers emphasized on was fear of judicial activism that might supersede the will of the contracting parties should judicial review is entrusted to the courts.[63] Along similar lines of argument, the Ethiopian judiciary was not trusted

[58] *Supra* note 54 at p. 177.
[59] *Supra* note 9 at p. 107.
[60] *Supra* note 6
[61] *Ibid.*
[62] *Ibid.*
[63] *Ibid.*

to undertake judicial review on the account that the centralized executive of the previous regimes has inhibited the development of the well functioning judiciary.[64] As a result, all constitutional disputes are made to fall within the jurisdiction of a purely political organ and atypical institution (the HoF).[65]

The SA Constitution, unlike the FDRE Constitution, confers the highest authority in its Constitutional Court in all constitutional matters[66] to safeguard the supremacy of the Constitution, and the respecting, protection, promotion and fulfillment of the Bill of Rights. The SA Constitutional Court forms an integral part of the judicial power; it is made independent and its judges are free from any government interference whereas an issue of independence of the HoF is unthinkable.[67] The very reason for creating the new legal order and vesting judicial review power in the courts of South Africa, as Chaskalson P commented, was to protect the rights of minorities and those who cannot have their rights protected through the democratic process.[68]

The South African Constitutional Court is, therefore, "the highest court in all constitutional matters", "decides only on constitutional matters or issues connected with decisions on constitutional matters " and "makes a final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter".[69]

[64] Mgbako, Chi, et al., "Silencing the Ethiopian Courts: Non-judicial Constitutional Review and its Impact on Human Rights," *Fordham International Law Journal* (2008) 32 (1): 12.
[65] FDRE Constitution,art. 83(1) and 62(1).
[66] SA Constitution, S 167.
[67] See SA Constitution S 165 and S 166 on the independence of the Constitutional Court and nowhere in the FDRE Constitution or subsidiary laws is the independence of the HoF mentioned.
[68] Tesfaye Fessha, Yonatan, "Judicial Review and Democracy: a Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review," *African Journal of International and Comparative Law* (2006) 14 (1): 58.
[69] SA Constitution S 167

What makes the HoF unique is not only its being a political institution. It receives an assistance from a separate institution known as the Council of Constitutional Inquiry (the CCI) which is composed of 11 members eight of whom, including the President and Vice President of the Federal Supreme Court, possess legal expertise, is established to give professional support to the HoF by investigating constitutional disputes and submitting its recommendations to the latter should it find that the interpretation of the Constitution is necessary.[70]

2.2. The Power of Regular Courts in Constitutional Adjudication Under the two Jurisdictions

The vital question one may ask in relation to judicial review is which court possesses the power to make a final finding on the constitutionality of laws or conducts in a given polity.

In the context of South Africa, two main features can be discovered from the hybrid system of judicial review the country adopted.[71] First, the task of invalidation of legislation is not assigned to only ordinary courts just like as in the United States or to only one specialized Constitutional Court just like as in Germany. Second, all courts are not equally competent to make final decision of unconstitutionality provided that appeal is not taken to the higher court.

Basically, the courts that are competent to make an order of constitutional invalidity of an act of parliament, a provincial act, or conduct of the President are the Constitutional Court, the Supreme Court of Appeal, a High Court or a court of similar status while the magistrate Courts are explicitly excluded from any decision on the constitutional validity of any legislation or acts

[70] FDRE Constitution art. 82 and art. 84.
[71] Woolman, Stuart (ed.), *Constitutional Law of South Africa* (Cape Town: Juta Legal and Academic Publishers, 2008): 4-53.

of the President.[72] Courts of similar status to either the Supreme Court of Appeal or to the High Court are the Labor Court,[73] the Labor Appeal Court[74] and Land Claims Court[75].

The SA constitution makes it clear that an order of constitutional invalidity by the Supreme Court of Appeal, the High Court and Court of similar status over an act of Parliament, provincial act or act of the President will have no force until it is confirmed by the Constitutional Court.[76] While the 'act of Parliament' under s 167(5) of the Constitution covers all statutory provisions enacted by Parliament, It does not extend to subordinate legislations such as regulations and by-laws, conducts other than the conduct of the President or the common law.[77] In regard to these other norms of laws and conducts, confirmation by the Constitutional Court of a declaration of invalidity is not required and the other courts' finding is final.[78]

The Constitution is not without exception even with regard to the power of the Supreme Court of Appeal and the High Court for there are matters falling under the exclusive jurisdiction of the Constitutional Court.[79] Without the need to go into the details of the matter, these exclusive jurisdiction of the Constitutional Court include: deciding on disputes emerging from the constitutional status, powers and functions of organs of government both at national or provincial spheres; deciding on parliamentary or provincial Bill, though only under certain circumstances; deciding on applications made by either the National or the Provincial Assembly alleging that an act of the Parliament or Provincial Assembly is unconstitutional; deciding on the constitutionality of any amendment to the Constitution; deciding that the President or the

[72] SA Constitution S 170
[73] Labor Relations Act 66/1995, Republic of South Africa, 13 December 1995, S 151(2).
[74] Id S 167(3).
[75] Restitution of Land Rights Act 22/1944, Republic of South Africa, 25 November 1994, S 22(2)(a).
[76] SA Constitution s 167(5).
[77] *Supra* note 71 at p. 4-53.
[78] *Ibid*.
[79] SA Constitution s 167(4).

Parliament has an obligation or failed to fulfill constitutional obligation; and certifying a provincial constitution. Since this exclusive jurisdiction of the Constitutional Court is an exception to the general rule that judicial authority vests in all courts, the exclusive jurisdiction must be narrowly interpreted and justified.[80]

The first justification for exclusive jurisdiction is to speed up judicial process in certain specific cases. Disputes between branches of government and organs of states may disrupt the speedy functioning of the political process and it is deemed appropriate that these disputes be solved as expeditiously as possible.[81] The second justification, scholars suggest, is the fact that the status of judges that perform a particular function, though based on perception than judicial capability, is important for the acceptance of their decisions by the other branches of the government.[82] This institutional respect thus warrants, and is inherent in the notion of, exclusive jurisdiction.

In all other cases in which the High Court and the Supreme Court of Appeal share jurisdiction with the Constitutional Court, only under exceptional circumstances that direct access be granted. This is so because direct access naturally does not allow the Constitutional Court to enjoy the benefits and assistances of the views of the other court on the matter before it.[83] The Constitutional Court of South Africa stated that highly important and quite complex issues compel the need for it to be assisted by the views of a lower court.

As mentioned before, the power to interpret the Constitution in Ethiopia rests with the HoF[84] and it has the authority to decide on all constitutional disputes.[85] It must be noted here, however, that

[80] *Supra* note 71 at p. 4-27.
[81] *Id* p. 4-23.
[82] *Ibid*.
[83] *Id* p. 4-27.
[84] FDRE Constitution, art. 62(1).
[85] FDRE Constitution, art. 83(1).

constitutional interpretation is not the sole function of the HoF. Pursuant to Art. 3 of Proclamation No. 251/2001, the HoF, in addition to its power to interpret the Constitution, has other powers such as deciding on issues pertaining to the right to self-determination including secession, promoting equality and unity of the peoples, resolving disputes arising between states, determining the division of revenues derived from joint federal and state tax sources, determining civil matters that need the enactment of laws by the HPR, ordering the intervention of the federal government where states threaten the constitutional order, deciding on the determination of election constituencies, determining the sources of taxation together with the HPR, electing the President of the country in joint session with the HPR, participate in constitutional amendment and also issue regulation in light of Art. 58 of same. There has been a torrid academic debate on whether there is anything left for courts to deal with in the sphere of constitutional review in Ethiopia. Those who argue in favor of the courts power to interpret the Constitution ascribing the form of judicial review adopted by Ethiopia as the mixed one where the power of constitutional interpretation is apportioned between the regular courts on one hand and the CCI and the HoF on the Other hand, offer the following arguments.[86] Some argue that it is only the unconstitutionality of legislative act that should be decided by the HoF, relying on Art. 84(2) of the Amharic version of the FDRE Constitution. This provision runs as relevant as "where any Federal or State legislative law is contested as being unconstitutional … the Council of Constitutional Inquiry shall consider the matter and submit it to the House of the Federation for a final decision."[87] Another argument in favor of the courts power is premised on the proposition that courts have constitutional duty to enforce the Constitution and it is only the

[86] Seboka, Bulto Takele, "Judicial Referral of Constitutional Disputes in Ethiopia: from Practice to Theory," *African Journal of International and Comparative Law* (2011) 19 (1): 105.
[87] FDRE Constitution, art. 84(2). See also A Fiseha, Assefa, "Federalism and the Adjudication of Constitutional Issues: the Ethiopian Experience," *Netherlands International Law Review* (2005) 52 (1).

invalidation of laws that is reserved to the HoF.[88] Similarly, the constitutionality of administrative act, administrative decision or a custom is said to be determined by regular courts. The fact that all judicial power is vested in courts has also been relied on by others to show the court's power to adjudicate constitutional disputes.[89]

The Amharic and the English versions of Art. 84(2) of the FDRE Constitution show disparity apropos the scope of the term 'law'. In terms of the English version, the term 'law' refers to any Federal or State law. The Amharic version, on the other hand, refers only to federal and state laws of the legislature but not to all federal and state laws. In cases of discrepancy, the Amharic version shall have an overriding authority by virtue of Art. 106 of the FDRE Constitution. On the basis of this premise, it may be fairly argued that courts can interpret and invalidate all subordinate laws and executive acts falling short of laws of federal and state legislatures.

