Constitutional Adjudication by Parliaments: Experiences across Time and Space

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Table of Contents

Abstract

This thesis has the purpose of exploring historical experiences in France and Brazil and the contemporary constitutional set-up in China where parliaments were/are empowered to adjudicate constitutional issues and derive lessons for a similar contemporary constitutional design in Ethiopia. Comparison of the contexts and rationales under which legislative or non-legislative parliaments were/are endowed with the power of interpreting constitutions and failures/difficulties have been made. In France, the Revolutionaries, who were against the powerful courts of the pre-revolution period, excluded courts from interfering in the legislative and administrative functions for reasons of separation of powers and supremacy of *la loi.* The 1824 Brazilian Constitution had to establish strong emperor at the centre to safeguard unity of the country against powerful provinces. Regardless of the differences in context and rationales, parliaments in both France and Brazil had failed to adjudicate constitutional issues. Supremacy of the National People's Congress and absence of separation of powers, both attributable to Socialist/Communist ideology, derived the current constitutional arrangement in China whereas in Ethiopia, the supremacy of the Nations, Nationalities and Peoples and consideration of the Constitution as an agreement among them has made the House of Federation to be constitutional adjudicator. The experiences across time in different jurisdictions indicate that (non-)legislative assemblies are not appropriate organs to adjudicate constitutional issues. Therefore, the Constitution of Ethiopia should take lessons of failure/difficulty from the experiences of France, Brazil and China and resort to other institutional choices for constitutional adjudication.

List of Abbreviations

CCI- Council of Constitutional Inquiry of Ethiopia

CPC- Communist Party of China

EPRDF- Ethiopian People's Revolutionary Democratic Front

FDRE- Federal Democratic Republic of Ethiopia

HoF- House of Federation

LPC- Local People's Congress

NNPs- Nations, Nationalities and Peoples

NPC- National People's Congress

NPCSC- National People's Congress Standing Committee

Introduction

The current Ethiopian Constitution has been praised for accommodating diversity as 'building bricks' of the federal system[1] thereby adopting ethnic federalism, allocating one third of the constitutional provisions to human rights including socio-economic and environmental rights, recognizing women's past sufferings, and providing for affirmative actions, child rights etc. The Constitution makes the Nations, Nationalities and Peoples (hereinafter the 'NNPs') its authors and declares that the federation is established by their 'free' agreement.[2] Sovereign political power also resides in them.

The Constitution was, on the other hand, criticized because of its making process and content. Many scholars have contested its legitimacy arguing that the making process did not include significant political actors, the discussions were more of educational rather than taking inputs from the population, and the whole process was dominated by the Ethiopian Peoples' Revolutionary Democratic Front (hereinafter 'EPRDF') and hence it lacks original legitimacy.[3] Others also criticized it on the ground that the federal structure tilts more towards the 'self-rule' rather than the 'shared rule'[4] considering it as a 'recipe for disaster'. The existence of highly centralized political party which has dominated the political sphere since the promulgation of the Constitution was also considered as making the federal arrangement 'dysfunctional'.[5]

Absence of strong form of constitutional review which keeps government organs within their constitutional limits was also another critic. The Constitution empowers the House of

[1] See generally Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: Comparative Study*, (The Netherlands: Wolf Legal Publishers, 2006).
[2] Paragraph 1 of the Preamble of the FDRE Constitution.
[3] See for instance Tsegaye Regassa, 'The Making and legitimacy of the Ethiopian Constitution: Towards Bridging the gap between Constitutional Design and Constitutional Practice', *Africa Focus*, 2010, Volume 10 No.1, pp. 85-118. www.gap.ugent.be/africafocus/pdf/vol23_1_making.pdf last visited 04/04/2017.
[4] See for instance Fiseha, Federalism and Accommodation of Diversity, *op cit.* pp. 297-300.
[5] See for instance Aberra Degefa, 'The Scope of Rights of National Minorities under the Constitution of FDRE,' Series on Ethiopian Constitutional Law, 2005, Volume 1.

Federation (hereinafter 'the HoF'), assisted by the Council of Constitutional Inquiry (hereinafter 'the CCI'), as an organ interpreting the Constitution. Some criticize this mechanism of constitutional adjudication as highly politicized indicating 'absence of effective domestic safeguards against regression into rule by law'.[6] Others criticize it on the ground that it silences ordinary courts from protecting human rights and the HoF lacks independence to exercise the necessary checks and balances against government organs and as such does not protect human rights.[7] There are ample scholarly literatures that critically analyse the fact that the HoF cannot effectively interpret the Constitution and make different recommendations.

The tradition of empowering parliaments in socialist states was more common and currently exists in China where the National People's Congress (hereinafter the 'NPC) is empowered to interpret the Constitution. This arrangement was categorized as one of the weak form of constitutional review which gave unlimited power to the government and ultimately to the Communist Party of China (hereinafter 'the CPC').[8] Therefore, Ethiopia is not alone in empowering a parliament to interpret the constitution and hence it should derive lessons from historical and contemporary failures/difficulties.

So far, scholarly works have addressed the issue of whether a parliament could effectively interpret constitutions both theoretically and in practice. But, this issue has not been explored from historical perspectives by comparing similar past arrangements with the current ones. The main purpose of this thesis is to explore the experiences of constitutional adjudication by

[6] Adem K. Abebe, 'Rule by law in Ethiopia: Rendering constitutional limits on government power nonsensical', CGHR Working Paper 1, 2012, Cambridge: University of Cambridge Centre of Governance and Human Rights, pp. 15-16. https://www.repository.cam.ac.uk/handle/1810/245111 last visited 04/04/2017.

[7] Chi Mgbako *et al*, 'Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights', *Fordham International Law Journal*, 2008, Vol. 32, Issue 1, pp. 259- 297. http://ir.lawnet.fordham.edu/ilj/vol32/iss1/15/ last visited 04/04/2017.

[8] See for instance Cheng Xueyang, 'Institutional Developments, Academic Debates and Legal Practices of the Constitutional Review in China: 2000-2013', *Frontiers of Law in China*, 2014, Vol. 9, pp. 636-656 (hereinafter 'Constitutional Review in China') http://academic.hep.com.cn/flc/EN/10.3868/s050-003-014-0040-1 last visited 04/04/2017; Guobin Zhu, 'Constitutional Review in China: An Unaccomplished Project or a Mirage?', *Suffolk University Law Review*, 2010, Volume 43. pp. 593-624, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1664949&download=yes last visited 04/04/2017.

parliaments in France before 1946, Brazil before 1891 and contemporary China and draw some lessons to Ethiopia.

The main reason that motivated me to choose to undertake my thesis on the historical accounts when legislative assemblies were empowered to interpret constitutions and comparing them is to derive lessons for similar contemporary arrangement in Ethiopia as I was working in the Council of Constitutional Inquiry as constitutional researcher and have practically observed how weak the constitutional review system is.

The core research question of the thesis is to explore historical failures/difficulties when parliaments served as constitution interpreters like in the previous constitutions of France and Brazil and contemporary China and compare them with Ethiopia. In dealing with this main research question, the author addresses the following subsidiary research questions:

- What were/are the rationales behind empowering the legislatures in the constitutional history of France, Brazil and contemporary China and how could it be compared with the reasons for similar arrangement in Ethiopia?
- What lessons could be drawn to Ethiopia from the failures/difficulties of empowering legislatures to interpret constitutions in France, Brazil and China?

The thesis employs predominantly library work whereas some cases have also been referred with a view to illustrate failures/difficulties of constitutional adjudication by parliaments. Comparison is made among the jurisdictions based on some common criteria like the rationales behind empowering parliaments as constitutional adjudicator and their effectiveness.

Regarding its limitation, the thesis is confined to exploring historical experiences of constitutional adjudication by parliaments in France and Brazil and experiences of China in the periods mentioned above and derive lessons to similar constitutional design in Ethiopia. Hence, it does not cover the issue of which institutional choice fits Ethiopia. The other limitation of

this thesis is the inaccessibility of practical data of cases decided by the HoF and CCI. To remedy this gap, I have looked in to unpublished annual reports and cases to show the failures and difficulties of constitutional adjudication by the HoF. With respect to the significance of the thesis, it will contribute towards strengthening the idea that parliaments are not appropriate bodies to interpret constitutions by showing throughout history that it has failed or faced difficulties.

The thesis is divided in to three Chapters. Chapter One discusses the reasons why constitutions are interpreted and the commonly known institutional choices that should adjudicate constitutional disputes. Regardless of differences in institutions, constitutional adjudication has the purpose of at least ensuring supremacy of the constitutions, defining the scope of fundamental rights and as such protect them from acts of government organs violating rights and adjudicating disputes among government organs. With a view achieve these objectives, two common models of constitutional adjudication have been identified: decentralized model where ordinary courts could interpret the constitution and centralized model were a single specialized court is charged with the task. Constitutional adjudication by (non-)legislative parliaments have been a strange institutional choice.

Chapter Two explores and analyses the experience of France between the periods starting from the Revolution until the 1946 Constitution where the *Sénat* was empowered to review the constitutionality of legislations. The rationales why such institutional choice was made is also discussed along with the context which led to such arrangement. This Chapter also discusses the 1824 Constitution of Brazil where the General Assembly was given the task constitutional interpretation. It also identifies the lessons that should be derived from the experiences of France and Brazil to similar contemporary arrangements in Ethiopia.

The final Chapter explores constitutional adjudication in China by the NPC with its Standing Committee (hereinafter 'the NPCSC) and Ethiopia by the HoF/CCI by focusing on why (non-

)legislative assemblies are empowered to interpret the constitutions. The reasons that triggered such arrangements are partly similar to the extent that both rely on popular supremacy: supremacy of working people expressed through the supremacy of the NPC and supremacy of the NNPs as exercised by the HoF. However, the NNPs are authors of the Constitution and have final say on it whereas the NPC as the government organ supervises the Constitution. This Chapter also discusses how they are operating since their establishments and compares these trends with the failure stories in France and Brazil. It identifies lessons that could be discerned from the failures of the NPC of China to Ethiopia.

Chapter One

Constitutional Adjudication: Theoretical Basis

Constitutional adjudication[9] has become one of the main areas of comparative constitutional law that has attracted the attention of many scholars from different jurisdictions. Even if the main focus of the thesis is to explore constitutional adjudication by parliaments particularly in the constitutional history of France and Brazil and similar contemporary arrangements in the constitutions of China and Ethiopia, it would be appropriate to discuss the reasons why constitutions are interpreted and which institutions are preferred in developed and stable constitutional systems. Hence, this Chapter focuses on highlighting the reasons why constitutions are interpreted and common models of constitutional interpretation.

1.1. The 'Why' of Constitutional Interpretation

Constitutions are fundamental laws that have the purpose of establishing and structuring governments, guaranteeing fundamental rights and determining the relationship between the government and citizens. They constitute a government and hence governments are expected to conform to this higher law. Constitutions confer legitimacy over government's action and hence empower a government.[10] They may also include 'aspirational' functions by 'picturing the best sort of community people could attain through its constitutional arrangements and commandments.'[11] 'In the conditions of creating and building up a modern democratic society,

[9] Even if the meaning of the expressions 'constitutional adjudication' and 'constitutional interpretation' may not be exactly the same, they are used interchangeably in this thesis as it may not have an impact on the issue under consideration.

[10] Walter F. Murphy, James E. Fleming, Sotirios A. Barber, *American Constitutional Interpretation,* (New York: The Foundations Press Inc., 1995) p. 3.

[11] Id. P. 4

the constitution appears as an act of institutionalizing the political system, but also as a means and guarantor of securing the fundamental democratic, political, and social relations.'[12]

Constitutional interpretation refers to the task of safeguarding the supremacy of a constitution and keeping laws and actions of government within the constitutional limits. Constitutional interpretation has been considered as one of the main mechanisms to protect fundamental rights enshrined in constitutions from actions of government by defining the scope of rights.[13] Legislation enacted by either the law maker or executive organ should be checked for compatibility with the constitution primarily with a view to check whether such acts of government violate fundamental rights and secondarily to keep balance of power among organs of government themselves.[14] Therefore, constitutional interpretation is generally a means ascertaining supremacy of the constitutions.

Depending on jurisdictions, constitutional interpretation may have one or more of the following proposes: to limit governmental powers, to keep supremacy of constitutions by ensuring that all laws and decisions conform to the constitution, and to keep balance of power in federations. Constitutions in federal countries include agreements and bargains hence considered as covenant. There should be an impartial arbiter so solve disputes that may arise on division of power between the two levels of government.[15]

[12] Pavle Nikolic, 'Constitutional Review of Laws by Constitutional Courts and Democracy: Problem of Legitimacy', in Mahendra P. Singh (ed.), *Comparative Constitutional Law*, (Lucknow: Eastern Book Company, 2011), p. 38.

[13] See Armen Mazmanyan *et al*, 'Constitutional Courts and Multilevel Governance in Europe: Editors' Introduction', in Armen Mazmanyan *et al* (eds.), *The Role of Constitutional Courts in Multilevel Governance*, (Cambridge: Intersentia Publishing Ltd., 2013).

