



Mechanism of Implementation of Constitutional Review Decisions: A Comparative Study of Ethiopia, Germany and Benin

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Abstract

In Ethiopia, constitutional review is the task of the House of Federation (HoF)-the upper House of the Parliament. The Council of Constitutional inquiry (CCI), which is predominantly composed of legal experts, offer professional assistance to the HoF while interpreting the Constitution. The number of cases flowing to the CCI/HoF and the constitutional rulings have raised over time. Despite the raise on the flow of cases and constitutional rulings, resistance to implement the rulings of the House has, however, lately become an emerging challenge. In relation to this, this paper is interested in finding out the mechanism of implementation of constitutional review decisions in Ethiopia. It is specifically interested to find out how and who executes such decision and whether the House has a role in this regard. The paper has employed a comparative research methodology. The paper has consulted the experience of two countries which have strong Constitutional Court and constitutional review system: Germany and Benin, in order to see if they have better system and experience in relation to the implementation of constitutional review decisions. Accordingly, the finding suggests that in Ethiopia, both the Constitution and other relevant laws lacks provisions regulating the modalities of enforcement of decision of the House. A coercive system of enforcement which would force the recipient to comply or implement the decision of the House is also absent. Even though the House has powers to resolve constitutional disputes arising from all acts of the state, the type and nature of decision the House offers is very limited. The House does not issue directions, guidelines or remedies in its decision. As a result, the House has a limited role in controlling the fate of the execution of its decision.

The experience of Germany and Benin also suggest that implementation challenge with regard to constitutional review decisions is not peculiar to Ethiopia. The execution of constitutional review

decision has been resisted by state bodies at a serval occasion in both countries. While a full-fledged mechanism of enforcement for constitutional review decisions is absent in both countries, in Germany- the Constitutional Court Act -provides some relevant provisions in this regard. Besides, the German Constitutional Court has been progressive in expanding its influence and control over the execution of its decision. In Benin, mechanism of enforcement is also unstated both in the Constitution and the Organic Law of the Constitutional Court. The Court, on the other hand, has had a self-restrained position to progressively expand its role in the enforcements of its decision. However, later, the Court changed its viewpoint and started issuing a more engaging and commanding decision that further its influence and control in the enforcement of its decision. The experience of the two countries suggest that the House need to adopt a progressive approach in expanding its influence over the execution of its decision pending the enactment of a law that regulates the mechanism of implementation. Sooner or later, it is important that Ethiopia enacts a law that regulates modalities of execution of constitutional review decision.

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Chapter One: Introduction

1.1. Background of the Study

Constitutional review is a widely used system of constitutionality control. According to Tom Ginsburg and Mila Versteeg ‘some 38% of all constitutional systems had constitutional review in 1951; by 2011, 83% of the world’s constitutions had given courts the power to supervise implementation of the constitution and to set aside legislation for constitutional incompatibility.’¹ Constitutional review system is also considered as an effective means of realizing the rights and values enshrined in a Constitution.² The promises of a constitutional review system are, however, realized only up on the execution of a review decisions. Whether review decisions are executed promptly and properly is very important in a constitutional system. This is because, for one thing, constitutional review decisions involve matters that have a broader legal and political significance on the overall constitutional system.³ For the other, a law or an act of a state body that has been found unconstitutional must not stay in effect incumbering citizens.⁴ A problem of implementation of constitutional review decisions is not, however, uncommon in practice. A disregard by the judges, administrators, and legislators to a constitutional review decision is abundant in many constitutional systems. Regardless of the tremendous role and influence of the U.S. Supreme Court in the American democracy and constitutionalism, the implementation of its decisions has, for instance, sustained at a several occasions a resistance from judges, administrators and legislators. This particularly concerns the Court’s decisions in 1950s to

¹Tom Ginsburg & Mila Versteeg, "Why Do Countries Adopt Constitutional Review?" 30 Journal of Law, Economics and Organization 587, 2014, p.2.