This position, however, does not take as far for there are two proclamations that expose the scope of application of the term law in a more clear method. By virtue of proclamation No. 250/2001, the House of Federation has a power to decide on the constitutionality of any law or decision by any government organ or official which is alleged to be in conflict with the Constitution.[90] The term 'law' in this proclamation includes proclamations and regulations of both the Federal and State governments as well as international agreements that Ethiopia has endorsed.[91]

[88] Donovan, Dolores A., "Leveling the Playing Field: the Judicial Duty to Protect and Enforce the Constitutional Rights of Accused Persons Unrepresented by Counsel," *Ethiopian Law Review* (2002) 1: 31.
[89] Tsegaye, Regassa, "Courts and the Human Rights Norms in Ethiopia", in Assefa Fiseha (ed.), *Proceedings of the Symposium on the Role of the Courts in the Enforcement of the Constitution* (Addis Ababa: Birhanina Selam, 2001): 116.
[90] Proclamation n. 250/2001, *The Council of Constitutional Inquiry*, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, Year 7, n. 40, Addis Ababa, 2001, art. 6.
[91] Id art. 2(5)

More surprising is the extension of the term 'law' to include directives issued by both Federal and State government institutions in accordance with the proclamation established to consolidate and define the powers and responsibilities of the House of Federation.[92]

While the law establishing the CCI[93] behests that courts shall stay proceeding and send the matter to the CCI if they found that the matter before them needs constitutional interpretation until the issue of constitutionality is determined by the Council, neither the FDRE Constitution nor the two proclamations[94] offer guidance as to whether the referring courts have to indicate the relevance and plausibility of the question, the challenged law and the constitutional provision that it allegedly violates. The parties are entitled to appeal to the CCI should the court is unsatisfied with the presence of the issue of constitutionality and disregards their request for referral.[95]

The foregoing analysis promise the inference that Ethiopian courts of all tiers of both the Federal and State governments are not given the power to declare unconstitutionality of, let alone proclamations and regulations, even directives of government institutions. Hence, Courts are neither empowered to nor inquire into and give final decision on the constitutionality or otherwise of laws in Ethiopia.

In general, the two jurisdictions, despite their similarity in carrying out major transformation through their respective constitutions, show a jarring disparity as regards the institutions entrusted with a power of constitutional adjudication. South Africa not only created an

[92] Proclamation n. 251/2001, *Consolidation of the House of the Federation and Definition of its Powers and Responsibilities* Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, Year 7, n. 41, Addis Ababa, 2001, art. 2(2)
[93] *Supra* note 89 article 21(2) and (4).
[94] The two proclamations referred to are the Council of Constitutional Inquiry cited under note 89 and the House of the Federation Consolidation Proclamation cited under note 91.
[95] *Supra* at note 89, Art. 22(3).

independent constitutional court with the highest authority in constitutional matters but also divided such a judicial review power between the Constitutional Court and ordinary courts. Ethiopia, on the other side of the spectrum, has fashioned the HoF to overtake the business of unconstitutionality review and kept regular courts away from inquiring into constitutional matters.

CHAPTER THREE

THEORETICAL FOUNDATIONS FOR CONSTITUTIONALITY REVIEW IN ETHIOPIA: AN EVALUATIVE APPROACH

The fact that Ethiopia has adopted an inimitable model of constitutional review offers to the scholarly community an opportunity to ask such fundamental questions as: What spurred the country to adopt such a unique type of constitutionality review? Why courts were not made involve in the business of constitutional adjudication? How far sound are the arguments advanced by the framers in injecting such atypical model of judicial review into the country's legal system? Is the HoF an apposite organ to undertake constitutionality review? These will make up the bastion of the current chapter and the first stage of the projected analysis. Some of the arguments forwarded by the founders of the FDRE Constitution, as stated in the preceding chapter, were that the Constitution is a political pact between the Nations, Nationalities and Peoples; the interpretation of this political document should be done not by ordinary courts, but by the HoF that represents the different ethno-nationalists, and distrust to the judges of the previous regime.

3.1. The Constitution as a compact 'between Nations, Nationalities and Peoples'

At a very basic level, the notion that 'the constitution is a pact between the nations, nationalities and peoples' contradicts with the theory of social contract. According to the theory of social contract,[96] three important points can be identified: First, private individuals are not mere chattels of their ruler; nor are they unemancipated minors or inferiors by nature. They are rather

[96] Lomaskya, Loren E., "Contract, Covenant, Constitution," *Social Philosophy and Policy* (2011) 28 (1): 50-71.

self-determining agents who have formed civil order through a free exercise of their will. Second, the state is bound to provide services to its citizens and perform those obligations for which it was created. Thirdly, government can justifiably be challenged if it goes beyond the limits imposed upon it by the terms of the social contract. Though the FDRE Constitution has enunciated a number of fundamental individual human rights,[97] considering it merely as a pact among the nations does seem to have disregarded the first and most important component of this theory of social contract and relegated the stake and role of private individuals treating them as a third party to the contract.[98] The notion also denigrated the truism that the constitution establishes structural boundaries between the Federal and State governments and overlooks the place of the Federal government as a party to the compact.

Even when observed as a complex and "cross-temporal pact", incompleteness of a constitution is an inexorable consequence which calls for an institution that fills the gap in the underlying pact. This very conception has much in common with conventional explanations of gap filling in ordinary contracts and the making use of an independent judiciary to honor the generalized yet incomplete intent of the parties thereto.[99] For a number of reasons, either "because they can not foresee every future event or know precisely how their own purposes may change" or for deliberate preservation of private information, contracting parties often fail to stipulate all of the

[97] See Chapter 3 of the FDRE Constitution, which is devoted to provide for a wide range of human rights.
[98] Art. 39(10) of the FDRE Constitution defines 'Nations, Nationalities and Peoples' as 'a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.' This gives primary focus to group rights than individual subjects.
[99] Issacharoff, Samuel, "Constitutional Courts and Democratic Hedging," *Georgetown Law Journal* (2011) 99 (4): 981.

relevant terms, rendering the contract incomplete.[100] The task of a judiciary in responding to these difficulties can be easily facilitated through the creation of an independent judiciary.

It must be noted here that parties to constitutional agreement are unlikely to have longstanding trust among themselves in particular in a country emerging from undemocratic rule, at the moment of constitutional negotiation. Nor have they much more experience regarding what might ensue from the implementation of the new constitution since the resulting document is mostly aspirational and uses broad ambition with little specificity.[101]

Two important tasks of Constitutional Courts can be recognized here: Constitutional courts play significant role in facilitating the transition to democracy first by allowing the parties quick transition to foundational democratic governance before they are able to come to full agreement.[102] In the second place, constitutional courts are of vital assistance in terms of what professor Ginsburg observes: "uncertainty increases demand for the political insurance that judicial review provides. Under conditions of high uncertainty, it may be especially useful for politicians to adopt a system of judicial review to entrench the constitutional bargain and protect it from the possibility of reversal after future electoral change."[103] In general, empowering courts with judicial review not only promote efficiency in the course of constitutional bargaining but also allows the parties to reach consensus on a specific matter.

[100] Barnett, Randy E., "The Sound of Silence: Default Rules and Contractual Consent," *Virginia Law Review* (1992) 78: 821

[101] Elkins, Zachary, et al. *The Endurance of National Constitutions* (New York: Cambridge University Press, 2009): 69-71.

[102] *Supra* note 100 at p. 983.

[103] Ginsburg, Tom, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases Cambridge* (Cambridge: Cambridge University Press, 2006). On a detailed role of the Constitutional Court in contributing to stability of democratic order, see Solyom, Laszlo, "The role of Constitutional Courts in the Transition to Democracy: with Special Reference to Hungary," *International Sociology*, (2003) 18 (1).