[14] In France, interpreting a constitution was done primarily to inhibit the legislature from encroaching upon the powers of the executive. It was only in 1971 that the *Conseil Constitutionnel* decided that it also safeguards fundamental rights. See Sophie Boyron, *The Constitution of Franc*e: *A Contextual Analysis*, (Oxford: Hart Publishing Ltd. 2013) pp. 150-151

[15] See Rudolf Dolzer, 'The Role of the Courts in the Preservation of Federalism: Some Remarks on the US and the German Experience', in in Mahendra P. Singh (ed.), *Comparative Constitutional Law*, (Lucknow: Eastern Book Company, 2011), pp.69-88.

One of the reasons to interpret constitutions may be that clauses or phrases of constitutional texts are unclear as to their meanings. Framers of constitutions often adopted flexible language to make a workable constitution or owing to difficulties of including compromises and balancing of values. [16] James Madison identified three sources of difficulties in framing the US Constitution: the complexity of the relations to be regulated, the imperfections of human notions about politics, and the inadequacy of words to convey complex ideas with precision and accuracy.[17] Hence, constitutions are interpreted in order to clarify clauses and phrases which are not clear to apply to particular cases.

Some clauses in constitutional texts may appear in potential conflict with others in order to apply them to particular cases.[18] Some other constitutional clauses may have been framed very broadly or some parts of the constitutional text may be read as if it takes away what it granted by another clause. It is through constitutional interpretation that these constitutional clauses could be applied consistently.

Another reason that justifies interpretation of constitutions may relate to omissions. Although in many ways succinctness of constitutional texts is desired, 'this brevity means that much is left unsaid or only hinted at'.[19] Constitutional texts may not include all matters to be regulated owing to different reasons. However, such omissions may be remedied either by amendments if it is fundamental, or by interpretation.

Unforeseen developments may also necessitate interpretation of constitutions.[20] In the context of the US Constitution, there were many matters that were not foreseen by the framers but that

[16] Murphy *et al*, *American Constitutional Interpretation*, *op cit.* p.9
[17] Ibid.
[18] Id. p. 10.
[19] Id. p. 11.
[20] Id. p. 12.

could be accommodated through constitutional interpretation which helped the Constitution to be the oldest constitution in the world.[21]

In addition to problems and difficulties in constitutional texts, constitutions are interpreted with a view to ensure supremacy of constitutions and to ensure compatibility of legislation and executive action with constitutions. Review of constitutionality of legislation by interpreters of constitutions, most often supreme courts and constitutional courts, has been contested on the ground that it undermines democratic principles by empowering unelected judges to nullify legislation enacted by elected representatives which have direct mandate from the people.[22]

1.2. Models of Constitutional Interpretation

Even if there is a consensus that constitutions should be interpreted owing to the reasons discussed above, the issue of who should interpret them has been one of the most controversial issues in constitutional law. In the United States, ordinary courts interpret the Constitution while most European countries have established constitutional courts.[23] In France, the *Conseil Constitutionnel* is empowered to interpret the Constitution. In China and Ethiopia, the constitution is interpreted by a (non-)legislative chamber. These whole varieties of institutions indicate the disagreements thereof on institutions which interpret constitutions.

The role of the organ entrusted with the power of interpreting a constitution is paramount: it ensures the supremacy clause of the Constitution; it provides the ultimate decision in constitutional disputes; in federations, it umpires the division of power between the federal

[21] Ibid.

[22] See for instance Helmut Steinberger, 'Aspects of Judicial Review of the Constitutionality of executive Actions in the Federal Republic of Germany: A Basic Outline', in Mahendra P. Singh (ed.), *Comparative Constitutional Law*, (Lucknow: Eastern Book Company, 2011), pp. 29-32; Pavle Nikolic, 'Constitutional Review of Laws by Constitutional Courts and Democracy: Problem of Legitimacy', in Mahindra P. Singh (ed.), *Comparative Constitutional Law*, (Lucknow: Eastern Book Company, 2011), pp. 33-48.

[23] From among European countries, eighteen of them have established constitutional courts while only three countries that adopted the USA model of judicial review. See in general Victor Ferreres Comella, *Constitutional Courts and Democratic Values: a European Perspective*, (New Haven: Yale University Press, 2009).

government and the constituent units; moreover, it plays an adaptive role to the current change by keeping its spirit; it enforces human rights. Given these important functions, institutions established to undertake such tasks are vital and hence should be impartial and independent.

Over time, two models of constitutional adjudication have emerged: centralized and decentralized. These two models have different history emerging from different jurisdictions. Both have their own peculiar features. This section of the thesis is devoted to briefly outlining these two different approaches to constitutional interpretation.

1.2.1. Decentralized Model

In the United States and other countries that follow its practice, the power to interpret the constitution is vested in the ordinary courts which examine regular civil or criminal cases. In many countries, which have adopted this system, the judicial review power is given to the highest court of the land having jurisdiction both over general law matters and exclusive jurisdiction over all constitutional controversies.

The decentralized model had its origin in the United States, where judicial review remains a most characteristic and unique institution.[24] The idea of empowering ordinary courts to interpret the Constitution was constructed by interpretation in the *Marbury v. Madison* where Chief Justice John Marshall reasoned that 'it is emphatically the province and duty of the judicial department to say what the law is' and to apply the constitution as a higher law to ordinary legislation.[25] *Marbury* articulated a theory of judicial review in which courts could play a large role in national governance.'[26]

[24] Mauro Cappelletti, 'Judicial Review in the Contemporary World', *California Law Review*, 1970, Vol. 58, Issue 5, p. 1034, http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2712&context=californialawreview last visited 04/04/2017.
[25] *Marbury v. Madison*, 5 U.S. 137 (1803).
[26] Mark Tushnet, '*Marbury v. Madison* and the Theory of Judicial Supremacy', in Robert P. George (ed.), *Great Cases in Constitutional Law*, (Princeton: Princeton University Press, 2000), p. 1.

In the United States, all judges, state and federal, can decide on constitutional issues.[27] The authority to review the constitutionality of legislation is vested inherently in the judiciary in the USA while this task is monopolized by constitutional courts in many European countries.[28] The Federal Supreme Court has jurisdiction to review those decisions and could give authoritative interpretations which are binding on lower courts.[29] 'The power of judicial review, which is invoked to preserve the Constitution as a supreme law of the land, involves two different missions: one directed towards the states and implicates principle of federalism and the other addresses acts of executive and legislative branches.[30] Ordinary courts could adjudicate constitutional issues only in concrete cases where there are real controversies. Hence, they cannot review constitutionality of legislation in abstract i.e. in the absence of real disputes between parties.

In order for the parties to bring such issues to the attention of courts, they should fulfil standing requirements: injury in fact, nexus between the injury and the unlawful act and redressability.[31] These requirements are one of strict rules of standing to bring constitutional questions. '[I]t is in principle only the violation of a party interest which puts in motion the procedure of legislation.'[32] It may then be questionable whether it is possible to contest constitutionality of legislation which may not relate to a particular individual interest but affect the public at large.[33]

[27] Vicky Jackson & Mark Tushnet, *Comparative Constitutional Law* (New York, Foundation Press, 2nd edition, 2006), p. 501.
[28] Alec Stone Sweet, 'Constitutional Courts', in Michel Rosenfield and Andras Sayo (eds.), *The Oxford Handbook of Comparative Constitutional Law*, (Oxford: Oxford University Press, 2012), p. 818.
[29] Ibid.
[30] Maeva Marcus, 'The Founding Fathers, Marbury vs Madison- and So What?' In Eivind Smith (ed.), *Constitutional Justice under Old Constitutions*, (The Hague: Kluwer Law International, 1995), p. 25.
[31] 468 U.S. 737 (1984) *Alen v. Wright.*
[32] Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution', *The Journal of Politics*, 1942, Vol. 4, No. 2, p. 193, http://www.journals.uchicago.edu/doi/abs/10.2307/2125770 last visited 04/04/2017.
[33] Here environmental cases may be good examples. In *Massachusetts v. EPA*, the U.S. Supreme Court decided that Massachusetts has standing to sue the Federal Environmental Protection Agency for failure to regulate the emission of 'green gases' which contributed to global warming. However, there are cases like *Valley Forge Christian College v. Americans United* (454 U.S. 464 (1982)) where the constitutionality of act of the federal government giving a real estate to a private Christian university under the supervision of a religious order as a violation of the 'Establishment Clause' was rejected on the ground that the plaintiffs did not show the injury they

Decisions rendered by the US Federal Supreme Court on the unconstitutionality of legislation is binding on all parties and government organs cannot apply the statute anymore. It also serves as a precedent binding lower courts in entertaining similar constitutional issues.

1.2.2. Centralized Model

The centralized model of constitutional review was born in Europe after World War I.[34] It was proposed by Hans Kelsen and first established in Austria where he also served as constitutional judge.[35] Kelsen feared that authorizing ordinary courts to refuse to the application of unconstitutional legislation would create non-uniformity in constitutional questions.[36] He also added that the existence of administrative courts made contradiction among the decisions of courts was inevitable.[37] Absence of precedence in many European countries was another reason for Kelsen to propose a different approach to constitutional adjudication than that of the US. Hence, he argued that these reasons compel for the centralization of judicial review of legislation where the 1920 Austrian Constitution reserved judicial review of legislation to a special court called constitutional court.[38]

There are different explanations why most European countries rejected the US model of constitutional adjudication. Part of the explanation focuses on the principle of separation of powers that emerged during the French Revolution of 1789 and spread to many European

suffered. See Norman Dorsen *et al.* (eds.), *Comparative Constitutionalism: Cases and Materials* (St. Paul: Thomson/West, 2nd edition, 2010) pp. 168-170.

[34] Victor Ferreres Comella, 'The European Model of Constitutional Review of Legislation: Toward Decentralization?' 2004, *ICON*, Vol. 2, No. 3, p.461, icon.oxfordjournals.org/content/2/3/461.full.pdf last visited 04/04/2017.

[35] See John E. Ferejohn, 'Constitutional review in the Global Context', *Legislation and Public Policy*, 2004, Vol. 6. pp. 49-59. http://www.nyujlpp.org/wp-content/uploads/2012/11/John-E-Ferejohn-Constitutional-Review-in-the-Global-Context.pdf (Ferejohn argues that the Kelsean model of constitutional review spread throughout Europe because they wanted to enforce constitutional provisions after the collapse of authoritarian regimes)

[36] Hans Kelsen, 'Judicial Review of Legislation', *op cit.* pp. 184-186.

[37] Ibid.

[38] Ibid.

countries, where judges were to have limited role.[39] Many scholars have criticized this explanation on the ground that even if 'it is important in explaining the rise of special bodies like constitutional courts in Europe, it does not give us justificatory reasons for their existence and for the particular details of their design.'[40]

The second explanation is that European civil law countries cannot achieve legal certainty with the design similar to decentralized system of constitutional adjudication.[41] The reasons include the existence of more than one supreme courts owing to the fact that courts are specialized in different areas of law and absence of the doctrine of precedent in the civil law tradition.[42] Therefore, centralized model of constitutional review was partly explained by the conception of separation of powers and legal certainty.

The centralized model of constitutional review refers to the existence of one single organ to interpret constitutions. A constitutional court is an independent organ of the state with the task of primarily ensuring superiority of the constitutional norm.[43] In other words, it is only the constitutional court that reviews constitutionality of legislation and declare it unconstitutional. Portugal is one exception in that in addition to establishing constitutional court, it also empowers ordinary courts to set aside legislation they deem unconstitutional, but reserving the power to nullify such legislation only to the constitutional court.[44] In addition, ordinary courts in some countries are empowered to set aside legislation that were enacted before the constitution came in to force.[45]

[39] Comella, *Constitutional Courts and Democratic Institutions, op cit*, p. 10. Developments which led to restricting the role of courts in reviewing legislation will be discussed in detail in Chapter two.
[40] Ibid. p. 19.
[41] This justification was brought by Hans Kelsen. See Kelsen, 'Judicial Review of Legislation', *op cit.*
[42] Comella, *Constitutional Courts and Democratic Institutions, op cit*, p. 21.
[43] Stone Sweet, 'Constitutional Courts', *op cit*, p.817.
[44] Comella, The European Model of Constitutional Review', *op cit*, p. 463.
[45] Comella, *Constitutional Constitutional Courts and Democratic Institutions, op cit*, p. 6.