²Gerhard Dannemann, ‘Constitutional Complaints: The European Perspective’ in the International and Comparative Law, Quarterly, Vol. 43, No 1, 1994, p.142.

³ Siegfried Bross, “Reflections on the Execution of Constitutional Court Decisions in a Democratic State under the Rule of Law on the Basis of the Constitutional Law Situation in the Federal Republic of Germany” paper presented in a conference on the Execution Of The Decisions Of Constitutional Courts: A Cornerstone Of The Process Of Implementation Of Constitutional Justice, Vince Commission in cooperation with the Constitutional Court of Azerbaijan, Baku, Azerbaijan 14-15 July 2008, at p.2.

⁴ Ibid, p.6.

1960s.⁵ Despite the Court's decision in *Brown v. Board of Education*, schools in several states in south had stayed segregated for more than ten years after the decision.⁶ The same had happened on other decisions of the Court rendered in this period including the decision of the Court regarding the practice of religion in public schools and the rights of a criminal suspect.⁷ Though not comparable with those times, problem of implementation still exist in the U.S.⁸ Also in France, studies proved a similar challenge concerning the decision of the Constitutional Council.⁹

As opposed to the case for decisions of regular courts, it is not common to see legal systems regulating enforcement mechanisms for constitutional review decisions. Constitutional systems, beyond establishing review bodies and conferring them an important role of controlling constitutionality, often neglect stipulating mechanism of implementation of review decisions. How and who ensures the implementation of constitutional review decision is often unforeseen in many constitutional systems. The stipulation of modalities of implementation of review decision is, however, critical for a meaningful contribution of a constitutional review system.

This paper is generally interested in finding out how far a constitutional system envisage a mechanism of implementation for constitutional review decisions. In finding out whether a constitutional system has envisaged a mechanism of implementation it is important to raise the following queries: whether there is a specific body mandated to ensure the implementation of

⁵ Lawrence Baum, *The Implementation of the U.S. Supreme Court Decisions* in Rogowski Ralf and Gawron Thomas (eds.) *Constitutional Courts in Comparison: the U.S. Supreme Court and the German Federal Constitutional Court*, Revised edition, 2016, pp 191-209, p.193.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Aboudou Latif Sidi (Directeur des études juridiques et de la gestion des recours à la Cour constitutionnelle), 'La Mise A Execution Effective Des Decisions De La Cour Constitutionnelle', *Seminaire Sur 'La Cour Constitutionnelle Et Le Pouvoir Judiciaire'* Date : Du 18 au 19 décembre 2017 Lieu : Hôtel du La, Citing Guillaume DRAGO's "L'exécution des décisions du Conseil constitutionnel: l'efficacité du contrôle de constitutionnalité des lois(translated using DeepL translation), p.1.

constitutional review decisions? If not; whether the review body has a role in controlling the implementation of its decision? and whether there exists a sanction for failure to comply with or implement the constitutional review decision?

Defining key terms

While interpreting a constitution, constitutional review bodies may give a variety of decisions. They may declare a challenged law or an act of a state body constitutional/ unconstitutional or may make other forms of decision including orders, solutions, directions, guidelines and remedies. In this paper constitutional review/interpretive decisions refers to any of these forms of decisions rendered by review bodies in the course of interpreting a constitution and which are binding up on the recipient.

In describing the situation which comes after a constitutional review decision is rendered, it is common to see the following terminologies are used such as ‘implementation’, ‘execution’, ‘compliance/non-compliance’ and ‘enforcement.’ If we see meaning of these terms in the Cambridge dictionary, they each refer to a very close concept. *Implementation* is an act of putting a plan in to action; *Execution* is a carrying out of a plan or order or a course of action; *compliance* is the action or fact of complying with a wish or a command; and *enforcement* is the act of compelling observance or compliance with a law, rule or obligation. Yet, the use of each terminologies may be more appropriate depending on the type of decision of the review bodies. For instance, the term *compliance/non-compliance* may be more appropriate to describe the enforcement of a decision of a review body that imposes a negative than positive obligation on the recipient. Therefore, in this paper, to the extent the context of the statement allows, the terms are used accordingly.