This role of the judiciary can be illuminated well through the experience of South Africa which offers a wonderful process of constitutional formation. Without however the need to probing deep into the long multi-party negotiation of transition from apartheid to democratic governance, exposing the two innovative steps involved in the process merits some mention.

First, the negotiating political groups could produce an Interim Constitution that contained a set of 34 principles that made the basis for the formation of the Final Constitution.[104] Second, the task of ensuring the compliance of the Final Constitution with the general principles was entirely given to the Constitutional Court which stressed on, among other things, limitation on government, the importance of checks and balances, the principle of federalism, special procedures for constitutional amendment and the centrality of the Bill of Rights during the certification proceeding.[105] Accordingly, the Constitutional Court, in discharging its mandate, certified the Final Constitution after the second round judicial inquiry in December 1996.[106] This informs us that the South African Constitutional Court played a significant role in effecting a quick and smooth transition of the country to a more democratic system.

3.2. Constitution as a Political Document

Today, several types of powers wielded by Constitutional Courts, including but not limited to, preliminary constitutional review, abstract constitutional interpretation, examining the constitutionality of political parties, overseeing election, and so on, are regarded by both scholars and practitioners as political per se.[107]

[104] The South African Interim Constitution has 34 principles annexed to it.
[105] Certification of the amended text of the constitution of the Republic of South Africa 1996, Case CCT37/96, 1997(1) BCLR 1.
[106] *Ibid.*
[107] Uitz Renata, "Constitutional Courts in Central and Eastern Europe: What Makes a Question too Political?," *Juridica International* (2007) 13 (2): 5.

The fact that constitutional judicial review itself is a political activity undertaken through a jurisdictional form makes constitutional court's involvement in political life inevitable.108 A constitutional order cannot be expected to be pure and separate from political sphere and constitutional courts can hardly stay out of politics. The fact that a decision has a political implication does not, however, itself thwart the court from making a decision, but only requires it to apply a legal standard in making such a decision.[109] More specifically, the Constitutional Court is asked not to make political decision, but to ensure that political decisions comply with standards set by the Constitution. Aharon Barak, the former President of the Supreme Court of Israel, said to this end that "nothing falls beyond the purview of judicial review; the world is field with law; anything and everything is justiceable".[110] In some countries like the United States and Canada, however, the Supreme Courts, having been informed by the principle of separation of powers, were averse to accept for judicial review certain matters that they believe it to be appropriate for the political branches of government to decide.[111]

Nonetheless, a need to balance legal expertise, against the acknowledgment of the inescapably political nature of constitutional review can be reflected in the composition of the justices of the Constitutional Court. A glance at the Italian model may offer an insight in this regard. In Italy, the fifteen judges of the Constitutional Court are chosen from among law professors, magistrates of higher courts, and lawyers having more than twenty years of experience, out of which 5 judges are named by the President of the Republic, five by the Parliament in joint session, and

[108] Ovsepian, Zh. I., "Constitutional Judicial Review in the Russian Federation," *Russian Politics and Law* (1996) 34 (5): 46.
[109] *Supra* note 71 at p. 4-8.
[110] Hirschl, Ran, "The Judicialization of Mega-Politics and the Rise of Political Courts," *Annual Review of Political Science* (2008) 11: 93-118.
[111] *Supra* note 108 at p. 6.

five by the supreme judicial, administrative and audit jurisdictions.[112] Coming back to the South African case, the Chief Justice and the Deputy Chief Justice of the Constitutional Court are appointed by the President following the consultation he should make with the Judicial Service Commission and the leaders of those parties represented in the National Assembly. The remaining Constitutional Court judges are appointed by the President after consulting the Chief Justice and the political party leaders represented in the National Assembly based on the list of nominees prepared by the Judicial Service Commission.[113] The President should, however, "advise with reasons if any of the nominees are unacceptable and appointment remains to be made."[114] The involvement of the President, as head of the national executive, and the leaders of the political parties represented in the National Assembly, in the appointment of the Chief Justice and the remaining judges of the Constitutional Court appear to be intense. While this might sufficiently reflect the fact that the constitution is not untainted from its political character, the Constitution offers adequate protection to the independence of the judiciary. To this end, S 165 of the SA Constitution affirms that "the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favor or prejudice" and interference by any person or organ of state with the court's functioning is outlawed by the Constitution.[115] The constitutionally guarded judicial independence equally applies to the Constitutional Court,[116] and the Constitutional Court ensures the supremacy of the Constitution and the protection of the Bill of Rights that is perceived as the corner stone of democracy in

[112] Groppi, Tania, "The Italian Constitutional Court: Towards a Multilevel system of constitutional review?," *Journal of Comparative Law* (2008) 3 (2): 102. This model was later adopted by other countries such as Chile, Columbia, Dominican Republic, Guatemala, Ecuador, Korea, Mongolia, Indonesia, and Paraguay.
[113] See SA Constitution S 174 regarding the appointment of the chief Justice, Deputy Chief Justice and the judges of the Constitutional Court.
[114] See also SA Constitution S 174.
[115] See SA Constitution S 165
[116] See SA Constitution S 166 dealing with the judicial system that comprises the Constitutional Court.

South Africa.[117] From the foregoing, one can make an inference that the political nature of the Constitution itself cannot stand out to divest courts from interpreting it.

3.3. Institutional Inaptness and Lack of Expertise on the Part of the HoF

The HoF currently consists 135 members[118] who are politicians not required to possess legal expertise. The mode of its decision making is also by unanimous or majority vote.[119] This is not an appropriate forum for, and makes the settlement of such complex constitutional arguments more difficult, if not impossible albeit the arrangement is the most common way of legislative deliberation.[120] It seems in response to this problem that the HoF, in accordance with a proclamation issued to consolidate its powers, is authorized to "establish a committee, drawn from its members, which shall investigate the draft proposal submitted to it by the" CCI "and an appeal lodged against the decisions of the" CCI.[121] Moreover, this "committee may be mandated by the house to make a decision whether an appeal made against decisions of the CCI should be presented to the general meeting of the HoF or not."[122] This arrangement is however a

[117] See SA Constitution SS 2, 7 and 167.

1. [118] Since each nations nationalities and peoples is represented in the HoF by at least one member and one additional representative for each one million of its population, the number changes from one electoral time to another. The current number of the members of the HoF is available at www.ipu.org, accessed on 10 March 2013.

[119] Proclamation n. 251/2001, *Consolidation of the House of the Federation and Definition of its Powers and Responsibilities* Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, Year 7, n. 41, Addis Ababa, 2001, art. 14 and 46.

[120] Supra note 68 p. 74.

[121] Proclamation 251/2001, cit., art. 18.

[122] *Ibid*.

duplication of efforts and overlooks the very reason for which the CCI, in which the interest of the HoF has already been represented, is established.[123]

A simple glance at the constitutions of most countries evinces that Constitutional judges are elected from among senior members of the ordinary judiciary, or legal scholars, or those with legal education or profession background.[124] Most of the members of the HoF, as their profile demonstrates, are however members to either the state executive branch or the state council the majority of whom are without the necessary proficiency that would enable them to engage in constitutional dialogues.[125]

One might fairly argue that the establishment of the CCI, an organ whose most members (eight of eleven) are legal professionals, would fill the legal expertise gap of the HoF. While this meticulous argument is important and, to an extent apparently convincing, it does not, however, provide a complete explanation since the recommendation of the CCI is not binding on the HoF.[126]

3.4. The Undemocratic Nature of the Judiciary

As noted earlier, one of the main accounts why the framers of the FDRE Constitution entrusted constitutional review power to the HoF rather than to courts was the undemocratic nature of the judiciary. Constitutional interpretation, a concept elevated by the framers to the status of constitutional amendment, the framers argued, should not be carried out by unelected

[123] Three members out of eleven of the CCI are designated by the HoF itself in accordance with art. 82(6) and for the detailed discussion on the subject, see supra note 68 at p.75.
[124] Supra note 108 see its footnote no. 24 where different laws of post communist countries have laid down minimum criteria for becoming a Constitutional Court judge.
[125] Supra note 68 at p. 75.
[126] FDRE Constitution, art. 84(2).

professionals for such is permitting them to avert the democratic process.[127] As a consequence, they entrusted the HoF with a power to interpret the Constitution.[128]