With respect to tasks allocated to constitutional courts other than reviewing the constitutionality of legislation, some courts have jurisdiction to supervise the regularity of election and referenda, to verify legality of political parties or to enforce the criminal law against higher government officials.[46] 'The more important those other functions are, the larger the workload they generate, and the closer they are conceptually to the enforcement of ordinary law, the less pure constitutional court is.'[47]

The issue of who could bring cases to constitutional courts is another important issue to highlight under this section. The first type of procedure is through constitutional challenges, to be submitted by public institutions which challenge legislation in abstract in the absence any controversy.[48] A statute may be challenged before or after promulgation in different jurisdictions. The second type of procedure is through constitutional questions initiated during litigation in ordinary courts where judges stay proceedings and send the constitutional issue to the constitutional court if he/she believes that a statute applicable in that particular case is unconstitutional.[49] Some countries like Germany and Spain provide for a third type of procedure where individuals can file a *constitutional complaint* alleging that their fundamental rights has been violated.[50]

Constitutional courts often review the constitutionality of legislation prior to the promulgation of laws. Such control of legislation is called 'abstract review' which implies the absence of cases and controversies unlike the decentralized model. Here, constitutional courts 'opines on the constitutionality of proposed or enacted legislation without regard to the application'.[51] France

[46] Ibid.
[47] Id. p. 6
[48] Id. p. 7
[49] Ibid.
[50] Ibid.
[51] Michael C. Dorf, 'Abstract and Concrete Review', in Vikram David Amar and Mark V. Tushnet (eds.), *Global Perspectives on Constitutional* Law, (New York: Oxford University press, 2009), p. 3.

has been an archetypal for 'pure' abstract review until the *Conseil Constitutionnel* was empowered in 2008 to review constitutionality of legislation in concrete cases.[52]

1.3. Constitutional Adjudication by (Non-) Legislative Houses

At this juncture, it is important to mention that review of constitutionality of legislation by courts is not automatic. Institutional choices vary across jurisdictions. Even in the United States where there is strong judicial review, there are debates relating to whether it is compatible with democratic principles to allow unelected judge to quash legislation enacted by representatives which have direct mandate from the people. Many European countries have chosen constitutional courts. Some other jurisdictions have made a different arrangement by granting this power to (non-)legislative assemblies which are the focus of this thesis.

In the spectrum of institutional choices empowered to adjudicate constitutional issues, one could find parliaments with or without legislative powers in some jurisdictions. There were some historical incidents where parliaments were empowered with such task and even there are contemporary examples for such arrangement. In France, since the Revolution of 1789 up to the enactment of the 1946 Constitution, the *Senat* was the organ who used to adjudicate constitutional disputes. The Imperial Constitution of Brazil which was enacted in 1824 on the verge of its independence was another example where the Senate was empowered to interpret the Constitution.

Currently, China and Ethiopia stand at odds as jurisdictions which empower legislative and non-legislative parliament to interpret constitution.[53] The 1982 Constitution of Peoples' Republic of China authorizes the NPC to 'supervise the enforcement of the Constitution'.[54] The

[52] Ibid.
[53] See Article 62(1) of the Ethiopian Constitution and Article 62(2) of the Constitution of China.
[54] Article 62(2) of the Constitution of Peoples Republic of China.

NPC is also supported by the Standing Committee which undertakes routine tasks of the NPC. Similarly, the 1995 Constitution of the Federal Republic of Ethiopia authorizes the HoF, an upper chamber, to 'interpret the Constitution' as one of its many tasks listed under Article 62 of the Constitution. The experiences of constitutional adjudication in the jurisdictions mentioned above will be discussed in detail in the next two chapters as it is the main theme of the study. The approach followed first starts by highlighting the context and reasons of each of the constitutional arrangements were made, then tries to look in the effectiveness of the arrangement and compares the jurisdictions.

Chapter Two

Historical Failures/Difficulties of Constitutional Adjudication by Parliaments in France and Brazil

2.1. Introduction

Constitutional history and comparative law shows that there were constitutions which empowered parliaments to adjudicate constitutional disputes. As has been highlighted in the last section of Chapter One, the constitutional history of France and Brazil could be mentioned as typical examples to show that such an arrangement could provide lessons to similar contemporary designs particularly to Ethiopia. This Chapter focuses on discussing these two jurisdictions in a more detailed manner with more emphasis on France due to long-standing influence on the conception of judicial review afterwards. It is designed to show the failures and difficulties of constitutional adjudication by parliaments and the lessons it teaches to similar contemporary arrangement in Ethiopia.

2.2. Constitutions of France between 1799 and 1946

France is one of the jurisdictions which rejected the US model of judicial review as early as the Revolution when courts were deliberately restricted, by law, from interfering in the legislative and administrative functions where the judiciary was considered as the 'most dangerous organ'. The *Sénat* was instead empowered to interpret the constitutions. There are explanations given to such arrangements. This section of the thesis focuses on discussing how the Revolutionaries reacted to the roles of courts and the rationales behind granting the power of adjudicating constitutional disputes to the *Sénat.*

2.2.1. The Reactions of the Revolutionaries and the Sénat

During the old regime, the *parlements*[55] had active roles in the government process. Many historians consider the *parlements* as the last reflection of the tension between the aristocracy and the monarchy[56] as they resisted many reforms. Particularly, the refusal of the *Parlement* of Paris to register edicts that created new offices, reforms on monetary and fiscal controls and edicts of tax reforms gave provincial *parlements* the same view and claims of resisting reforms by the aristocracy and the King.[57]

Within the *ancien régime*, *parlements* had an active role in the legislative process; they could reject laws declared by the Kings. The courts had the right of *remonstrance*, which entitled them to refuse to register a King's decree which they believed violate the 'fundamental law'-principles that were developed in the courts for a long time.[58] The judges of *parlements* affirmed that they had the power and obligation to 'examine edicts and laws of the Kings' against the fundamental law.[59]

'By 1750, the *parlements* had emerged as an articulate and determined opposition, resisting every effort at moderate reform that successive ministers sought to propose.'[60] There were frequent and stiff confrontations between the *parlements* and the King, which compelled the

[55] *Parlements* were appellate courts of the *ancien régime* in France. Initially, there was only one *Parlement*, that of Paris. Later, other *parlements* were created in the provinces. See https://www.britannica.com/topic/Parlement last visited 04/06/2017.

[56] William Doyle, 'The *Parlements* of France and the Breakdown of the Old Regime 1771-1788', *French Historical Studies*, 1970, Vol. 6, No. 4, p. 415, https://www.jstor.org/stable/i212687 last visited 04/05/2017.

[57] Martin A. Rogoff, *French Constitutional Law: Cases and Materials*, (Durham: California Academic Press, 2011) p. 126.

[58] James Bradsley, 'Constitutional Review in France', *Supreme Court Review*, 1975, Vol. 1975, p. 191, http://www.journals.uchicago.edu/doi/abs/10.1086/scr.1975.3108812 (Emphasis original). The requirement of registration of king's edicts and ordinances originally had a narrow and practical function of providing the *parlement* with a reliable text which later was considered by the crown to be an essential requirement. See for instance Rogoff, *French Constitutional Law, op cit.* p.125.

[59] Mauro Cappelletti and John Clarke Adams, 'Judicial Review of Legislation: European Antecedents and Adaptations', *Harvard Law Review*, 1966, Vol. 79, p. 1210. https://www.jstor.org/stable/pdf/1339202.pdf last visited 04/04/2017. Courts used to refer traditional higher laws of the kingdom as 'fundamental law' as there was no written constitution. See also Comella, *Constitutional Courts and Democratic Values, op cit.* p. 12.

[60] Rogoff, *French Constitutional Law, op cit.* p. 126.

latter to make some reforms in the judiciary. This in turn led to judicial strikes thereby creating a tense relationship among them.[61] These powerful courts kept their control over the King for a longer time until the eve of the Revolution.

The French Revolution responded in a 'hostile' manner to the powerful and arbitrary role played previously by the judiciary.[62] This hostility to the role of judges has led the French constitutional thought for nearly two centuries to have the notion of 'political' judicial review.[63] There were several measures that aimed at excluding ordinary courts from the task of reviewing legislation. Such hostile approach began to take action in 1790 where a judicial reform was introduced by the Constituent Assembly, which required judges to apply and interpret statutes and precluded them from taking part in law-making functions.[64] Similar prohibition against judges were incorporated in the 1791 and 1795 Constitutions.

The reaction against the role of courts in the *ancien régime* yielded different attempts to exclude the judiciary from the purview of constitutional review of legislation which went through different proposals: in 1792, a special bench of 'censors' was proposed to be established within the legislature; in 1793, a 'national grand jury' was proposed to vindicate the rights of citizens oppressed by the legislature; in 1795, a '*jurie constitutionnaire*' was proposed to hear complaints relating to the unconstitutionality of legislation.[65] These proposals helped prepare the terrain for a system of non-judicial review of constitutionality of legislation introduced in the 1799 Constitution, which empowered the *Sénat* with such review.

[61] Ibid, pp. 418-420. For instance, the famous edict of Chancellor Rene-Nicolas de Maupeou in 1770 forbade strikes, suspension of service, mass resignation, and cooperation between *parlements*, all which were considered by *parlements* as 'sweeping and unjust attack' on their public role over several decades. In 1771, Maupeou suggested for the *parlements* to be abolished and replaced by *conseil superieurs,* even if it was rejected by the King.

[62] George D. Brown, 'DeGaulle's Republic and the Rule of Law: Judicial Review and the *Conseil d'Etat*', *Boston University Law Review*, 1966, Vol. 46, pp. 462-463, http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1770&context=lsfp last visited 03/21/2017.

[63] James Beardsley, 'Constitutional Review in France', *op cit.* pp. 189-260

[64] Id. p. 192.

[65] Id. pp. 208-209.

With a view to limiting the powers of courts, a *référé facultatif* was instituted which obliged judges to look for binding interpretation of laws from the legislature in cases where they had doubts as to the meaning of a law.[66] 'Even the *Tribunal de cassation,* which was established in 1790-1791, originally had an extra judicial and essentially legislative nature.'[67] This *Tribunal* had the power of quashing judicial decisions which it considered conflicting with the letter of the law.[68] 'If the courts to which the case was then remanded persisted in the decision that the *Tribunal* had declared illegal, the case was referred to the legislature by the so-called *référé obligatoire* for a binding interpretation of the law.'[69] These were some of the mechanisms of excluding courts from the process of making law to the extent of controlling how courts used to interpret legislation.

Regarding the attempts made to keep courts away from interfering with administrative functions, the task of legal validity of administrative acts was assumed by the *Conseil de'Etat* under the 1799 Constitution as a separate institution from the judiciary.[70] Later on, the *Conseil de'Etat* was followed by lower administrative courts. Hence, it could be said that the *Conseil de'Etat* was the result of reactions of the revolutionaries against *parlements'* role in administrative functions.

The *Sénat conservateur* was empowered by the Constitution of 1799 to check the constitutionality of legislation enacted by the Parliament. 'The Constitution empowered the *Sénat* as the guardian of the Constitution and that no statute might be promulgated without first being submitted to the *Sénat,* whose duty was to 'oppose' the promulgation of unconstitutional legislation.'[71] This was a direct response to the previous role of *parlements* and it prohibited

[66] Cappelletti and Adams, 'Judicial Review of Legislation', *op cit,* p. 1212.
[67] Id. p. 1212. The *Tribunal de cassation* was later developed in to a judicial organ named *Cour de Cassation.*
[68] Ibid.
[69] Ibid. The institutions of *référé facultatif* and *référé obligatoire* were later abandoned.
[70] Comella, *Constitutional Courts and Democratic Values, op cit.* p. 13.
[71] Beardsley, 'Constitutional Review in France', *op cit,* p. 194.

them from engaging in reviewing the constitutionality of legislation. The same trend continued in the Constitution of 1852 and subsequently it came to be deeply rooted in French constitutional law that rejected judicial review of legislation.

Therefore, the reforms after the Revolution to minimize the role of pre-revolution *parlements* started first by excluding them from taking part in the legislative and administrative functions. Then, it went on to allocating the power of interpreting the constitutions to the *Sénat.* This arrangement rejected the leading role of ordinary courts and paved a new era of constitutional interpretation by parliaments.

One may wonder how the *Sénat* was composed and whether it was suitable to exercise its power of checking the constitutionality of legislation. The *Sénat* was composed of members recruited by co-option from a list of candidates submitted by the Corps *législatif,* the *Tribunat* and the First Consul. According to Article 21 of the Constitution of 1799, the *Sénat* had the power to either maintain or annul acts referred to it by the *Tribunat* or the Government. It had no power to review the constitutionality of legislation after it was promulgated. However, the *Sénat* did not exercise its power of constitutional review until its disappearance from the Constitution in 1815. This is one clear lesson that constitutional adjudication by legislature has never worked.

Despite the failure of the previous constitutional arrangement in making the legislature as constitution interpreter, the *Sénat* revived again in the 1852 Constitution with a slight difference from its ancestor in its composition, but with the same power of constitutional adjudication, among other powers. It was composed of cardinals, marshals, and admirals of the Republic as well as other persons as the President of the Republic might wish to appoint. Similar to the previous arrangement, the *Sénat* was considered as the guardian of the Constitution and statutes should pass through a review by it. This Constitution also allowed citizens to refer legislation to the *Sénat* before promulgation. Once again, the *Sénat* under the Second Empire did not annul

any law as unconstitutional[72] proving further that it is not an appropriate body to review the constitutionality of legislation.

The attempts made to undertake reviewing the constitutionality of legislation by the *Sénat* was not successful for the reason that it was under the complete political dependence of the Emperor and therefore 'lacked the necessary institutional distance to evaluate the laws'.[73] The ineffectiveness of the political body to exercise review of constitutionality of legislation was criticized by renowned French scholars and considered such an arrangement as the 'fruit of constitutional labours of a small group of 'repentant revolutionaries'.[74]

In addition to the pressures from the reactionary Revolutionaries to exclude the judiciary from the law-making process, courts used to defer cases which involved interpretation of constitutions. For instance, many decisions by the Court of Cassation, like the case of *affaire Paulin,* had been disposed by deference on the ground that statutes adopted and promulgated could not be challenged on the basis of unconstitutionality.[75] A similar approach was followed by the *Conseil d'Etat* when it confronted the issue for the first time in 1901.[76]

Hostility of the revolutionaries towards the *parlements* of the ancient regime ended up by excluding them from taking part in the law-making process and administrative functions. Then, the power of constitutional adjudication ended up with the *Sénat* by authorizing it as a guardian of the constitutions. Despite the important role of constitutional adjudicator in other jurisdictions, the *Sénat* did not entertain cases, as a result of which was later replaced by the Constitutional Committee under the 1946 Constitution.