Isaac Unah in his chapter discussing the impact of the U.S. Supreme Court decisions defined the term *implementation* as ‘the process of putting in to effect the policies or orders announced in Supreme Court decisions. It involves what happens after the Supreme Court speaks and, in particular, the set of activities and policy projects developed to ensure that the Court’s decisions and orders achieve their desired effect.’¹⁰ Yet, *implementation* of constitutional review decisions may also be used to refer to the broader concept of realization of the essence of review decision beyond compliance and execution. It may hence refer to the impact of the decisions at a greater scale beyond the direct execution of the decisions. This research is not interested in studying implementation of interpretive decision from that broader aspect of the meaning of the term. Therefore, in this paper the term *implementation* is used only in the narrower meaning of the term.

Generally, the terminologies such as “*implementation*”, “*execution*” “*compliance*”, and “*enforcement*” are used interchangeably to the extent they each describe the scope and objective of the paper.

1.2. Statement of the Problem

In Ethiopia, constitutional review power is vested on the upper House of the Parliament, which is called the House of Federation (HoF or the House, here in after).¹¹ The HoF as a constitutional interpreting body enjoys a power to review constitutionality of laws of a legislative body, and of any actions of state bodies at federal and state level.¹² It also enjoys a power to resolve

¹⁰Unah I., The Impact of U.S. Supreme Court Decisions. In: The Supreme Court in American Politics, Palgrave Macmillan, New York, 2009, p. 166.

¹¹The Constitution of the Federal Democratic Republic of Ethiopia (FDRE, here in after), Proclamation no 1/1995. Article 61(1). See also article 83(1).

¹²Ibid, Article 84(2).

constitutional disputes arising from an alleged violation of human rights as filed by citizens.¹³

Although a review power resides up on the House, the Council of Constitutional Inquiry (CCI, here in after) provides the House with a professional assistance. CCI is an advisory body consisting largely legal professionals.¹⁴ The Council receive and investigate constitutional petitions, and if it takes a view that the petition merits constitutional interpretation, it provides the House with recommendation for a final decision.¹⁵

The number of cases flowing to the House/CCI has increased over time. The number of cases filed to the CCI/House has raised from 3 in 2014/15 to 2610 in 2017/18.¹⁶ By June 2018, the total number of cases submitted to CCI/HoF had reached to 3, 350.¹⁷ Also, as shown below, the number constitutional rulings have also raised over time. Yet, despite the raise on the flow of cases and rulings, problems of non-execution and non-compliance with the decisions of the House have lately become a challenge.¹⁸

Noting the implementation challenge, this paper tries to find out whether there exists a defined enforcement mechanism in Ethiopia and what kind of role does the House has in this regard. These being the main questions, the paper also attempt to answer the following questions: what kind of decision does the House give while resolving a constitutional disputes? does it provide, in its decision, a specification on how and who shall execute the decision? is there any procedure available to challenge refusal or non-compliance with the decisions of the House? Is there a

¹³The Proclamation to Consolidate the Powers and Function of the House of Federation of the Federal Democratic Republic of Ethiopia, No 251/2001, Addis Ababa, Ethiopia, Article 7(2).

¹⁴FDRE, Article 82(1) & (2).

¹⁵FDRE, Article 84(1).

¹⁶ Gebremeskel Hailu & Teguadda Alebachew, Increasing Constitutional Complaints in Ethiopia: Exploring the Challenges, Hawassa University Journal of Law Vo.2, 2018, pp 61-62.

¹⁷ በኢ.ፌ.ዴ.ሪ የሕገ መንግሥት ጉዳዮች አጣሪ ጉባዔ ጽ/ቤት የተዘጋጀ, የሕገ መንግሥት ጉዳዮች አጣሪ ጉባዔ የውሳኔ ሀሳቦች, ሕገ መንግሥታዊ ጀርናል, ቅፅ 1፣ ቁጥር 1, page 3, available at <https://www.cci.gov.et/wp-content/uploads/2019/01/CCI-Journal-2011.pdf>.