It is true that the degree of influence that constitutional courts might exert on the power of a democratically elected legislature inexorably raises the vexed issue of their legitimacy. Courts are perceived as promoters and protectors of democratic institutions and not themselves democratic institutions, should the democratic nature of an institution be measured by its electoral mandate and its direct accountability towards the electors.[129] Constitutional Courts have only derivative legitimacy since their judges are appointed either by the Parliament or the President or both as the case may be.130 However, the very notion that judicial review is antagonistic to democracy has itself been a litigious issue. In the terms of Samuel Freeman, "More than one principle is needed to characterize democratic ideals, and we cannot categorically say judicial review is not under certain conditions an effective institution for maintaining these principles. If so, then a priori philosophical claim that judicial review is inherently undemocratic is unfounded."[131]

At a very basic level, judges are required to examine the justification for policies rather than imposing their own policy, which will slant power balance in favor of government by judiciary. To this end, it is worth noting that "(a) constitution which did not have this balance between constitutionalism and majoritarian democracy, and allowed judges to impose their own policies,

[127] See minute of the Constitutional Assembly *supra* note 7.
[128] FDRE Constitution, art. 62.
[129] *Supra* note 38 at p. 213.
[130] Id p. 213.
[131] Freeman, Samuel, "Constitutional Democracy and the Legitimacy of Judicial Review," *Law and Philosophy* (1990) 9 (4): 361.

would arguably erode democratic rule and invariably erode the legitimacy of the constitutional enterprise".[132]

The framers of the FDRE Constitution, by taking constitutional review power from the hands of the courts and putting in the hands of the Hof, failed to achieve its objective to avoid counter-majoritarian dilemma. The FDRE Constitution requires the State Councils (law making organ of the regional states in Ethiopia) to elect members to the HoF.[133] This may involve either election by the State Councils themselves or through holding direct election. The practice so far dictates that members to the HoF are not directly elected by the people but by the State Council themselves. Yonatan for instance emphatically rejected the counter-majoritarian notion that the founders of the FDRE Constitution believe to have injected into the country's Constitutional order.[134] His conclusion is based on the premise that the existing mechanism by which the members to the HoF are appointed by the State Councils is no different from the appointment of judges of the ordinary courts since the latter are also appointed by the Federal Parliament and the State Councils at Federal and State levels of governments respectively. Hence, giving the power of constitutional adjudication to the HoF could not escape from the criticisms that entrusting such power to courts spurs. Perhaps, the framers' argument might have been well founded and more sound had they entrusted the HPR with such review power than the HoF should the argument of counter-majoritarian problem is to be defended.

3.5. Lack of trust in Judges of ordinary courts

Experience reveals that ordinary courts are of no power to inquire into the constitutionality of statutes in some countries. The most they are able to do should they have doubts about the

[132] Davis, Dennis M., "Transformation and the Democratic Case for Judicial Review: the South African Experience," *Loyola University Chicago International Law Review* (2007) 5: 47.
[133] FDRE Constitution, art. 61(3).
[134] *Supra* note 68 p. 73.

constitutionality of a statute which they are called on to apply, is to refer the question to the Constitutional Court suspending the proceedings.[135] Due to fear of "a possible threat to the unity of the legal system" and the fact that the judiciary in the civil law following countries enjoy relatively low status and can hardly be trusted, courts of these countries are deliberately divested of the power of judicial review in favor of the creation of Constitutional Courts.[136]

Lack of trust towards the judiciary of the previous regime, as noted elsewhere in this work, was also one of the reasons for why the framers of the FDRE Constitution were not interested in empowering the ordinary judiciary to engage in constitutional adjudication. In addition, judges of the time did not possess as much as necessary qualification to undertake constitutionality review. The introduction, by the FDRE Constitution, of the federal form of government gave rise to the creation of numerous federal and state courts that demanded copious number of judges to fill the new positions.[137] As a consequence, professional qualification was relaxed and many judicial positions were filled with persons of quite minimal legal training and practice. It was a common place practice for state judges, particularly at district level, to have a three to six months maximum legal training course to become a judge during this early stage.[138] In light of this, it is highly unlikely for these judges to correctly interpret laws, appreciate core principles such as judicial/professional code of conduct, judicial independence, separation of power, and at a very specific level, to carry out the thorny business of judicial review. This situation has gradually been changed, first by the establishment of the Ethiopian Civil Service College that has began

[135] Sadurski, Wojciech, *PostCommunist Constitutional Courts in Search of Political Legitimacy* (Florence: European University Institute, 2001): p. 2.
[136] *Ibid.*
[137] The World Bank, *Ethiopia. Legal and Justice Sectors Assessment, 2004*, available at http://www4.worldbank.org/legal/publications/ljrmanualLowres.pdf, accessed on 27 March 2013.
[138] *Ibid.*

training persons from each region to gain legal knowledge and skills.[139] The expansion of law schools throughout the country both in government sponsored and private universities has finally done altogether the dearth of legal professionals in the country.[140]

On account of the law schools practice deficit education system in Ethiopia, a Justice Organs Professionals Training Center was established at national level in 2003 and later on in six states (Tigray, Amhara, Oromia, Gambella, SNNP, and Harari) with an objective of boosting the capacity of judges through pre-service, on job and special training programs.[141] While it can be assumed that the judicial system of the country is yet to become prestigious, there is a jarring difference between what was the case in the early years of 1990s and the current condition in the Ethiopian judiciary particularly in terms of the academic and professional qualification as well as preparation of the judicial staffs both at national and regional levels. Similarly, lack of trust on the judges of the previous regime can hardly be a sound reason since nearly all judges are appointees of the incumbent government at least today.[142]

To put it in a nutshell, all what have been accounted for by the founders of the FDRE Constitution in favor of the creation of the HoF leaving the judiciary with no share in constitutional adjudication, can hardly be regarded as defensible. The arguments are not only flawed and irrational, but also devoid of an informed choice that failed to be cognizant of the waves of democratic processes taking place around the globe.

[139] Regulation N. 3/1996, *Council of Ministers Regulation for the Establishment of Ethiopian Civil Service College*, 1996.

[140] There were many government sponsored and privately owned law schools. However, the private run law schools were closed later on by reason of government policy. Yet, government universities are producing large number of legal professionals each year currently.

[141] See the websight of the Ethiopian Federal Justice Organs Professionals Training Center available at www.joptc.gov.et/Profile%20of%20JOPTC.html, accessed on 14 March 2013.

[142] *Supra* note 138.

CHAPTER FOUR

EMPOWERING COURTS TO REVIEW CONSTITUTIONALITY IN ETHIOPIA: WHAT LESSONS TO BE DRAWN?

Apart from its theoretical congenital defect, the current Ethiopian system of 'judicial review' is censured for a number of pragmatic reasons. Just to cite only the prominent ones, "it lacks independence from the executive branch of the government and thus cannot be trusted to adjudicate sensitive political matters involving the constitution in unbiased manner"; the system "weakens the judiciary's power to check the constitutional excesses of the other branches of government"; "fails to protect the rights of minority groups in constitutional disputes due to the majoritarian make-up of the" HoF; "and perpetuates an inefficient system that precludes access to justice".143 The current essay does not recanvass the findings of other works exposing the flaws of the judicial review system in Ethiopia, rather benefits from the discovery of these works and reinforces the need for reform of a mechanism of judicial review in the country. In this chapter, in which the second stage of the analysis is intended, the ostensible importance of judicial review, significance of letting regular courts participate in constitutional adjudication, and possible challenges together with their way outs will be presented.

4.1. The Need for an Independent Organ to Adjudicate Constitutionality Review

In most democratic states, jurisdictional disputes arising between states, between the federal government and the states in federal states, between branches of government, between courts, and Municipalities fall under the jurisdiction of either the Supreme Court or the Constitutional

[143] *Supra* note 64 at p. 261.