[72] Ibid.
[73] Comella, *Constitutional Courts and Democratic Values, op cit,* p. 14
[74] Beardsley, 'Constitutional Review in France', *op cit,* p. 210.
[75] Id. p. 193. Beardsley mentions that the Court of Cassation had also reviewed substance of statutes in some cases but, later returned to 'impermissibility of intervention by the judges in the legislative power.'
[76] Id. p.194.

2.1.2. The Rationales

There are some explanations why the *Sénat* was empowered to undertake review of constitutionality of legislation from the time of Revolution up to the establishment of the Constitutional Committee by the 1946 Constitution. These conceptions of the constitutionality review of legislation have influenced jurisdictions across Europe which later came up with the establishment of constitutional courts.

The first justification forwarded for not adopting judicial review of legislation by courts was 'the theory of separation of powers underlying the revolutionary legislation'.[77] 'The theory of separation of powers [...] gave French democratic political theory a matrix in to which judicial review could not fit.'[78] The Revolutionaries relied more on the legislature and executive as institutions of social transformation 'to liberate the people from feudal privileges.'[79] Hence, 'judicial functions' were understood to be 'distinct and separate' from legislative and administrative functions. Codification of laws guaranteeing individual rights and principles of equality helped to limit the role of judges.[80] As has been discussed earlier, the role of courts during the *ancien régime* was the cause for the need to restrict role of the judges.

The issue of the organ that has to interpret the constitutions was a point of contention during the enactment of the 1946 Constitution which resulted in the establishment of the Constitutional Committee. The Constitutional Committee was empowered to decide whether legislation was in contradiction with the organic part of the constitution and constitutional amendment was required to validly enact statute.[81] This arrangement, too, kept the traditional understanding of

[77] Id. p. 193. See also Rogoff, *French Constitutional Law: Cases and Materials*, *op cit.* p. 168 ff.
[78] Cappelletti and Adams, 'Judicial Review of Legislation', *op cit.* p. 1211.
[79] Comella, *Constitutional Courts and Democratic Values, op cit*. p. 11.
[80] Ibid.
[81] Id. p.14.

separation of power by allocating review of constitutionality of legislation to an organ outside the judiciary.

The second rationale behind authorizing the *Sénat* to review the constitutionality of legislation was the supremacy of laws as an expression of 'general will'. 'Largely because of these abuses of the judicial function, the ideology of the Revolution, enshrined in the works of Rousseau and Montesquieu, stressed the omnipotence of statutory law, the equality of man before the law, and the rigid separation of powers in which the judge, the passive *bouche de la loi*, performed the sole task of applying the letter of the law to individual cases.'[82] The legislature, therefore, as the voice of popular and national sovereignty, was seen as the best guarantor of fundamental rights, and ultimately of the constitutions.

To sum up the traditional conception of separation of powers that prevailed in France since the Revolution and the supremacy of *la loi* as an expression of the 'general will' were the rationales behind empowering the *Sénat* as an organ interpreting the constitutions. It was against the background of the powerful courts in the regimes preceding the Revolution that the Revolutionaries provided these reasons to exclude courts from the ambit constitutional interpretation and allocated it to the *Sénat.*

2.3. Brazil under the 1824 Monarchical Constitution

Brazil was one of the jurisdictions which experienced constitutional interpretation by the legislature. The Imperial Constitution of 1824, which was enacted upon independence from Portuguese colonization, gave birth to the imperial state of Brazil. This Constitution established 'a monarchic, inherited, constitutional and representative government'.[83] This section of the

[82] Mauro Cappelletti, 'Judicial Review in Comparative Perspective', *California Law Review*, 1970, Volume 58, Issue 5, p. 1026. http://scholarship.law.berkeley.edu/californialawreview/vol58/iss5/1 last visited 04/04/2017.
[83] Charles D. Cole, *Comparative Constitutional Law: Brazil and the United States*, (Lake Mary: Vandeplas Publishing, 2008) p. 27.

thesis briefly discusses the constitutional arrangement relating to constitutional adjudication under the 1824 Constitution of Brazil and the rationales for such choice.

2.3.1. The General Assembly as Interpreter of the Constitution

With respect to its making process, the Emperor rejected proposals of a 'Constitutional Convention' and called a group of prominent figures 'a State Council' and enacted a text drawn up by them.[12] Although it was not the fruit of social pressures or a democratic conquest, it was a rather liberal charter.[84] The Emperor had a significant role in the making process and influenced the content of the constitution which granted him a wider political power. The Constitution was in force for a long period until 1889.

According to Article 10 of the Constitution, political power is comprised of 'legislative, 'moderating'[85], executive and judicial powers.'[86] Legislative power is allocated to the General Assembly which is composed of two bodies: The Chambers of Deputies and the Senate.[87] One of the functions of the General Assembly listed under Article 15 of the Constitution was 'to watch over the Constitution and to promote the wellbeing of the nation'. It also had the power to make, to interpret, to suspend and to repeal laws.[88] This arrangement was similar with that of France's constitutional history discussed above except for the fact that the General Assembly of Brazil under 1824 Constitution was composed of both chambers.

These constitutional texts vividly envisaged granting the power to interpret the Constitution to the legislative organ, the General Assembly. Such an arrangement was made due to the

[84] Samantha S. Moura Ribeiro, *Democracy after the Internet - Brazil between Facts, Norms, and Code*, (Switzerland: Springer International Publishing 2016) p. 65, http://www.springer.com/kr/book/9783319335926 last visited 04/04/2017.
[85] This concept of 'moderating power' that was created by the Constitution in addition to the legislative, executive and judicial powers is explained below.
[86] Article 10 of the 1824 Imperial Constitution of Brazil (hereafter 'the 1824 Constitution of Brazil').
[87] Article 13 and 14 of the 1824 Constitution of Brazil.
[88] Article 14 of the 1824 Constitution of Brazil.

dominating role of the Emperor, who had a unique 'moderating power' which allowed him to control all other organs of government. The Emperor was described as 'supreme chief of the nation' and empowered to 'incessantly watch over the maintenance of independence, the equilibrium and harmony of the other political powers'.[89]

The 'moderating' power of the Emperor extended to nominating Senators, convoking of extraordinary General Assemblies, sanctioning the decrees and resolutions of the General Assembly and giving them the force of laws, and dissolving the Chamber of Deputies, to mention some.[90] The Emperor was the chief of the executive power and exercised it through his Ministers of State.[91] All these powers of the Emperor remained unchecked as the General Assembly, an entity supposed to keep the supremacy of the Constitution, was under the control of the Emperor.

2.3.2. The Rationales

The creation of the 'moderating' power of the Emperor may be explained by the fact that the issue of national unity along with new institutions after independence had to be solved by the centralizing power of the Emperor.[92] This power of the Emperor helped him to limit powers of the local and regional government which were deemed to be a threat to national unity.[93] If stronger constitutional review mechanisms were envisaged in the Constitution, it may have, supposedly, hampered the Emperor's exercise of power.

The 1891 Constitution, which established the First Republic, was largely taken from the Constitution of the United States. It established a federal presidential system, separation of powers, checks and balances and institutions. The period of monopoly of power by the Emperor

[89] Article 98 of the 1824 Constitution of Brazil.
[90] Article 101(I) - (V) of the 1824 Constitution of Brazil.
[91] Article 102 of the 1824 Constitution of Brazil.
[92] Cole, *Comparative Constitutional Law*, *op. cit.* p. 28.
[93] Ibid.

came to an end with this Constitution. The provinces were given the status of sub-units and power was allocated between the two levels of government.

Empowerment of the legislatures in both France and Brazil as constitutional adjudicator was justified taking to account of pragmatic considerations: France's experience of difficulty of having powerful courts which led to their exclusion from reviewing legislation and administrative action on the grounds of separation of powers and supremacy of *la loi* and Brazil's justification of establishing strong central government to keep the country unified against the interests of strong provinces. However, the difference lies in the degree of influence in the subsequent constitutions. In France, the influence of the ideals of the revolutionaries on separation of powers and supremacy of *la loi* remained deeply rooted in the constitutional jurisprudence of the country whereas it ceased to exist in Brazil as early as 1891.

The role of the judiciary in constitutional adjudication was secondary during the pre-republican period of imperial regime in Brazil. Under the 1891 Constitution, the role of interpreting the Constitution was granted to the Supreme Court. 'The current structure of judicial review was created in the 1891 Constitution which expressly authorized the judiciary to review all matters, laws and executive orders, for consistency with the constitution.'[94] Since then, the Supreme Court of Brazil interpret constitutions which were changed several times.

2.4. Conclusions

The history of France and Brazil discussed above indicates that constitutional adjudication by parliaments has never worked. These arrangements were attempted in different contexts for different reasons. They had, however, the same end of failure and difficulties to exercise their power of constitutional adjudication.

[94] Id. p. 34

In France, *parlements* were excluded from the ambit of legislative power owing to their pre-revolution dominant roles. The main rationales for empowering the *Sénat* were supremacy of *la loi* and separation of powers. Seen from the theoretical perspectives of parliamentary supremacy that its laws cannot be quashed by judges and the strict conception of separation of powers, these rationales seem reasonable. The failure of the *Sénat,* however, implies that parliaments are not appropriate bodies to adjudicate constitutional issues. As has been highlighted above, this organ lacks the requisite institutional distance to effectively review constitutionality of legislation. In addition, 'a political organ with effective powers of constitutional review and the requisite independence would have been too powerful, displacing the Government itself.'[95] Subsequent changes that were brought to this arrangement took into account these same rationales, but with the belief that stronger checks on the constitutionality of laws and executive actions was necessary.

The case in Brazil was different in that the Emperor consolidated his power of dominating all branches of government with a view to centralizing political power. The threat to the central government came from the provinces that the Emperor had to concentrate power to limit powers of the regional and local governments and defend the unity if the country. Stronger form of judicial review mechanism was not desired as the purpose of the Constitution was to create dominating emperor.

Both constitutional arrangements were in force for longer periods: France with more than 150 years and Brazil more than 60 years. Their history, however, ended with failures, that the legislatures were not able to exercise their power. The parliaments, as political bodies, were less interested in constitutional adjudication. Eventually, these jurisdictions resorted to granting

[95] Beardslay, Constitutional Review in France, *op. cit.* p. 10.

constitutional adjudication to a different body: France first to Constitutional Committee then to *Conseil Constitutionnel* and Brazil to the Supreme Court.

Hence, empowering (non-)legislative assembly to interpret a constitution is not an invention of the Constitutions of China or Ethiopia nor is it something that has never been tried. It could be discerned from the constitutional history of France and Brazil and that of contemporary arrangement in China, as discussed in the next Chapter, that the Ethiopia Constitution authorizing constitutional adjudication by parliaments would face a similar failure or difficulty which would adversely affect prevalence of constitutionalism.

The experiences of France between 1789 and 1946 and that of Brazil between 1824 and 1891 should serve as a test whether parliaments could successfully exercise power constitutional adjudication. Both experiments ended up with failure stories which were, at a later stage, obliged to come up with a different institution interpreting the constitutions. This is the lesson that the contemporary arrangement in the Constitution Ethiopia should take and make necessary adjustments. The next Chapter of the thesis discusses the contexts and rationales of empowering (non-)legislative assemblies in China and Ethiopia along with how they are being exercised.

Chapter Three

Constitutional Adjudication by (non-)Legislative Parliaments in China and Ethiopia

3.1. Introduction

The previous Chapter of the thesis has outlined the experiences of constitutional adjudication by parliaments from a historical perspective, particularly France and Brazil, and the failures of such arrangements. This Chapter focuses on discussing the arrangements made in the 1982 Constitution of China and the 1995 Constitution of Ethiopia along with their rationales and showing the lessons that Ethiopia should take from the experiences of the failures of similar arrangements in France, Brazil and China. Attempts have been made to briefly look in to the background of the two constitutions under consideration with a view to shed some light on institutional choices for constitutional adjudication.

3.2. Constitutional Adjudication by the National People's Congress of China

The current institutional choice for constitutional adjudication in China did not come out of the blue. Rather, it was heavily shaped by the arrangements in the constitutions preceding it. There were four written constitutions in the constitutional history of China. This section discusses briefly the constitutional history preceding the 1982 Constitution and looks in to the powers of the constitutional supervision and interpretation by the NPC and NCPCSC.

3.2.1. Brief History Constitutional Adjudication in China since 1954

Chinese constitutional history after the overthrow of feudal monarchy in 1911 is explained by struggles between traditional Confucian ideas, western constitutionalism and communism. After the World War I, communism came to be stronger and shaped the political constitutional

history of the country since then. Four written constitutions were enacted since 1950s, all of which were characterized as typical examples of constitutions without constitutionalism.[96] Even if the purpose of this section of the thesis is not to provide a complete constitutional history of China, it is important to devote some paragraphs to discuss constitutions preceding the current one with a view to give a background on how the current constitutional arrangements were chosen.