¹⁸Supra, note, 16, p 67.

sanction for failure to comply? who follows up the implementation of the decisions of the House? And what is the experience in this regard in Germany and Benin?

1.3. Objective of the Study

This paper has the following general and specific objectives. The general objective of this paper is to see whether a defined mechanism for the implementation of constitutional review decisions is anticipated in the Ethiopian constitutional system. The specific objectives, on the other hand, includes the following. Firstly, it is to see whether there is a specific body which ensure the implementation of review decision. Secondly, it is to see what kind of role the interpreting body plays or can play in commanding the execution of its own decisions. Thirdly, it is to see whether there is a legal mechanism to force compliance with the review decision. In relation to this, the paper also aims to explore the experience in Germany and Benin in this regard.

Besides, the paper aims to contribute to the scholarship on issue revolving the execution of constitutional interpreting decision, which is scarcely addressed by the academia

1.4. Selection of the Jurisdictions

In answering the research questions, the paper undertakes a comparative study through exploring the experience in Germany and Benin. The paper, through exploring the laws and selected case laws of the respective constitutional courts, investigates whether these countries have better experience regarding the issue at hand and whether they can offer a lesson for Ethiopia. The two jurisdictions are selected based on the following reasons.

House of Federation, though it is unique institutionally, it is yet a body entrusted with a role of constitutional review and that it is the only body that it exercises the constitutional review function in Ethiopia. Most importantly, HoF, like the Constitutional Court of Germany and Benin, function both as a defender of constitutionalism and protector of fundamental rights of

individual citizens. Additionally, currently, there is a push from the academia and the members of the CCI to upgrade the CCI to a Constitutional Court.¹⁹ In fact, the Council of Constitution inquiry has been detached institutionally from the House and is functioning as a separate office as of 2013 through the establishing Proclamation no.798/2013. It seems, the Council is getting all the experience what it takes to become a self-standing review body. To this end, it is my sincere believe that the elevation of the CCI to a Constitutional Court will not be too far. As a result, the experiences in countries with a Constitutional Court model- as it offers a direct experience- will be helpful in the process of restructuring the system.

Besides, the Constitutional Court of Germany and Benin are both powerful constitutional Courts. The Constitutional Court of Germany- *Verfassungsgericht*- is an influential Court around the world and has played a significant role in advancing human rights, consolidating democracy and safeguarding the constitutional order through its decisions.²⁰ The Benin Constitutional Court is also among the few well-regarded Constitutional Courts in the Africa continent.²¹ The Constitutional Court of Benin has, through its decisions, played a positive role in advancing human rights and strengthening Benin's young democracy.²² Besides, Germany²³ and Benin²⁴ are strong democracies and also a civil law countries.

¹⁹For instance, Dr Fasil Nahom (a senior legal expert and long sited member of the Council inquiry) had told the writer that the council members are pushing to elevate the Council to a Constitutional Court. (September 27, 2017, Addis Ababa). The issue was also a subject of discussion in the recent consultative forum held to strengthen constitutional interpretation at national level, organized by the Council of Constitutional inquiry, on December 29, 2018.

²⁰Michaela Hailbronner, Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism, *International Journal of Constitutional Law*, Volume 12, Issue 3, 2014, p 626-627.

²¹See generally Anna Rotman, Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Harv. Hum. Rts. J. 281, 2004. The Constitutional Court of South Africa is also among the strongest Constitutional Courts in Africa. But it is not considered in this paper, because constitutional review is not the sole responsibility of the Court. Accordingly, given that Ethiopia is moving to adopt a Constitutional Court Model, the South African system may not present the full experience of the enforcement system or potential challenge in Constitutional Court model.

²²Adjolohoun H S, 'Benin' *Constitutions of the Countries of the World Online*, Oxford University Press, 2012, p 29-30.