Court. They wield a power to resolve jurisdictional disputes in addition to their power of constitutional review and serve as a guardian of the constitution and as an ultimate arbiter of jurisdictional controversies.144

Scholars also tend to show the basic complementarities between judicial review and the notion of federalism. One of the logics which is structural and functionalist in character emphasizes the want to deal with inevitable disputes in countries with more complex political and legal structures. It is based on the premise that whenever there are different levels of law making bodies with different jurisdictions, the potential conflict over jurisdiction is likely to ensue. One has to be mindful of the very truism that judicial constitutional review first appeared in the United States to cope with the difficulty associated with the Federal arrangement as opposed to the German or Italian Constitutional Courts whose primary purpose was to guard fundamental constitutional rights. This calls for the establishment of neutral and impartial third party organ that will assist in solving this jurisdictional dispute.145

It should come as no surprise to anyone who is familiar with the Ethiopian legal system that there are highly convoluted matters associated with the federal arrangement that are not yet resolved. Just to note an example, the Constitution is silent apropos the primacy relationship between the federal and state legislations in cases of conflict.146 The legislative jurisdiction conundrum between the federal and the state legislatures, the power to enact criminal procedure code being a typical example, also remains still unsolved.147 The theoretical and pragmatic

144 *Supra* note 17 at p. 56.
145 *Supra* note 20, p. 3.
146 Tsegaye, Regassa, "Sub-national Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level," *Mizan Law Review* (2009) 3 (1)
147 Art. 52(1) of the FDRE Constitution provides that "all powers not given expressly to the Federal government alone or concurrently to the federal government and the states are reserved to the states". While the HPR is empowered to enact Penal /Criminal Code, the constitution is silent as to who wields the power to enact criminal

problematique of the power of the Federal Supreme Court to review the cassation decisions of the State Supreme Courts purely on state matters is but another cloudy issue in the polity.148

Recognition of the preceding facts inexorably prompts the need to reform the Ethiopian judicial review or constitutional adjudication mechanism. An issue unavoidably annexed to this innovation is which institution: the Supreme Court or the Constitutional Court that fits into the Ethiopian legal tradition as it exists today. Giving a precise answer to a question which type of judicial review system should the country adopt is obviously a highly complex question with possibly a number of answers which do not claim themselves to be perfect. Favoreu warns against a hasty generalization recalling the renowned preposition of Hans Kelsen: "it is impossible to propose a uniform solution for all possible constitutions: constitutional review will have to be organized according to the specific characteristics of each of them."149 Studies have revealed that the devise of judicial institutions has significant implications for a number of social, political and economic processes of a country. In an attempt to offer reasons for the creation of constitutional courts, scholars have a number of views. The desire to maintain checks and balances where there is uncertainty of balance of political forces; distrust of judges of the previous regime; copying of previous democratic experiences; the endeavor to ensure legal certainty and the needs of federal arrangements a country decided to advance are for instance what Francisco Ramos Romeu offers in this regard.[150] On top of this, it may be possible though

procedure code. A year before, regional states having been authorized by the Federal government concerned authority, engaged in the drafting of the criminal procedure code, spent about a year on the drafting process and finally the Federal government came up with a decision taking back such power to draft the criminal procedure code at national level.

[148] Abdo, Muradu, "Review of Decisions of State Courts over State Matters by the Federal Supreme Court," *Mizan Law Review* (2007) 1 (1)

[149] Favoreu, Louis, "Constitutional Review in Europe", in Louis, Henkin, and Albert, J. Rosenthal (eds.), *Constitutionalism and Rights* (New York: Columbia University Press, 1989): 46.

[150] Ramos Romeu, Francisco "The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions", *Review of Law and Economics* (2006) 2 (1): 103.

not necessary to design constitutional courts in a manner different from ordinary courts through choosing a flexible procedure to select and appoint the judges of the Constitutional Court.[151] If one takes seriously the fact that neither the Federal Courts nor State courts seem to be appropriate fora for Federal-State jurisdictional dispute resolution, the creation of a constitutional court in Ethiopia may arguably sound suitable.[152] Along similar vein of argument, lack of consensus among rival political parties throughout the lifespan of the current system of government in Ethiopia may logically justify the construction of a Constitutional Court that overtakes the mandate of resolving the differences of these parties. The creation of a Constitutional Court as a highest court on constitutional matters might also minimize the fear of the framers that the Constitution as a political document cannot be reviewed by ordinary courts, as long as selection of Constitutional Courts might follow a more political procedure. This is in no way, however, to suggest that vesting judicial review power totally in ordinary court is wrong or impossible. Nor is it to guarantee the success of constitutional court for such depends usually on the interplay of many realities. The best one can hypothesize based on the foregoing analysis, citrus paribus, is that the creation of Constitutional Court in Ethiopia may be justified.

Without the need to pronounce as blunder the ultimate determination of the country which type of judicial institution it opts for, this study gives strong credence to the involvement of regular courts in constitutional review on account of a number of reasons. In what follows, these justificatory grounds for making regular courts partakers in constitutionality review will be observed.

[151] *Supra* note 49 at p. 1709.
[152] *Ibid.*

4.2. Advantages of Involving Regular Courts in Constitutionality Review

4.2.1. Promoting Legitimacy of the Constitutional Court

If a certain country chooses to adopt judicial review by constitutional courts, the legitimacy of constitutional court can be preserved by decentralization of much of its works by involving ordinary courts in judicial review. The SA Constitution, when empowering ordinary courts to inquire into the constitutionality of legislations (Save the case of Magistrate Courts) can best serve this particular purpose. Similarly, the mechanism chosen by the Italian Constitutional Court may be regarded as another elucidative example where the transformation from a centralized method of judicial review to hybrid one in which case ordinary courts of law contribute to the guarantee of the national constitution under the direction and control of the Constitutional Court.153 Hence, empowering regular courts to inquire into constitutionality of legislations, even though to a limited degree, might help in boosting the legitimacy of the Constitutional Court. Procedural linkage between the regular courts and the Constitutional court also allows the development of a constitutional culture among the former.

4.2.2. The need for and significance of Views of lower courts

The exclusion of all levels of courts from adjudication of constitutional matters is and should be an exception to the general rule that the constitution vests judicial authority in Federal and State Courts.154 It also deviates from the general principle that the decision of a first instance court is supposed to be subject to appeal.155 As the SA Constitutional Court repeatedly indicated, it is not desirable generally "for a court to sit as a court of first and last instance" as a consequence of

[153] *Supra* note 113 at p. 117.
[154] See FDRE Constitution, art. 79(1).
[155] *Supra* note 71 at p. 4-23.

which such should occur only under exceptional circumstances.[156] In Bruce Fleecytex Chaskalson nicely stated that "(i) f as a matter of course, constitutional matters could be brought directly to it, we could be called upon to deal with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and which might prove to be purely academic, and to hear cases without the benefit of the views of the other courts". He went on and added that "it is not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being possibility of appealing against the decision given".[157] On top of that, experience reveals that the likelihood of decisions to be correct is greater if more than one court has been permitted to consider the issues raised.[158] The losing party will also have an opportunity of challenging the reasoning the first judgment followed and of reassessing previously raised arguments in the light of such judgment.[159]

More often than not, lower courts engage in framing of various constitutional issues and also offer various accounts regarding ways to resolve these issues by giving explanations on how and why a specific conclusion could be reached, so that the last resort court is able to rationally review their decisions. Justice Ginsburg, in one of the US Supreme Court cases, maintains that "(w)e have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from state and federal appellate courts may yield a better informed and more enduring final pronouncement by this court".160 A necessary

[156] *Ibid.*
[157] Bruce and Another v. Fleecytex Johannesburg CC and Others 1998, Case CCT1/98, 1998(4) BCLR 415, par. 7
[158] *Id*. par. 8
[159] *Ibid.*
[160] Arizona v. Evans, 514 U.S. 1 (1995), as cited in Clark, Tom S., and Kastellec, Jonathan P., "The Supreme Court and Percolation in the Lower Courts: an Optimal Stopping Model," *Journal of Politics* (2013) 75 (1).

inference from the foregoing premises is that it must be only under exceptional circumstances that a highest court sits both as a "court of first and last instance".

4.2.3. Promoting Diversity of Constitutionalism

The FDRE Constitution recognizes the cultural, religious and ethno-linguistic diversity in the country.[161] Lower courts are diverse as the various regions and localities in the country and generally understood to be mindful of, and often expected to be responsive to, local sensitivities.[162] Quite crucial constitutional issues that might arise in lower courts would logically garner a number of outcomes from judges of differing lower courts. Involving regular courts in constitutional review opens a room for diverse interpretations of the constitution to co-exist as enforceable judicial determinations which do not necessarily contradict each other, but as Aronson prescribes, "represent different visions of the constitution, of a constitutional provision, or of how the constitution should be interpreted".[163] However, most constitutional scholars leave out the critical role of lower court judges rendering them "the forgotten step children of constitutional theory", despite the fact that they are dynamic players in the creation of constitutional meaning.[164] It can be well argued that dispersing constitutional adjudication renders judicial review more contextual, heterogeneous, and localized, and this in turn fosters innovation, dialogue and pluralism than constitutional adjudication carried out only by one highest court.[165] It may be argued that perhaps "the simplest, most established, and possibly most genuinely reflective apparatus for promoting localism and diversity in constitutional

[161] Abdo, Mohammed, "Legal Pluralism, Sharia Courts and Constitutional Issues in Ethiopia," *Mizan Law Review* (2011) 5 (1): 2.
[162] Aronson, Ori, "Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts," *University of Michigan Journal of Law Reform* (2010) 43 (4): 32.
[163] Id at p. 33.
[164] Gewirtzman, Joni, "Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System," *American University Law Review* (2012) 61 (1): 457.
[165] Supra note 162 at p. 49.

adjudication is by relegating the power of judicial review to state judicial systems."[166] Involving both Federal and State level courts of Ethiopia can promote diversity of the legal tradition to which the FDRE Constitution has committed itself.