In 1949, the Political Consultative Committee was established which was composed of political parties and associations mostly dominated by the Communist Party of China (hereinafter the 'CCP').[97] The Consultative Committee adopted provisional Common Programme which laid down new principles for all subsequent constitutions.[98] This document proclaimed a 'people's democratic dictatorship' to refer to 'a power based on a 'united front' made up of classes of workers, peasants, petty and national bourgeois'.[99] The Common Programme influenced heavily constitutions enacted afterwards. The Preamble of the 1954 Constitution expressly recognizes it was enacted 'based on the Common Programme of the Chinese People's Political Consultative Conference of 1949 and is a development of it.'[100] The current Constitution took the institutional arrangements from the 1954 particularly on constitutional adjudication. One can see the influence that the Common Programme has in the Current Constitution through the 1954 Constitution.

The first written socialist constitution, which was a prototype for the current Constitution, was enacted in 1954. Among other things, this Constitution established NPC and NPCSC, the State President, the State Council, and Local People's Congress (LPC), the same structure with the

[96] Qianfan Zhang, *The Constitution of China: A Contextual Analysis,* (Portland: Hart Publishing, 2012), p. 43.
[97] For detailed information on the Political Consultative Committee, see http://www.china.org.cn/english/archiveen/27750.htm last visited 04/04/2017.
[98] Zhang, *The Constitution of China, op cit*. p. 44
[99] Ibid.
[100] Paragraph 3 of the Preamble of the 1954 Constitution of People's Republic of China (hereinafter 'the Constitution of China')

current Constitution. However, this Constitution 'was not implemented with serious effort and curb calamities of massive scale caused by abuse of state power', a reason which caused subsequent constitutional and political changes that affected the contemporary China.[101] Regarding the power to interpret the Constitution, Article 27 provided that it was the NPC which was empowered to 'supervise the Constitution'. As there were no provision under the Constitution dealing with constitutional interpretation, it could be assumed that the NPC was intended to exercise this power too.[102]

The rationale behind such an arrangement comes initially from the Common Programme of 1949 which provided 'democratic centralism' under the dominance of the Communist Party of China. Democratic centralism is defined as the decision-making process adopted by the Communist Party of The Soviet Union and later by the CPC which combined two seemingly opposing ideas of democracy and central control.[103] Accordingly, all powers belong to the NPC ultimately and to local people's congress at the lower level where decisions should be made collectively with unanimity at times. It would be incompatible with the ideas held by the Communist Party if the power to control the NPC and the government was granted to an impartial body which would be eager to exercise it. Weak constitutional review mechanism was chosen against this background and continued to be adopted by subsequent constitutions including the current constitution.

Empowerment of the NPC as constitutional adjudicator also relates to the conception of supremacy of the legislature in socialist/communist states as a reflection of sovereignty of the people. Socialist legal systems reject the conception of separation of powers by making the

[101] Zhang, *The Constitution of China, op cit*. p. 45
[102] Cai Dingjian, 'Constitutional Supervision and Interpretation in the People's Republic of China', *Journal of Chinese Law*, 1995, Vol. 9, pp. 220-221, http://heinonline.org/HOL/Page?handle=hein.journals/colas9&div=17&g_sent=1&collection=journals last visited 04/04/2017.
[103] Encyclopedia Britannica, https://www.britannica.com/topic/democratic-centralism last visited on 3/22/2017.

legislature the highest authority of the government even if they allocate powers to the three organs of government as these organs has never been equal.[104] Legislative supremacy was 'recognized as fundamental premise of the socialist ideology'.[105] As a result of supremacy of the legislature, which is not usually directly elected by the people like in the case of China, legislations are the primary sources of law as opposed to judicial decisions.

A similar hostile attitude of French Revolutionaries towards the exercise of constitutionality review by courts could be also observed in the case of China too. The legislative organ was empowered to check constitutionality of state actions as a consequence of its supremacy and 'constitutionality review could not be exercised by extra-parliamentary bodies'.[106] Hence, in the case of China, distrust of courts comes from the supremacy of the NPC and its legislations whereas in France, it emerged as a reaction against the powerful courts that existed in the ancient regime. This conception of supremacy of the NPC and its legislations over other organs of the government has shaped the constitutional law of China and its institutional choice of constitutional adjudication.

Separation of power was rejected in the case of China as the NPC was/is supreme and courts were/are consequently excluded from constitutionality review whereas separation of powers was the basis for the French Revolutionaries to exclude courts from interfering in the functions of the legislature and executive. The same concept, i.e. separation of powers, which was rejected in one and strictly construed in another was the basis to exclude courts from the ambit constitutional review.

[104] Rhett Ludwikowski, 'Judicial Review in the Socialist Legal System: Current Developments', *International and Comparative Law Quarterly*, 1988, Vol. 37, p. 90. http://heinonline.org/HOL/Page?handle=hein.journals/incolq37&div=11&start_page=89&collection=journals&set_as_cursor=0&men_tab=srchresults last visited 04/04/2017.
[105] Ibid.
[106] Ibid.

During the reign of Mao Zedong, many measures were taken the constitutionality of many of which were officially disregarded focusing on bringing the desired changes which made the constitution to remain a paper value. This situation continued during the Cultural Revolution (1966-1976).[107] Then, the NPC convened and enacted the 1975 Constitution and primarily reduced human rights provisions from the previous constitution and abolished procedural safeguards. It added the right to strike and other rights to carryout socialist revolution.[108] This Constitution 'conflated the party and state functionaries and dramatically enhanced the role of the CCP by authorizing the Chairman of the Central Committee to command the national armed force; replacing the LPC and local governments with the revolutionary committee; and substituting the township governments in rural areas with the Peoples Communes.'[109] The 1975 Constitution did not provide any institutional mechanism for constitutional interpretation. It was rather a very simplistic articulation of the NPC[110] with few constitutional provisions.

A third Constitution was enacted in 1978 following Mao Zedong's death. This Constitution made some changes, but it was regarded as a continuation of the social revolution: it deleted some of the leftist provisions and added human rights provisions, and 'set the 'Four Modernizations' in industry, agriculture, defence, science and technology.'[111] This Constitution was a re-establishment of the 1954 Constitution with a view to rebuild the political system of the 1950s which was destroyed by the Cultural Revolution.[112] Hence, the power of the NPC to supervise the Constitution was restored. But this time, the NPCSC was granted the power to

[107] The Cultural Revolution was launched by Chinese Communist Party Chairman Mao Zedong during his last decade in power (1966–76) to renew the spirit of the Chinese Revolution. Fearing that China would develop along the lines of the Soviet model and concerned about his own place in history, Mao threw China's cities into turmoil in a monumental effort to reverse the historic processes underway. See https://www.britannica.com/event/Cultural-Revolution last visited on3/22/2017.
[108] Zhang, *The Constitution of China, op. cit.* p. 46.
[109] Id. p. 46. See also articles 15, 22 and 23 of the 1975 Constitution of China.
[110] Dingjian, 'Constitutional Supervision', *op cit.* p.221.
[111] Zhang, *The Constitution of China, op. cit.* p. 47.
[112] Dingjian, 'Constitutional Supervision', *op cit.* p. 221.

take part in constitutional interpretation.[113] This Constitution was revised twice subsequently before it was replaced by a new constitution in 1982.

Regarding the institutional choices for constitutional adjudication, a similar trend of empowering the NPC continued through the constitutions which was influenced by the communist ideology and the CCP. The first three constitutions, which have shaped the current one, have been discussed above. The next sub-section of the thesis explores the arrangement under the current Constitution.

3.2.2. Constitutional Adjudication under the 1982 Constitution

The 1982 Constitution was 'necessitated by economic reforms initiated in December 1978' which signified an attempt to embrace free market in socialist state, a project which was started by its predecessors.[114] It was in fact an attempt to restore pre-Cultural Revolution constitutional system as radical measures taken by revolutionary leaders have destroyed it. The constitution was conservative with respect to its resemblance to its remote predecessor, the 1954 constitution, while the societal contexts were different.[115] Hence, the choice of making the NPC/SC an organ interpreting the Constitution was not an invention of the 1982 Constitution, but it was taken from the 1954 Constitution. Proposals to establish a constitutional court by the Constitution Revision Committee was rejected by its own influential members as 'not necessary'.[116]

Even if it is 'recognizable to Westerners' in taking some features from their constitutions and have some features it took from the Soviet Constitution, there are some 'unusual

[113] Ibid.
[114] Surya Deva, 'The Constitution of China: What Purpose Does it (Not) Serve?', *Jindal Global Law Review*, 2011, Volume 2, p. 62. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1918793 last visited 04/05/2017.
[115] Zhang, *The Constitution of China, op. cit.* p. 48.
[116] Xueyang, 'Constitutional Review in China', *op cit.* p. 636.

characteristics'.[117] One of these unusual features is the NPC, which is not directly elected by the people.[118] According to Article 57 and 58 of the Constitution, the NPC is the highest organ and exercise the legislative power of the state. The NPC could seldom be considered as parliament owing to its big size with more than 3000 members and it meets once a year to initiate legislation.[119] Some of the powers of the NPC, as listed under Article 62, include amending the Constitution, supervising the enforcement of the Constitution, enacting legislation, electing the President and the Premier, appointing the President of the Supreme People's Court and the Procurator-General of the Supreme People's Procuratorate. Even if the NPC have extensive powers under the Constitution, it is considered by many scholars as 'rubber stamp' to the Communist Party as it was translating the policies of the party in to legislations.[120]

The NPC is composed of deputies elected, for the term of five years, from the 'provinces, autonomous regions, municipalities directly under the Central Government, and the special administrative regions, and of deputies elected from the armed forces.'[121] Minority nationals have also special representations in the NPC. The Constitution does not fix the total number of seats of the NPC, but rather grows as prescribed by law.

As the NPC meets annually, its routine activities are undertaken by its permanent body, the Standing Committee which is composed of the Chairman, the Vice-Chairmen, the Secretary-

[117] William C. Jones, 'The Constitution of People's Republic of China', *Washington University Law Review*, 1985, Volume 63, Issue 4, p. 707-708, http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=2203&context=law_lawreview last visited 3/20/2017.

[118] According to Article 34 of the Constitution of China, all citizens who has attained the age of 18 have the right to elect their representatives in the local congress which in turn elect deputies to the NPC. Hence, it could be said that the members of the NPC are elected in an indirect like election.

[119] Jones, 'The Constitution of People's Republic of China', *op cit.*p. 708.

[120] See for instance Zhu, 'Constitutional Review in China: An Unaccomplished Project or a Mirage?', *op cit.* There are also scholars who argue that the NPC was reviving as an independent entity through time by raising instances where the NCP rejected the draft bills of the Standing Committee and through internal structures. See Michael W. Dowdle, 'The Constitutional Development and Operations of the National People's Congress', *Columbia Journal of Asian Law*, 1997, Volume 11, No. 1, pp. 1-125, https://heinonline.org/HOL/PrintRequest?collection=journals&handle=hein.journals/colas11&div=8&id=11&print=section&format=PDFsearchable&submit=Print%2FDownload last visited 3/20/2017.

[121] Article 59 and 60 of the Constitution of People's Republic of China.

General and Members.[122] The NPCSC has the same term of office with the NPC whereas the Chairman and Vice-Chairman many not serve for more than two consecutive terms. The NPCSC is responsible and reports to the NPC which may recall and question them.[123] Powers of the NPCSC recognized under Article 67 includes to interpret the Constitution and supervise its enforcement, to enact and amend statutes that does not fall under powers of the NPC, to enact and amend statutes when the NPC is not session and to interpret the statutes to mention some.

The preceding paragraphs have highlighted that the NPC is the highest organ of the state and represented by its permanent body called Standing Committee. Powers of these organs relating constitutional adjudication is stipulated under the Constitution with different but similar expressions. Under Article 62 (2), the NPC has the power to supervise the enforcement of the Constitution while the powers of the NPCSC are crafted under Article 67(1) as the power to interpret the Constitution and supervise its enforcement. Then, the next important issue to be addressed is discussing the respective powers of the two organs involved in constitutional adjudication.

The 1982 Constitution provides for constitutional review on two grounds. One is Paragraph 12 of the Preamble which clearly declares that the Constitution is 'the fundamental law of the state and has supreme legal authority' which has to be observed and obeyed by 'the people of all nationalities, all state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings in the country.'[124] The second ground is under Article 5 which provides that the Constitution binds all acts of the government entities and no law or regulation

[122] Article 65 of the Constitution of People's Republic of China.
[123] Articles 65 and 69 of the Constitution of People's Republic of China.
[124] Paragraph 12 of the Preamble of the Constitution of China.

may contravene it. The powers of the two organs supervising and interpreting the Constitution emanates from these two constitutional grounds.