4.2.4. Promotion of Access to Justice

Where the protection of interests of under-organized, weakened and vulnerable groups is at stake, access to courts is difficult, if not impossible, to various claimants who seek to challenge the unconstitutionality of legislations or decisions.

The physical distance and cost to access to the judiciary are often very problematic in Ethiopia on account of the geographic setup and level of development of infrastructure of the country. Due to the fact that most population lives in the rural area, much people travel for several days to reach a district court[167] let alone a single centralized court situated in the capital city of the country. Hence, recourse to the highest court for issues involving constitutional dispute is disparaging for individuals who claim the violation of their rights by reason of inaccessibility of the Court.

4.2.5. Minimizing case Load

By concentrating judicial review in only one highest court, one can sensibly expect an enormous increase in the number of constitutional claims brought before this highest court. There should be a mechanism by which the highest court deals with the most important cases but not act as an every claims court. To relieve the highest court of its case load, in many countries, such the highest court is given a discretionary power to decide which cases to accept, while there are some countries that used a technique of transferring some of the competences of the highest

[166] *Ibid.*
[167] *Supra* note 138.

court to ordinary courts.[168] Accordingly, involving ordinary courts in constitutionality review can aid in playing down the number of cases that goes to the highest court and would relief the latter from becoming congested by case load.

4.3. Potential Challenges and Ways Out

This work is cognizant of some potential objections to the introduction of hybrid form of judicial review to the Ethiopian legal system. Here comes the depiction of some of these potential challenges together with possible ways out.

4.3.1. Lack of Legal certainty or uniformity

The first of these objections might well fit into the idea of lack of legal uniformity or certainty. Put in other words, involving ordinary courts might crop up in loss of certainty and predictability in terms of the contents of the constitutional norms. Just to illustrate, where two regional states of Oromia and Amhara enact similar legislations, Oromia state's statute might well be struck down by its court and Amhara state's statute is upheld by its court. Mark Tushnet puts in this regard that "(p)eople in organized societies tolerate a fair amount of uncertainty on some questions as long as there is sufficient stability on other matters".169 It may be questioned also whether such by itself could not constitute a mechanism of constitutionalism that gives effect to the normative veracity of legal pluralism.[170] To minimize the occasion of jarring disparity in the interpretation of the constitution, however, it is important to entrust the highest constitutional court with the ultimate power to decide on constitutional matters. In this respect, the SA Constitution is patent when it establishes the Constitutional Court as the highest court in all constitutional matters.171

[168] Slovenia amended its Constitution to solve the problem of case load by giving the constitutional court a discretion to decide which cases to process and transferred some of the constitutional court competences to the regular courts found at www.vlada.si/en/media_room/government...rel**ease**s/.../03/, accessed on 27 March 2013. .
[169] Tushnet, Mark, "Popular Constitutionalism as Political Law," *Chicago-Kent Law Review* (2006) 81: 1001.
[170] Supra note 162 at p. 49.
[171] SA Constitution, S 167(3)(a)

4.3.2. Lack of Precedent

Another question one may reasonably ask with respect to the introduction of a diffused form of judicial review to the Ethiopian legal system is how a country with a civil law legal system can guarantee a uniform interpretation of the constitution in the absence of rules of precedent that exists in the case of common law legal system. This ostensibly intricate question is quite simple to answer. There are many civil law countries that have adopted specific measures to overcome this particular problem. Just to offer some viable examples, in Mexico, the Constitution affirms that 'the law shall specify the terms and cases in which the precedents of the courts of the federal judicial branch are binding, as well as the requirements for their modification'.172 We also find in Argentina and Brazil, which adopted a model closely akin to that of the United States, a legal instrument known as 'recurso extraordinario inconstitucionalidad' meaning 'extraordinary claim of unconstitutionality' which can be petitioned before the Supreme Court against final judgments in which unconstitutionality of a federal law has been declared. Albeit the decision of the Supreme Court is of an in casu and interpartes effect, it defacto has an erga oms effect since the lower courts are bound by the decisions of the highest court of the country.173 Another solution offered by Venezuela is that 'judges shall apply the jurisprudence of the cassation Chamber in analogous cases so as to protect the integrity of the legislation and the uniformity of the case law'.174

[172] *Supra* note 17 at p. 50
[173] *Ibid.*
[174] *Ibid.*

Along similar vein, the French Conseil Constitutionnel is allowed by the French Constitution to exert influence on the jurisprudence of the other courts and its decisions have a binding effect on all public, administrative and judicial authorities.175

Likewise, some countries such as the Philippines, Japan and Argentina have adopted the American model of judicial review despite having a legal tradition founded on civilian legal principles.176 It is worth noting to have regard to the case of South Africa here. In South Africa where the hybrid judicial review system is adopted, the country has a combination of civilian and common law legal tradition.177

The Ethiopian legal system, as it exists today, can hardly be regarded as taking only one form of legal system; rather it combines elements of both civil and common law traditions though the former is more dominant.178 Even under the current system of constitutional adjudication in the country, "(t)he final decision on constitutional interpretation shall have general effect which therefore shall have applicability on similar constitutional matters that may arise in the future".179 To this end, the law requires the HoF to publicize its final decisions in a special publication for this particular purpose. On the other side of the spectrum, the current trend in Ethiopia corroborates that interpretation of a law by the Federal Supreme Court Cassation Division with not less than 5 judges is binding on Federal and regional courts at all levels.180

[175] Ponthoreau, Marie-Claire, and Hourquebie, Fabrice, "The French *Conseil Constitutionnel*: an Evolving Form of Constitutional Justice," *Journal of Comparative Law* (2008) 3 (2): 281.
[176] *Supra* note 42 at p. 4, footnote 12.
[177] *Supra* note 42 at p. 4.
[178] For a general understanding of the Ethiopian legal tradition and the extent to which it is influenced by the common law and civil law traditions, see Abdo, Muradu, *Legal History and Traditions. Teaching Material*, Prepared under the sponsorship of the Justice and Legal System Research Institute, available at chilot.files.wordpress.com/2011/06/legal-history-and-traditions.pdf, accessed on 15 March 2013.
[179] Proclamation n. 251/2001, cit., art. 11(1).
[180] Proclamation n. 454/2005, *Proclamation to re-amend the Federal Courts Proclamation n. 25/1996*, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, Year 11, n. 42, Addis Ababa, 2005, art. 4.

In general, common law countries have developed the doctrine of stare decisis while countries of the Roman law family of legal systems have adopted other mechanisms in order to respond to the dilemma of legal uncertainty and the likely conflict between different levels of courts with regard to judicial review.181 Hence, there is no necessary correlation between the model of the judicial review and the legal system a country adopts.182

4.3.3. Biasness and Abuse of Locality

It is true that regional court judges are "too closely associated politically, socially, or financially with the political elites in their region of their jurisdiction and therefore would be overly reluctant to strike down a legislation passed by their peers."[183] More generally, regional courts may be suspected for their biasness towards their regions and abuse locality or regionalism.[184]

This may be more apparent in Ethiopia where the Republic is constituted of ethno-nationalist federating units.[185] Nonetheless, this risk can be curtailed as Aronson observes, at least to a certain degree, by strong judicial recruitment and appointment mechanisms and also ensuring the political and social independence of the judiciary.186

4.3.4. Uncertainty of success

Another equally important question that one might pose pertaining the devolution of judicial review power on lower ordinary courts is the question of its fitness to a constitutional democracy, more particularly a fledgling democracy that is still under process of shaping its constitutional order and forming the institutions that would sustain it. This thesis suggests that there are real concerns that necessitate a contextualized formulation of the institutions to carry

[181] *Supra* note 17 at p. 50.
[182] *Ibid*.
[183] Supra note 162 at p. 44.
[184] Ibid
[185] *Supra* note 9 at p. 99.
[186] *Supra* note 162 at p. 44.

out judicial review: what seems right for the United States might not necessarily be right for Kenya or Iraq or France. Nevertheless, while it is true that the majority of rising constitutional democracies in the past century have preferred highly centralized and concentrated models of constitutional adjudication,[187] it would be erroneous to disregard the empowerment of ordinary courts to adjudicate constitutional disputes even in processes of transition.

4.3.5. The Difficulty of power delineation

One must also be mindful of the power delimitation challenges that might ensue from the injection of a new judicial review system into a certain legal tradition. To this end, precaution must be made as regards the delineation between the powers of the Constitutional Court, should introducing Constitutional Court is opted for, and of ordinary courts. Civil law legal traditions that have created Constitutional Courts alongside their ordinary court system have traditionally experienced difficulty in terms of defining the precise jurisdictional boundary between them. The continued clash between the Constitutional Court and ordinary courts of Russia is but only a good illustration in this respect.188 Currently, South Africa introduced an amendment to its Constitution in which case 'the Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.'189

It can be deduced from the preceding analysis that the edifice of the current Ethiopian constitutional review is subject to vilification both from theoretical and pragmatic perspectives. This necessarily calls for rethinking the institutional conventions of judicial review in Ethiopia.

[187] Garlicki, Lech, "Constitutional Courts versus Supreme Courts", *International Journal of Constitutional Law* (2007) 5 (1): 44.
[188] Burnham, William, and Trochev, Alexei. "Russia's War between the Courts: the Struggle over the Jurisdictional Boundary between the Constitutional Court and Regular Courts," *The American Journal of Comparative Law* (2007) 55 (3): 381.
[189] Constitution Seventeenth Amendment Act 72/2013, Republic of South Africa.

While it is not a simple exercise to choose between institutions with whom the ultimate power of constitutionality review should rest, the creation of Constitutional Court and involving regular courts in constitutionality review should be considered for a range of reasons. However, a careful choice rather than a mechanical design that most fits into the essential characters of the polity needs to be underscored when, in particular, dividing constitutionality review power between regular courts and constitutional court.

CONCLUSION AND RECOMMENDATIONS

Judicial review of legislations, even if first effectively realized in the United States in early 19th Century, could not gain similar status in the rest of the world until the 20th Century. Despite the fact that the legislature was perceived as the guarantor of the universal values, in particular, in countries with civil law legal systems, there arose the need to limit the power of the legislature by introducing judicial review albeit with differing approach.[190] Some adopted the American decentralized form; others opted for the centralized European model while still others have chosen the hybrid of the two. Countries also differ in terms of the nature of the institution to which the task of judicial review is entrusted. Ordinary courts, separate constitutional courts or special bodies are used in different countries to accomplish the job of unconstitutionality review. Furthermore, what constitutional courts perform and what roles they play Depends on its own historical, political, social and cultural context and hence vary significantly from nation to nation.

Both Ethiopia and South Africa underwent a breakthrough constitutional transformation in many respects in 1994.[191] The institutional framework the configured for the purpose of unconstitutionality review, nonetheless, shows a vociferous difference. South Africa not only fashioned an independent Constitutional Court with a final say on constitutional matters but also regular courts have significant role in constitutionality review. On the contrary, the FDRE Constitution has assigned the task of unconstitutionality review to the HoF, a political body, with technical assistance from the CCI. However, the theoretical accounts on which the construction

[190] Mauro Cappelletti, 'Judicial review in comparative perspective', 58 Cal. L. Rev. (5) (1970) 1017.
[191] See the Interim Constitution of SA, Act 200/1993 and FDRE Constitution of 1995.

of the HoF was premised and its practical inaptness to carryout unconstitutionality review prompted a number of unresolved questions. The present work canvassed the theoretical flaws recognizing the works of others regarding its pragmatic challenges. Recognition of these verities inevitably calls for the need for reform. This research in no way claims to be comprehensive and final. Rather, it is intended to lay bare a leeway that takes into account the existing problematique of constitutionality review in Ethiopia mainly drawing on the South African experience. It offers a chance to think alternatively and opens a room for further research. Accordingly some reform measures will be recommended in what follows.

In the first place, it sounds not to be an easy task to recommend a constitutional court but not the Federal Supreme Court to exercise an ultimate authority on constitutional matters for each system has its own pain and success stories. Just to borrow the words of Kasia Lach and Wojciech Sadurski, "constitutional courts should not be taken for granted. Their role must be always critically evaluated …"[192] Hence, this piece of research need not reach conjecture rather is cautious when recommending the creation of a Constitutional Court. The unsolved lingering political fragility and persisting highly convoluted jurisdiction boundary issues between the Federal and Regional governments in Ethiopia might account for such a scrupulous inference. Genuine deliberation between political parties and agreement among the regional and federal governments as well as mass and scholarly participations might be sought beforehand so as not to recur the previous blunder.

With this in mind, the creation of a Constitutional Court requires the delimitation of jurisdiction boundary between the HoF and the Constitutional Court with due caution so as to avoid potential conflict of jurisdiction. Establishment of the rules of the game which usually involves regulating

[192] *Supra* note 38 at p. 232.

relations between the legislature, regular courts, other government organs and the constitutional court is highly imperative. A mechanism by which a smooth functioning of a system where a court may decline to entertain a constitutional matter falling within its jurisdiction under certain defined circumstance unless procedural requirements are met must be designed in particular where such a dispute arises between certain spheres of government or organs of a state.[193]

In addition, the procedure by which the Chief justice and the rest of judges come to bench must be crafted carefully so that professional integrity and independence would not be compromised.

While this work recommends the hybrid form of judicial review that consists of total devolution of constitutionality review power of subsidiary legislations on Federal and State regular courts, and making them share with the Constitutional Court the power to review legislations, the extent of declaration of unconstitutionality of legislation by lower courts, the subject of review by these courts, the exclusive jurisdiction of the constitutional court, and procedural requirements for the latter to sit as a court of first and last instance must be determined with sufficient clarity. Since this research calls for both constitutional and judicial reform in Ethiopia, it suggests much lesson to be drawn from the experience of the judicial system of South Africa and beyond.

The South African judicial review system is clear in particular in terms of power allocation between the regular courts and the Constitutional Court and also the power relationship between these organs. Moreover, direct access to the Constitutional Court is possible only under exceptional circumstances.

[193] *Supra* note 71 at p. 3-20.

BIBLIOGRAPHY

BOOKS AND BOOK CHAPTERS

Elkins, Zachary, et al. *The Endurance of National Constitutions* (New York: Cambridge University Press, 2009).

Favoreu, Louis, "Constitutional Review in Europe", in Louis, Henkin, and Albert, J. Rosenthal (eds.), *Constitutionalism and Rights* (New York: Columbia University Press, 1989).

Ginsburg, Tom, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases Cambridge* (Cambridge: Cambridge University Press, 2006).

Guarnieri, Carlo, and Pederzoli, Patrizia, *From Democracy to Juristocracy? The Power of Judges: a Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002).

Sadurski, Wojciech, *PostCommunist Constitutional Courts in Search of Political Legitimacy* (Florence: European University Institute, 2001).

Sajó, András, *Limiting Government: an Introduction to Constitutionalism* (Budapest: Central European University Press, 1999).

Spitz, Richard, *The Politics of Transition a Hidden History of South Africa's Negotiated Settlement* (Oxford: Hart Publishing, 2000).

Tsegaye, Regassa, "Courts and the Human Rights Norms in Ethiopia", in Assefa Fiseha (ed.), *Proceedings of the Symposium on the Role of the Courts in the Enforcement of the Constitution* (Addis Ababa: Birhanina Selam, 2001).

Woolman, Stuart (ed.), *Constitutional Law of South Africa* (Cape Town: Juta Legal and Academic Publishers, 2008).

JOURNAL ARTICLES

Abdo, Mohammed, "Legal Pluralism, Sharia Courts and Constitutional Issues in Ethiopia," *Mizan Law Review* (2011) 5 (1): 72.

Abdo, Muradu, "Review of Decisions of State Courts over State Matters by the Federal Supreme Court," *Mizan Law Review* (2007) 1 (1): 61.

Aaronson, Ori, "Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts," *University of Michigan Journal of Law Reform* (2010) 43 (4): 971.

Barnett, Randy E., "The Sound of Silence: Default Rules and Contractual Consent," *Virginia Law Review* (1992) 78: 821.

Barroso, Luis Roberto, "The Americanization of Constitutional Law and its Paradoxes: Constitutional Theory and Constitutional Jurisdiction in the Contemporary World," *ILSA Journal of International and Comparative Law* (2010) 16:579.

Burnham, William, and Trochev, Alexei. "Russia's War between the Courts: the Struggle over the Jurisdictional Boundary between the Constitutional Court and Regular Courts," *The American Journal of Comparative Law* (2007) 55 (3): 381.