The Constitution does not define by what constitutional supervision or constitutional interpretation means. The issue would then be whether these two expressions interchangeable. Constitutional supervision is an all-encompassing phrase that may include 'examining, preventing, correcting and punishing acts' that are found to be unconstitutional.[125] This indicates that constitutional supervision may involve reviewing constitutionality of laws and actions with its own initiative when it finds necessary. Whereas the powers of the NPCSC is limited to interpreting the constitution which includes entertaining concrete cases. In addition, apart from the fact the NPCSC is accountable and reports to the NPC, the latter may alter decisions of the former. It could also be understood from the higher status of the NPC recognized as the supreme organ of the state under the Constitution that there cannot be areas of constitutional supervision where the NPC may be excluded for lack of power.

The NPC exercises its power of constitutional supervision through what is often called 'legislation supervision'. It supervises and controls legislation and regulations enacted hierarchically from local people's congress to its own laws. The Law of Legislation provides that review of constitutionality is conducted by the NPC and the NPCSC and review of legality is undertaken by the State Council.[126]

Regarding the scope of powers of the constitutional supervision, there are debates whether the NPC could exercise its power of constitutional control against the CPC.[127] Some argue that the

[125] Dingjian, 'Constitutional Supervision', *op cit.* p. 224.
[126] Zhu, 'Constitutional Review in China', *op cit, p. 631.*
[127] For more detailed discussions in this issue see for instance Dingjian, 'Constitutional Supervision', *op cit.* pp. 227-229; Larry Cata Backer, 'A Constitutional Court for China within the Chinese Communist Party: Scientific Development and a Re-consideration of the Institutional Role of CCP', *Suffolk University Law Review*, 2010, Volume 43, pp. 101-132. http://suffolklawreview.org/wp-content/uploads/2013/01/Backer_Lead_AdvancePrint1.pdf last visited 04/05/2017.

Preamble and Article 5 of Constitution clearly obliges political parties to bey the Constitution, whereas, there are also sceptic views because of its practical impossibilities as the CPC controls the NPC in many ways.[128] A compromise idea between these views is that the NPC may exercise constitutional supervision but only limited to documents and to the extent of advising for modifications if it found that it is unconstitutional.[129]

Some cases have been brought before the NPC and tested the constitutional review system and procedures of submitting cases especially since the '*Marbury v. Madison* of China' i.e. *The Qi Yuling Case.*[130] In this case, the Supreme People's Court issued a Reply to the lower court's submission on how to apply the laws which explicitly recognized that the infringement of constitutional right to education entails civil liabilities. Many scholars supported the decision on the ground that 'constitutional judicialization' was getting root in China and fundamental rights recognized by the Constitution could be enforced against the government through courts.[131] However, the reply was later in 2008 abolished by the Court itself without mentioning any reason.[132]

In some other instances, courts were kept distant from the ambit of constitutional interpretation even to the extent of not mentioning a constitutional provision in their judgments. Ordinary courts cannot decide on the inconsistency of legal norms of different hierarchy, for instance between local rule enacted by the local people's congress and the legislation enacted by the

[128] Dingjian, 'Constitutional Supervision', *op cit.* pp. 227-229.
[129] Ibid.
[130] Full text of the decision is available http://dx.doi.org/10.2753/CED1061-1932390403 last visited on 3/20/2017. See also Robert J. Morris, 'China's Marbury: Qi Yuling v. Chen Xiaoqi - The Once and Future Trial of Both Education & Constitutionalization', *Tsinghua China Law Review*, 2012, Vol. 2, pp. 273- 316, http://www.tsinghuachinalawreview.org/articles/PDF/TCLR_0202_Morris.pdf last visited on 3/20/2017.
[131] Morris, 'China's Marbury: Qi Yuling v. Chen Xiaoqi', *op cit.*
[132] Xueyang, 'Constitutional Review in China', *op cit.* p. 643.

NPC.[133] This has made courts to be weak with respect to their role in the enforcement of human rights.[134] The same point could be made with respect to Ethiopia, to be discussed later.

The issues of who could submit constitutional complaints has never been clear as the system of constitutional review was dormant for a long time. The NPCSC was also reluctant to resolve such constitutional disputes submitted to it in a direct way as a means of checks and balances. Rather, it resorts to political options of convincing the concerned organs to change their regulations.[135] This indicates the failure of the NPC/SC to adjudicate constitutional issues.

Different reasons have been forwarded by scholars for failure of the NPC/SC to exercise its power of constitutional review. Firstly, the task of constitutional supervision is an additional power to the organ with inherent legislative power. The NPC and NPCSC are 'one of the busiest legislatures in the world for enacting laws'[136] and hence barely have time to spend on constitutional review. Secondly, instead of checks and balances per se, cooperation prevails among organs of the government which makes these bodies to use political lines.[137] Thirdly, the traditional political culture has made the NPC to 'show respect other political organs'.[138] These and other reasons have contributed for the weak exercise of an already weak constitutional review mechanism.

[133] For instance, in the *Luoyang Seed Case* where the judge who pointed out inconsistency of local rule with Seed Law on her way in entertaining civil case between two companies was dismissed. See Xueyang, 'The Constitutional Review in China', *op cit*, p. 646.
[134] See for details Guobin Zhu, 'Weak Courts, Weak Rights: Assessing the Realization of Constitutional Rights in the PRC Courts', *Hong Kong Law Journal*, 2013, Vol. 43, Part 2, PP. 713-743. http://heinonline.org/HOL/Contents?handle=hein.journals/honkon43&id=1&size=2&index=&collection=journals last visited 04/04/2017.
[135] For instance, in the *Sun Zhigang Case*, the regulation issued by the State Council entitled 'Measures of Custody and Repatriation of Urban Vagrants and Beggars in Cities' was submitted to suggest change by five professors as unconstitutional as it deprives personal freedom through administrative regulations. Then State Council abolished before the NPCSC took any action. See Xueyang, 'The Constitutional Review in China', *op cit.* pp. 644-645.
[136] Id. p. 648.
[137] Ibid.
[138] Ibid.

The purpose of this section of the thesis is not to suggest which constitutional design fits China. Rather, it is to show that the current arrangement is not working properly since the enactment of the Constitution and draw lessons for Ethiopia. Constitutional adjudication by parliaments has already been tested in France and Brazil but it ended up with failures to achieve its goal of limiting powers of government, enforcing human rights and solving disputes among government organs. The above discussions clearly show that China is also another jurisdiction where constitutional adjudication by parliament has failed.

In conclusion, Chinese constitutional review system is not working properly, a similar story with the constitutional history of France and Brazil discussed in the preceding Chapter. Constitutional interpretation has important tasks of ensuring the supremacy of the constitution, protecting fundamental rights and keeping balance among government organs. Weak constitutional review mechanisms fail to achieve these purposes. The experiences clearly show that (non-)legislative parliaments are not appropriate organs to interpret constitutions. Therefore, Ethiopia should take the lessons from the historical and contemporary experiences of the jurisdictions under consideration.

Apart from the constitutional system of Mainland China, the Hong Kong Special Administrative Region (hereinafter Hong Kong SAR) has a quite different design for constitutional adjudication and hence deserves separate discussion. The Basic Law of Hong Kong SAR was enacted by NPC as part of its commitment to the Sino-Joint Declaration.[139] Accordingly, the Basic Law recognizes that Hong Kong remains to be capitalist for 50 years

[139] This agreement was signed between China and Britain in 1984 as a result of which China's exercise of sovereignty resumed in 1997. For further historical explanation see https://www.britannica.com/topic/reversion-to-Chinese-sovereignty-1020544

which raise many issues and a slightly different constitutional review mechanism signifying the notion of 'One Country, Two Systems'.[140]

Basically, it is the NPCSC which is empowered to interpret the Basic Law whereas courts of Hong Kong SAR are entitled to interpret the Basic Law while adjudicating cases reserving the power to interpret provisions of the Basic Law relating to the powers of the Central People's Government and relationship between the two governments.[141] This is a significant departure from the Mainland China, where courts were prohibited from interpreting the Constitution.

The Hong Kong SAR, as an autonomous territory within PRC, has a separate court structure from the Mainland China. The Court of Final Appeals retains the power to entertain cases based on the Basic Law. It has been seen in practice that there have been debates on the constitutional jurisdictions of Hong Kong SAR courts and that of the NPC where the Court of Final Appeals passed decisions in some cases that the NPCSC found as intruding its power of constitutional supervision.[142]

[140] For detailed discussion, see Guangxiang Li, 'Constitutional Review in Hong Kong under the 'One Country, Two Systems' Framework: An Inquiry into its Establishment, Justification and Scope', A Thesis Submitted for the Doctor of Philosophy, Durham University Law School, 2013, http://etheses.dur.ac.uk/6966/, last visited 3/21/2017.

[141] For detailed discussions on how constitutional interpretation works in Hong Kong and debates revolving around the relationship between the Mainland China and Hong Kong see for instance, Yash Ghai, 'Litigating the Basic Law: Justification, Interpretation and Procedure', in Johhanes M M Chan *et al* (eds.) *Hong Kong's Constitutional Debate: Conflict over Interpretation*, (Hong Kong: Hong Kong University Press, 2000); H L Fu, 'Supremacy of a Different Kind: The Constitution. The NPC and the Hong Kong SAR', in Chan, *Hong Kong's Constitutional Debate', op cit.*

[142] See for instance, Albert H. Y. Chen, 'Constitutional Adjudication in Post-1997 Hong Kong', *Pacific Rim Law and Policy Journal*, 2006, Vol. 15 No. 3, pp. 627-682, http://heinonline.org/HOL/Page?handle=hein.journals/pacrimlp15&div=29&g_sent=1&collection=journals last visited on 3/31/2017; Johannes Chan, 'Judicial Independence: Controversies on the Constitutional Jurisdiction of the Court of Final Appeal of the Hong Kong Special Administrative Region', *The International Lawyer*, 1999, Vol. 33, pp. 1015-1024, http://heinonline.org/HOL/Page?handle=hein.journals/intlyr33&div=74&g_sent=1&collection=journals last visited 3/31/2017; Po len Yap, 'Constitutional Review under the Basic Law: The Rise, Retreat and Resurgence of Judicial Power in Hong Kong', *Hong Kong Law Journal*, 2007, Vol 37, http://heinonline.org/HOL/Page?handle=hein.journals/honkon37&collection=journals&id=453&startid=&endid=478

3.3. Constitutional Adjudication by the House of Federation of Ethiopia

Throughout constitutional history of Ethiopia, there were four written constitutions: The Monarchical Constitutions of 1931 and 1955 (Revised), the 1987 Socialist Constitution and the 1995 Federal Constitution. The 1931 Constitution, the first written constitution, was a grant of the Emperor to its 'subjects' and had no supremacy clause. Whereas the Revised Imperial Constitution had a provision declaring the Constitution to be supreme but no organ was empowered to ensure supremacy.[143]

The 1987 Constitution declared that it is the supreme law of the land and it is the National *Shengo*, the legislative organ, which is empowered to 'supervise the observance the Constitution.'[144] This arrangement resembles the Chinese constitutional choice of the NPC as the National *Shengo* is the highest legislative body just like the NPC and it meets once a year and its routine activities were undertake by the State Council, an institution similar to the NPCSC. The regime's allegiance to the socialist ideology and its strong relation with the Soviet Union had influenced its choices of institutions. The Constitution was, however, suspended in 1991 by the ethno-nationalist movements who overthrew the regime which made the Constitution as one of the short-lived constitution.[145] As a result, the Constitution was not tested in practice and it is difficult to make comparison with its Chinese counterpart regardless of its similarity in its design.

The 1995 Constitution takes diversity strongly as a response to the immediate history of the Country and makes identity and language as a basis of granting autonomy. It starts from its Preamble which says, 'We the Nations, Nationalities and Peoples of Ethiopia' by recognizing

[143] Article 122 of the 1955 Revised Constitution of Ethiopia.
[144] Article 63 of the 1987 Ethiopian Constitution lists the power to supervise the observance of the Constitution as one of the powers of the National Shengo.
[145] See for instance Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia, op cit.* pp. 70-79.

that Ethiopia is composed of different ethnic groups. The Constitution also makes the Nations, Nationalities and Peoples its authors and declares that the federation is established by their 'free' agreement.[146] Sovereign political power resides in them. The basis of the federal system is predominantly ethnic and each group is entitled to establish its own state. The right to promote their culture, language and history, establish self-governments and being represented in the federal and state governments are also recognized under Article 39 of the Constitution.

As an expression of the sovereign power of ethnic groups, the Constitution, under Article 62, grants power to interpret the Constitution to the House of Federation, a second chamber composed of representatives of ethnic groups. Such a unique arrangement was justified by the framers for reason that the Constitution belongs to the Nations, Nationalities and Peoples and they should be the one that should have final say on it.[147] Despite the criticisms both in academics and political debate, the arrangement has not been changed. Given the absence of record of constitutional amendment since its promulgation some twenty-one years ago, and political process being dominated by a single political party which also took upper hand during its making process, it is less likely that the Constitution would be amended. Therefore, it is necessary to delve into the design and practices and comparison with similar experiences across the world.