Choudhry, Sujit, "After the Rights Revolution: Bills of Rights in the Post-conflict States," *Annual Review of Law and Social Sciences* (2010) 6: 301.

Clark, Tom S., and Kastellec, Jonathan P., "The Supreme Court and Percolation in the Lower Courts: an Optimal Stopping Model," *Journal of Politics* (2013) 75 (1): 150.

Davis, Dennis M., "Transformation and the Democratic Case for Judicial Review: the South African Experience," *Loyola University Chicago International Law Review* (2007) 5: 45.

Dickson, Brice, "Protecting Human Rights through a Constitutional Court: the Case of South Africa", *Fordham Law Review* (1997) 66 (2): 531.

Donovan, Dolores A., "Leveling the Playing Field: the Judicial Duty to Protect and Enforce the Constitutional Rights of Accused Persons Unrepresented by Counsel," *Ethiopian Law Review* (2002) 1: 31.

Dugard, Jackie, "Court of First Instance? Towards a Pro-poor Jurisdiction for the South African Constitutional Court," *South African Journal on Human Rights* (2006) 22: 261.

Fiseha, Assefa, "Federalism and the Adjudication of Constitutional Issues: the Ethiopian Experience," *Netherlands International Law Review* (2005) 52 (1): 1.

Freeman, Samuel, "Constitutional Democracy and the Legitimacy of Judicial Review," *Law and Philosophy* (1990) 9 (4): 327.

Ferreres Comella, Victor, "The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism," *Texas Law Review* (2004) 82: 1705.

Frosini, Justin, O., et al., "Constitutional Courts in Latin America: a Testing Ground for New Parameters of Classification?" *Journal of Comparative Law* (2008) 3 (2): 239.

Garlicki, Lech, "Constitutional Courts versus Supreme Courts", *and International Journal of Constitutional Law* (2007) 5 (1): 44.

Gewirtzman, Joni, "Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System," *American University Law Review* (2012) 61 (1): 457.

Gibson, James L., et al., "Defenders of Democracy? Legitimacy, Popular Acceptance and the South African Constitutional Court," *The Journal of Politics* (2003) 65 (1): 1.

Groppi, Tania, "The Italian Constitutional Court: Towards a Multilevel system of constitutional review?" *Journal of Comparative Law* (2008) 3 (2): 1.

Harding, Andrew, Leyland, Peter, and Groppi, Tania, "Constitutional Courts: Forms, Functions and Practice in Comparative Perspective," *Journal of Comparative Law* (2008) 3 (2): 1.

Hirschl, Ran, "The Judicialization of Mega-Politics and the Rise of Political Courts," *Annual Review of Political Science* (2008) 11: 93.

Issacharoff, Samuel, "Constitutional Courts and Democratic Hedging," *Georgetown Law Journal* (2011) 99 (4): 961.

Klug, Heinz, "South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition From Apartheid," *Journal of Comparative Law* (2008) 3 (2): 174.

Lach, Kasia, and Sadurski, Wojciech, "Constitutional Courts of Central and Eastern Europe: between Adolescence and Maturity," *Journal of Comparative Law* (2008) 3 (2): 212.

Limbach, Jutta "The concept of the supremacy of the constitution", *The Modern Law Review* (2001) 64 (1): 1.

Lollini, Andrea, "The South African Court Experience: Reasoning Patterns Based on Foreign Law," *Utrecht Law Review* (2012) 8 (2): 55.

Lomaskya, Loren E., "Contract, Covenant, Constitution," *Social Philosophy and Policy* (2011) 28 (1): 50.

Mgbako, Chi, et al., "Silencing the Ethiopian Courts: Non-judicial Constitutional Review and its Impact on Human Rights," *Fordham International Law Journal* (2008) 32 (1): 259.

Monaghan, Henry P., "Constitutional Adjudication: the Who and When," *The Yale Law Journal* (1973) 82 (7): 1363.

Ovsepian, Zh. I., "Constitutional Judicial Review in the Russian Federation," *Russian Politics and Law* (1996) 34 (5): 46.

Perrone, Lawrence Joseph, "The Fundamental and Natural Law 'Repugnant Review' Origins of Judicial Review: The Synergy of Early English Corporate Law with Notions of Fundamental and Natural," *BYU Journal of Public Law* (2009) 23 (1): 61.

Ponthoreau, Marie-Claire, and Hourquebie, Fabrice, "The French *Conseil Constitutionnel*: an Evolving Form of Constitutional Justice," *Journal of Comparative Law* (2008) 3 (2): 269.

Ramos Romeu, Francisco "The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions", *Review of Law and Economics* (2006) 2 (1): 1.

Seboka, Bulto Takele, "Judicial Referral of Constitutional Disputes in Ethiopia: from Practice to Theory," *African Journal of International and Comparative Law* (2011) 19 (1): 99.

Solyom, Laszlo, "The role of Constitutional Courts in the Transition to Democracy: with Special Reference to Hungary," *International Sociology*, (2003) 18 (1): 133.

Tsegaye, Regassa, "Sub-national Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level," *Mizan Law Review* (2009) 3 (1): 33.

Tsegaye, Regassa, "The Making and Legitimacy of the Ethiopian Constitution: Towards Bridging the Gap between Constitutional Design and Constitutional Practice", *Africa Focus* (2010) 23 (1): 85.

Tesfaye Fessha, Yonatan, "Judicial Review and Democracy: a Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review," *African Journal of International and Comparative Law* (2006) 14 (1): 53.

Tesfaye Fessha, Yonatan, "Whose Power is it any Way: the Court and Constitutional Interpretation in Ethiopia," *Journal of Ethiopian Law* (2008) 22 (1): 128.

Tushnet, Mark, "Popular Constitutionalism as Political Law," *Chicago-Kent Law Review* (2006) 81: 991.

Uitz, Renata, "Constitutional Courts in Central and Eastern Europe: What Makes a Question too Political?," *Juridica International* (2007) 13 (2): 47.

BOOK REVIEWS

Abraham, Henry J., "Mauro Cappelletti, Judicial Review in the Contemporary World," *The American Political Science Review* (1972) 66 (4): 1373.

Cooper, Allan D., "Heinz Klug, Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction," *Africa Today* (2003) 50 (2): 107.

Jellhorn, Walter, "Mauro Cappelletti, Judicial Review in a Contemporary World," *The American Journal of Comparative Law* (1972) 20 (2): 351.

INTERNET SOURCES

Abdo, Muradu, *Legal History and Traditions. Teaching Material*, Prepared under the sponsorship of the Justice and Legal System Research Institute, available at chilot.files.wordpress.com/2011/06/legal-history-and-traditions.pdf, accessed on 15 March 2013.

Ginsburg, Tom, *The global spread of Constitutional review: An Empirical Analysis*, available at http://www.law.northwestern.edu/colloquium/law_economics/documents/Spring2012_Ginsburg_Global_Constitutional.pdf, accessed on 15 March 2013.

The World Bank, *Ethiopia. Legal and Justice Sectors Assessment, 2004*, available at http://www4.worldbank.org/**legal**/publications/ljrmanualLowres.**pdf, accessed on 27 March 2013.**

CASES

Arizona v. Evans, 514 U.S. 1 (1995).

Bruce and Another v. Fleecytex Johannesburg CC and Others 1998, Case CCT1/98, 1998(4) BCLR 415.

Certification of the amended text of the constitution of the Republic of South Africa 1996, Case CCT37/96, 1997(1) BCLR 1.

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

LEGAL MATERIALS

Proclamation n. 1/1994, *Constitution of the Federal Democratic Republic of Ethiopia*, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, Year 1, n. 1, Addis Ababa, 1995.

Proclamation n. 250/2001, *The Council of Constitutional Inquiry proclamation*, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, Year 7, n. 40, Addis Ababa, 2001.

Proclamation n. 251/2001, *Consolidation of the House of the Federation and Definition of its Powers and Responsibilities* Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, Year 7, n. 41, Addis Ababa, 2001.

Proclamation n. 454/2005, *Proclamation to re-amend the Federal Courts Proclamation n. 25/1996*, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, Year 11, n. 42, Addis Ababa, 2005.

Labor Relations Act 66/1995, Republic of South Africa, 13 December 1995.

Restitution of Land Rights Act 22/1944, Republic of South Africa, 25 November 1994.

Constitution Seventeenth Amendment Act 72/2013, Republic of South Africa.

Constitution of the Republic of South Africa, Act 108/1996, Republic of South Africa.

OTHER DOCUMENTS

Minutes of the Constitutional Assembly, (unpublished), Addis Ababa, November 1994.