The 1995 Constitution provides that the Constitution is the supreme law and the House of Federation, a non-legislative upper chamber, is empowered to interpret the Constitution. As it has been mentioned above, the current Constitution adopts predominantly ethnic based federalism with a view to accommodate diversity. The HoF is one of the institutions that reflects this accommodative nature of the Constitution in its composition and powers entrusted to it. It is the representative of NNPs at the federal level with powers like constitutional interpretation,

[146] The Preamble of the FDRE Constitution, paragraph 1.
[147] Minutes of the Constitutional Assembly, Volume 5, November 1994, pp. 6-7.

deciding on issues relating to self-determination, promoting equality and unity, solving disputes among states, dividing revenues collected from concurrent powers of taxation and subsidies, ordering federal intervention in the states etc. to mention some.[148]

The HoF is assisted by a technical body, called Council of Constitutional Inquiry (CCI), composed of the President and Vice President of the Federal Supreme Court, six legal experts appointed by the President of the Country (Head of State) and three representatives of the HoF.[149] Membership of the President and Vice President of Federal Supreme Court as President and Vice President of the CCI is automatic that the appointment to the Supreme Court means at the same time they also lead the CCI.

There are debates on the scope of the power of the HoF to review constitutionality of laws, regulations and decisions of government organs. Some scholars argue that the power of the HoF is limited to reviewing constitutionality of legislation enacted by the federal parliament and state legislatures, leaving constitutionality of enacted by the executive at all levels and decisions of government organs could reviewed by ordinary courts.[150] Others argue that the HoF has exclusive power to review the constitutionality of all acts of organs of the government on the ground that the framers had no intention of sharing this between the HoF and the judiciary.[151] These debates are not merely theoretical in that they are creating practical problems. Some judges prefer to refer cases to the HoF/CCI on the suspicion that it may involve issue of

[148] Article 62 of the Constitution of FDRE.
[149] Article 82 of the Constitution of FDRE.
[150] See for instance Assefa Fiseha, Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation, 2007, *Mizan Law Review*, Vol. 1, No. 1, pp. 1-32. https://opendocs.ids.ac.uk/opendocs/ ; Tsegaye Regassa, 'Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia', *Mizan Law Review*, 2009, Vol. 3, No. 2, pp. 288-330. www.ajol.info/index.php/mlr/article/download/54014/42556 *last visited 3/21/2017.*
[151] See in general Getachew Assefa, 'All About Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation', *Journal of Ethiopian Law*, 2010, Vol. 24, No. 2.

constitutionality or fear of political pressure whereas others look in to cases which seem constitutional adjudication *per se*.[152]

Concerning the procedures of how cases reach the HoF, Proclamations 251/2001[153] and 798/2013[154] provides that case may be submitted either to the HoF, which refers the case to the CCI or to the CCI directly. As it could be understood from Article 84(2) of the Constitution, the CCI investigates the case and if it is convinced that there is violation of the Constitution, then it forwards its recommendation to the HoF for final decision. The HoF, then, undertakes its own investigation based on the recommendation of the CCI reaches at its own decision. In practice, the HoF barely reaches at a different conclusion than the CCI which makes the CCI an important institution in the process of constitutional adjudication in Ethiopia.

Hoping that the above paragraphs give a highlight of how constitutional adjudication works in Ethiopia, this section of the thesis discusses the rationales behind such constitutional choice and the lessons Ethiopia should take from the experiences of similar arrangements in France, Brazil and China discussed so far.

3.3.1. The Rationales of Empowering the HoF as Constitutional Adjudicator

The current Constitution of Ethiopia empowers the HoF as constitution interpreter which should be assisted by the CCI. The HoF is the representative of NNPs entrusted with task of interpreting the Constitution in addition to its role as a non-legislative second chamber. In the case of China, the NPC is the legislative assembly which has the highest state authority whereas the HoF is a non-legislative second chamber. The HoF has no legislative power even if there are some

[152] The *CUD v. PM Meles Case* could be mentioned as an example. For further analysis of the case, see Fiseha, 'Constitutional Adjudication in Ethiopia', *op cit.*

[153] Proclamation No. 251/2001, Consolidation of the House of Federation and the Definition of its Powers and Responsibilities Proclamation, *Federal Negarit Gazette*, 7th Year, No. 41, 6th July 2001, Addis Ababa. (hereinafter 'Proclamation No. 251/2001)

[154] Proclamation No. 798/2013, Council of Constitutional Inquiry Proclamation, *Federal Negarit Gazette*, 19th Year No. 65, 30th August 2013, Addis Ababa (hereinafter 'Proclamation No. 798/2013')

powers, which are not legislative, that it may jointly exercise with the House of People's Representatives.

The issue of who should interpret the Constitution and the respective roles of the HoF and ordinary courts was one of the most debated constitutional choice during its making process and later among scholars.[155] The framers of the Constitution justified allocating the power of constitutional interpretation to the HoF on the ground that the Constitution is 'a political contract among the NNPs' and hence the NNPs should, through their representatives, have final say on what the Constitution says.[156] The HoF was chosen from among variety of proposals: ordinary courts and constitutional courts.[157] The proposal for authorizing courts of any kind was rejected by the framers two reasons. Firstly, the framers believed that judges would not be neutral from prevailing thoughts in the society and they would erode rights of NNPs under the guise of interpretation.[158] Secondly, the NNPs, through their representatives should have power to interpret the Constitution for the reason that they are the owner of the rights and interests in the Constitution and participated in the process and established the constitution, and judges cannot be above the people.[159] This suggests that the judiciary was deliberately excluded from interpreting the Constitution for the fear that it may go against the rights of NNPs.

[155] See the Minutes of Constituent Assembly, Vol. 4, Discussion on Article 62 of the Constitution; Yonatan Tesfaye, 'Who Interprets the Constitution: A Descriptive and Normative Discourse on the Ethiopian Approach to Constitutional Review', unpublished LLM Thesis, Faculty of Law, 2004, University of Pretoria, http://repository.up.ac.za/bitstream/handle/2263/1079/fisseha_yt_1.pdf?sequence=1; Getahun Kassa, 'Mechanisms of Constitutional Control: a Preliminary observation of the Ethiopian System', *Africa Focus*, 2007, Vol. 20, No. 2, pp. 75-104; http://chilot.files.wordpress.com/2011/01/07-20-12-kassa.pdf ; Assefa Fiseha, 'Constitutional Adjudication in Ethiopia' *op cit.*; Getachew Assefa, 'All About Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation', *op cit.*

[156] Minutes of the Constituent Assembly, vol. 4. p.6. (Note that all translations of documents in Amharic language are translation by the author). The Minute reads in Amharic as 'ብሔር ብሔረሰቦች በጋራ ለመኖር ያደረጉትን ውል /የፖለቲካ ኮንትራት/ ሕገ መንግስቱን መተርጎም ያለባቸው ራሳቸው ውሉን የፈረሙት ብሔር ብሔረሰቦች መሆን …[ይገባቸውል]' (*sic*)

[157] The draft constitution indicates that it was a constitutional court as the preferred institution to interpret the constitution. However, this was changed when it was presented for the constituent assembly.

[158] The Constituent Assembly raised the example of judges of US Supreme Court and asserted that the judges interpret the constitution with influences from ideologies of the party that nominate them. See Minutes of the Constituent Assembly, Vol. 4, p.6-7.

[159] Ibid.

The idea of sharing the power of constitutional interpretation among the HoF and the judiciary was also raised in the Constituent Assembly: courts could interpret fundamental human rights provisions and the HoF reserves the power to interpret those provisions relating to the rights of NNPs. However, it was rejected by the majority of members of the Assembly on the ground that this would not prevent courts from eroding rights of NNPs and it would be difficult to categorize constitutional provisions in this manner.[160] Therefore, the framers had the intention of granting the power to interpret the Constitution exclusively to the HoF with a view to protect rights of NNPs as authors of the Constitution.

This rationale of the framers of the Constitution may be compared with that of the French Revolutionaries who also rejected courts as interpreters of the Constitutions. The framers of the Ethiopian Constitution had the intention of protecting rights of NNPs and making them have final say on what the Constitution want to convey as authors whereas the French Revolutionaries responded against the powerful courts of the *ancien régime* based on the concpetion of separation of powers and supremacy of *la loi.* The rationales and contexts are different but their view towards courts is the same in that both did not trust ordinary courts. A similar conclusion may be reached in the cases of Brazil and China. In the case of Brazil, the idea of having a strong central government with powerful Emperor was the main reason for empowering the legislature as constitutional adjudicator implicitly indicating that courts would constrain powers of the Emperor. Whereas, the Chinese Constitution focused on empowering the CPC, as a party leading the Country and its allegiance towards the socialist/communist ideology.

[160] Ibid. p. 7. The reason for rejection of such proposal was explained in the Minute with an example of a state legislature enacts a law that it deems protects NNPs within the region. However, the courts may make decisions against the interests of NNPs for the reason a legislation enacted for their benefit violates rights of individuals. This would create 'constitutional crises'.

Many critics have been forwarded against such an arrangement for the reason that the HoF is inefficient and partial. The reasons relate to the structure and composition of the HoF, election of members, powers and decision making procedures which shows that it is a political body and hence not an impartial organ to adjudicate constitutional issues. The HoF is structurally an upper chamber of the federal government which is composed of one representatives of all NNPs and one additional member for each one million additional population.[161] It has no fixed number of seats as its composition depends partly on the population size of NNPs. For instance, the number of seats during the 2010-2014 was 135.[162] The number of NNPs represented also varies through time due to seats allocated to new ethnic groups admitted to it as fulfilling the requirements under Article 39(5) of the Constitution.[163] Even if it seems logical that the NNPs as authors of the Constitution should interpret it, it has no the institutional independence from the political bodies as it is part of them.

Regarding the mode of election, the members of the HoF may either be directly elected by the people or indirectly by the state legislatures. In practice, the NNPs have never been elected representatives to the HoF. Rather, the State Council of each regional state sends representatives from the state executives. The manner of election both under the Constitution and in practice proves the political nature of the institution. This way of electing members is similar with that of the NPC of China as their members are not directly elected by the people.

The decision-making process of the HoF also adds another reason to the difficulty of exercising constitutional adjudication. According to Article 14 of Proclamation No. 251/2001, decisions of the HoF on cases of constitutional interpretation 'may' be passed by a unanimous vote of the

[161] Article 61 of Constitution of the FDRE.
[162] Source http://www.hofethiopia.gov.et/web/guest/fourth-season-member last visited on 1/21/2017. The number of seats of the current term has not shown significant change.
[163] Article 39(5) of the Constitution provides that a nation, Nationality, People 'is 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.' So far, around 75 ethnic groups are represented in the HoF.

members who are present. It is not clear on the meaning of the word 'may' i.e. whether it is up to the HoF to choose to decide based on unanimous vote or it is mandatory. However, given the composition of the HoF where every ethnic group has at least one representative and the size of the HoF, it is difficult to reach on unanimity. It has also an implication that diverse ideas has no place in the discussions of the HoF. This has not been a frequent problem yet indicating the political unanimity that the HoF.[164]

Additionally, the issue of who checks on the exercise of powers of the HoF other than constitutional interpretation may be raised here. In other jurisdictions, constitutional courts exercise powers other than constitutional adjudication like supervising election, referendum, controlling political parties etc. Decisions passed by the constitutional courts on these matters remain final. However, the powers of the HoF are not similar with that of constitutional courts as some of them are more of regulatory. For example, if a particular group alleges that they fulfil requirements of Article 39(5) and claim recognition as NNP and rights thereof, then the final and unappeallable decision rests on the HoF.[165] Another example would be the decision that the HoF would pass on the division of revenues collected from the concurrent powers of taxation of the two levels of government. These are decisions that the HoF passes as an organ of a government and are not pieces of legislation. In fact, the CCI, as an advisory body, cannot check the constitutionality of decisions of the HoF. This similar issue could also be raised in the case of the NPC/NPCSC of China. If a constitutional adjudicator has power, which is

[164] In practice, the EPRDF and its affiliates control all the nine regional states and state councils of each regional state sends representatives from state executive. This shows that the members of the HoF are in practice politicians from state executive.

[165] The Case of Kontoma Community who lives in the Guraghe Zone of Southern Nations, Nationalities and People's regional state (SNNPRS) recently claimed that they have distinct identity that qualifies the requirements under the Constitution and they are suffering from discrimination and harassment from other ethnic groups. After undertaking a research on the issue, both the SNNPRS and the HoF decided that the group does not fulfil the requirements under the Constitution. Then the representatives of the Community brought a constitutional complaint to the Council of Constitutional Inquiry against the decision of the HoF alleging that their constitutional right has been violated. The Council looked in the case and decided that it has no power to review the constitutionality of decisions of the HoF.

administrative in character, other than constitutional interpretation, then the power would remain unchecked.

These are theoretical concerns which shows the inappropriateness of the HoF as constitutional adjudicator. There are also practical reasons, which will be discussed below, that indicate the HoF is facing failure/difficulty of operating as an impartial and strong constitutional adjudicator. As mentioned above, the HoF is assisted by a technical body called Council of Constitutional Inquiry which deserves a separate discussion on how it is composed and its powers along with its practical importance.

3.3.2. The Role of the Council of Constitutional Inquiry

The CCI is the advisory body for the HoF in its task of constitutional interpretation. As has been mentioned above, it is chaired by the President and the Vice President of the Federal Supreme Court as President and Vice President, six legal experts to be appointed by the President of the Country upon recommendation by the Parliament, and three representatives of the House of Federation.[166] In general, from eleven of its members, at least eight of them are legal experts while there is no such requirement for members assigned by the HoF. The composition of the CCI makes it a technical body that assists the HoF.

In both cases of China and Ethiopia, the assemblies interpreting the constitutions are assisted by another body: The Standing Committee of NPC and the CCI of the HoF. However, the CCI is different in structure, composition and powers from the NPCSC of China. Firstly, unlike the NPCSC, the CCI is not an organ that operates as permanent body of the HoF. It is rather an advisory body empowered 'to investigate constitutional disputes' and make recommendations

[166] Article 82 of the Constitution of FDRE. One can see that structurally the CCI is dealt with under the Constitution in a chapter that provides for the judiciary. In addition, the earlier draft of this Article allocated 6 members to be elected by the HoF whereas legal experts appointed by the President of the Republic were three. It was changed in to the current composition with a view to strengthen the technical support that the CCI is expected to give to the HoF. See Minutes of the Constituent Assembly, Vol. 5 p. 1.

to the HoF if it finds necessary to interpret the Constitution.[167] Hence, the CCI does not take part in other functions of the HoF than constitutional interpretation.

Secondly, its composition is completely different from the NPCSC. The latter is composed of the Chairman, the Vice-Chairmen, the Secretary-General and Members of the NPC, none of which are required to be lawyers. Whereas the CCI, as mentioned above, is mainly composed of lawyers. The composition of these organs indicates the purposes for which these entities are created: NPCSC is created as permanent body of the NPC whereas the CCI is created to technically support the HoF particularly in the constitutional interpretation.

Regarding the procedures of complaint, Proclamation No. 798/2013 clearly mentions who could bring cases to the HoF/CCI.[168] According to Article 4 of this Proclamation, any interested party who thinks that his/her constitutional rights has been violated by a legislation, regulation or administrative decision may apply to the HoF/CCI for review of constitutionality given it has exhausted local remedies. If the case is justiciable, then courts should refer the constitutional issue to the CCI either upon request by the parties to the case or the court own initiative. when compared with China, there are indeed clear provisions regarding who could bring cases to the HoF/CCI. While in the case of China, the procedures of are more complicated as all legislation, regulations and ordinances should be filed with making it clear that mere filing triggers review of constitutionality or the filing is just for the record.

To sum up, the CCI is a key institution in constitutional adjudication. Most recommendations of the CCI convince the HoF even if there are some cases where the latter departed from the

[167] Article 84 of the Constitution of the FDRE.

[168] The reason why I preferred to discuss the procedures under the section talking about CCI is because all cases should be first seen by the CCI even it is possible to submit complaints to both. When the HoF receives complaints, it refers it the CCI to render recommendation on it.

opinion of the CCI and passed its own decision.[169] However, there are some constraints that hinder the CCI from exploiting this opportunity and play its part in the prevalence of constitutionalism in the country despite its limited power. Firstly, the Constitution establishes the CCI under Article 82 in the section dealing with the judiciary but says nothing about its autonomy. Even if it is an advisory body, genuine autonomy would enable the CCI to proactively engage in constitutional adjudication and show to what extent the organs of the government are observing the Constitution. This active role would put pressure on the political bodies to observe the Constitution as recommendations of the CCI would make them vulnerable politically.

Article 62(2) of the Constitution provides that the HoF has the power to organize the CCI. It is not clear how far this power to 'organize' could go, and hence leaves the door for the HoF to control even give instruction to the CCI. Clear indication under the Constitution as the independence and autonomy of the CCI would have enable it to play a much better role than now.

Secondly, the limited frequency of meetings of the CCI is another contributing factor to the minimal role of the CCI is it holds meetings at least once a month.[170] A separate secretariat has been established by Proclamation No. 798/2013 due to growing volume of cases coming the HoF. The number of complaints is growing fast that it takes more time to decide on cases despite the fact that the Constitution stipulates under Article 83 of the Constitution that the HoF has to decide on case within thirty days.

[169] The *Benishangul Gumuz Case* could be mentioned as an example where the HoF took its own stand. See *Benishangul Gumuz Case, Journal of Constitutional Decisions,* The House of Federation of the Federal Democratic Republic of Ethiopia, July 2008, Volume 1.
[170] Article 23 of Proclamation 798/2013.

Thirdly, there is no requirement, under the Constitution that demand the political neutrality of the legal experts appointed by the President of the Republic. This would also open the door for stronger political influence on the CCI as the Parliament recommends politically affiliated legal experts. In conclusion, the CCI would have played a better role had it not been for the above reasons. Once again, this is also a proof that constitutional adjudication is failing or at least facing difficulties.

3.3.3. Practical Implications

It has been more than 20 years since the Constitution of Ethiopia is enacted. Instead of arguing just on theoretical basis, the constitutional arrangement has become mature enough to examine whether it is achieving its purposes in practice. This section of the thesis highlights the practices of the HoF/CCI in light of the intention of the framers and hence has no purpose of giving complete analysis of the cases entertained by them.[171]

Since the enactment of the Constitution, the CCI has accepted more than 1700 cases most of which were individual complaints against judicial decisions.[172] This number looks larger when it is compared with the Chinese counterpart or with the French's *Sénat* or Brazil's Assembly. From among these cases, it is only in 24 cases[173] that the CCI found legislation and acts of government organs unconstitutional.[174] Most of the cases where the HOF/CCI decided unconstitutionality are individual complaints brought to them mostly against judicial decisions.

[171] It should be noted that the data used below is obtained from annual reports of the CCI as the decisions of both the HoF and the CCI are not available on their website or publication except the first four landmark cases which are published.

[172] The Annual Report of the Council of Constitutional Inquiry for the 2015/16 Annual Budget, unpublished. Further reports on the CCI could be accessed from state media. http://www.ebc.et/web/ennews/-/president-mulatu-tells-cci-members-to-work-for-respect-of-rights last visited 03/04/2017.

[173] Ibid. Most of these cases were decided after the CCI got its secretariat separate from the HoF in 2013.

[174] Most legislation the constitutionality of which was challenged like anti terrorism legislation, broadcast and media legislation, Regulation of emlpoyees of Revenu and customs authority were found to be constitutional despite their clear contradiction with the constitution.

As it has been discussed earlier, the framers of the Constitution intended to protect rights of NNPs from being eroded by the judiciary and empower them to have final say on the Constitution and hence chose the HoF to be an organ interpreting the Constitution. The issue then would be to what extent that the HoF/CCI entertained cases relating to NNPs and protected their interests in the past 20 years? From those cases where the HoF/CCI adjudicated since their establishment under the Constitution, only fewer than 5 cases were related to rights of NNPs and in one case that the CCI/HoF found unconstitutionality in its review.[175] Recently there are growing number of claims relating to the rights of NNPs which indicates the growing ethnic consciousness among groups.

This practical evidence adds another reason on top of flaws on the constitutional design that the framers fear was not founded. Surprisingly, the organ that passes decisions on issues relating to identity and exercise of rights of NNPs is the HoF. Ordinary courts cannot entertain such cases on the ground that they are not justiciable even in the absence of a restriction to interpret the Constitution. As it was mentioned in the Minutes of the Constituent Assembly, it would have been better if the HoF is empowered to interpret the Constitution only those cases involving rights of NNPs. Such an arrangement would have been sufficing to protect rights of NNPs on the one hand and have stronger judicial review than it is now. The framers' fear of what they called 'constitutional crises' would not have been a threat to constitutionalism as much as designing such weak constitutional review mechanism.

Rather than rights of NNPs, issues of violations of fundamental rights are the most frequently raised in constitutional complaints. Given the current situation of Ethiopia where people in

[175] See the *Silte Case*, *Journal of Constitutional Decisions,* The House of Federation of the Federal Democratic Republic of Ethiopia, July 2008, Volume 1, pp. 40-100; The Case of *Benishangul Gumuz* could also be mentioned as examples. Recently questions of the People *Qimant*, *Welkaite* and *Kontoma Community* may be added to the list. See Ruling of House of Federation, on 4th Parliamentary Term, 5th Year, 2nd Regular Meeting, 24th June 2015, Unpublished; Decision of Council of Constitutional Inquiry, File No. 1459/2015, 22 June 2016, unpublished.

many parts of the country, particularly in Oromia and Amhara Regional States, are protesting causing unrest[176] on the quest for better protection of human rights, lack of governance and equality, strengthening mechanism of review of constitutionality is one measure to restore peace. Hence, the issue of stronger constitutional review in Ethiopia has become more important than ever due to clear exaggeration of rights of NNPs by the framers and the current situation of the Country.

When the Ethiopian experience is compared with that of historical experience of France and Brazil, it may seem that it is relatively working due to the fact that there are cases decided by the HoF/CCI. However, unlike historic France and Brazil, we are living in the 21st Century where constitutionalism has become more global and citizens everywhere are more conscious of their rights than before. This demand for the protection of fundamental rights and constitutionalism through strong constitutional review has become an issue in Ethiopia and China. Due to failure of similar arrangements in France and Brazil, the necessity of responding to the demands of better protection of rights of citizens and prevalence of constitutionalism, and failures of constitutional adjudication in China and Ethiopia, constitutional choices in China and Ethiopia should be reformed.

Conclusion

Constitutional adjudication is one of the aspects of modern constitutional law especially in countries where there is a written constitution. There are reasons why constitutions are interpreted: to ensure supremacy of the constitution; to limit powers of the government; to keep balance of powers in federations etc. Nevertheless, there are variations in the institutions

[176] For details of the situations of the protests, see for instance Awol K. Allo, 'The Oromo protests have changed Ethiopia', available on http://www.aljazeera.com/indepth/opinion/2016/11/oromo-protests-changed-ethiopia-161119140733350.html last visited 3/21/2017.

empowered to adjudicate constitutional issues. Two models of constitutional adjudication are widely accepted: the diffused model of judicial review where ordinary courts at all levels can exercise constitutional review by reserving the power to render authoritative interpretation to the Supreme Courts; and the centralized model of judicial review where there is a specialized court, out of structure of ordinary courts, with the task of entertaining constitutional issues. Constitutional review by (non-)legislative assemblies stands as one of peculiar institutions in comparative constitutional law which is the focus of this thesis. This thesis has the purpose of drawing lessons from the constitutional history of France and Brazil and from contemporary China and show that the institutional choices of Ethiopia needs to be reformed. However, the thesis does not cover the issue of which institutional choice best fits Ethiopia.

The thesis has discussed the experiences of France and Brazil in empowering legislatures to interpret constitutions shows failure in exercising the power constitutional review. French Revolutionaries were hostile towards ordinary courts due to their dominant role in the ancient regime. The concept of separation of power and the supremacy of *la loi* as a reflection of supremacy of 'general will' were the main rationales for excluding courts from exercising such power and empowering the *Sénat*. Whereas in Brazil, centralization of political power in the hands of the Emperor was made against the powerful provinces which were considered as a threat to the unity of Brazil. As a consequence, the power to check constitutionality of actions of government organs was vested in the General Assembly with a view avoid constraints to the powers of the Emperor. Even if the rationales and contexts under which the two jurisdictions empowered legislative organs to adjudicate constitutional issues, both ended with failure to exercise their powers. Hence, constitutional review by legislatures is not a choice which was tried before. Rather, it was tried, but failed that both France and Brazil resorted to a different constitutional design due to its failure.

Currently, the Constitutions of China and Ethiopia empowers (non-)legislative assemblies to interpret the constitution: the NPC/NPCSC and the HoF/CCI. The NPC was empowered to adjudicate constitutional issues under the 1954 Constitution for the reason of supremacy of the legislature as a socialist legal system and 'democratic centralism'. Whereas, the Ethiopian constitution of 1995 gave the HoF the same power as a reflection of authorship of the Constitution to the NNPs to have a final say and to protect their interests against 'court interference'.

Current trends of constitutional review in China and Ethiopia indicates that the NPC and the HoF are not properly exercising their power of constitutional adjudication. Their political affiliation resulting in the absence of the requisite impartiality, lack of interest of exercise the powers, rare meetings per year, etc could be mentioned as reasons that commonly hold back these institutions from effectively exercising their powers. Even if the HoF has disposed some cases in the past 20 years, it is nevertheless too little and non-existent from the existing situation of the country.

The failures in France, Brazil and China should give lessons to Ethiopia that constitutional adjudication by parliaments is failing and they should resort to other institutional choices. The *Sénat* of France failed because it was a political body and had no interest to exercise the power. A similar logic could apply to the case of Brazil. Their experience show that constitutional adjudication by parliaments could not work and achieve the desired purposes why constitutions are interpreted. The institutional choice in Ethiopia should have been informed by the failed experience of France, Brazil and China. Once again, Ethiopia is repeating histories of failures/difficulties that France and Brazil faced in the past and currently in China.

Therefore, constitutional adjudication by (non-)legislative assemblies has failed in the past and is also failing nowadays. These all experiences confirm that parliaments are not appropriate

organs to interpret constitutions and achieve the purposes thereof. The Constitution of Ethiopia should take lessons from the failures/ difficulties of similar arrangements in the past. However, more researches should be undertaken to identify which institutions should adjudicate constitutional issues depending on particular contexts of the country.

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