1.5. Scope of the Study

The main interest of this research is to study the mechanism of implementation of constitutional review decisions i.e how and who executes the decision. Accordingly, it focusses on investigating laws and institutions designed to facilitate the implementation of review decisions. It also sees relevant case laws of the respective review bodies to study the developments in this regard. The paper highlights some implementation challenges experienced in the three jurisdictions to see how the respective systems or review bodies responded to this challenge, and to justify the need for a defined mechanism of implementation for constitutional review decisions.

It is not the primary interest of this paper to study the degree of compliance or non-compliance by state bodies or compare compliance among state bodies. It is not also the interest of this paper to compare the functioning of the review bodies of the three jurisdictions as a constitutional interpreter. Yet, as a way of studying the mechanisms of implementation, the paper will study the role of the respective review bodies in relation to the implementation of their decision.

The House of Federation assumes other functions other than constitutional adjudication.²⁵ Also the Benin Constitutional Court, as discussed below, undertake other functions other than constitutional interpretation. As such, these bodies may render other decisions which does not involve constitutional interpretation. Such decisions of the review bodies are beyond the scope of this paper. This paper is limited only as regards the implementation of the constitutional review decisions of these bodies.

²³Freedom House: Freedom in the World: Germany, 2018, available at <https://freedomhouse.org/report/freedom-world/2018/germany>, accessed on 23 December 2018.

²⁴Freedom House, Freedom in the world- Benin Report, 2017, available at <https://freedomhouse.org/report/freedom-world/2017/benin>, accessed on 19 October 2018.

²⁵FDRE, Article 62. The House of Federation exercise a list of other functions besides constitutional adjudication.

1.6. Structure of the Paper

This paper comprises four chapters and a conclusion. The first chapter is an introductory chapter presenting a background, the statement of the problem, objective of the research, scope and selection of the jurisdictions. The second chapter presents a general overview of the constitutional review system in the three jurisdictions focusing on the competence, nature and legal effects of decision of the interpreting bodies. Dealing with the competence of the interpreting bodies is important as it has implication on the enforcement of their decision. The enforcement of constitutional review decision is contingent to the nature of the review decision of the review bodies. The nature of decision of the review bodies is, on the other hand, dependent on the competence of these bodies. The third chapter address the mechanism of implementation as anticipated by the constitutional system of the three countries or as developed in the case laws of the respective constitutional interpreting bodies. This chapter also discuss the specific role of the review bodies in relation to implementation of their decisions. The fourth chapter, on the other hand, highlights the implementation challenge experienced in the three jurisdictions. Finally, a conclusion follows. In this section, the paper reflects and draw observation from the cases studies by way of conclusion. It specifically identifies the best practices and identify the challenges that needs a constitutional intervention.

Chapter Two: Competence and the Nature of Decision of the Constitutional Interpreting Bodies

2.1. Introduction

The task of constitution review, in the three countries, is handled by a separate review body outside the regular judiciary.²⁶ Constitutional review is the exclusive jurisdiction of these separate bodies in the three countries.²⁷ Yet, a difference exists among these review bodies in relation to their nature, competence, forms and types of decision they each render. This chapter discuss the basic issues such as the nature of the bodies, their competence and types of decisions they render. As such, it aims to provide a background for the next chapters.

2.2. The Nature of the Constitutional Review Bodies

In a way dealing with the nature of the review bodies it is important to see how this review bodies are organized, composed and functions. The Constitutional Court of Germany and Benin modeled after the centralized types of constitutional review systems generally share many similarities.

The Federal Constitutional Court of Germany is a constitutional entity established under the Basic Law of Germany.²⁸ The Court assumes different responsibilities as it is conferred to it in different provision of the Basic Law.²⁹ The Court is organized in two Senates. Each Senate has its own respective competences, but they decide as the Federal Constitutional Court.³⁰ In rare case both Senates pass decisions in a plenary.³¹ This often happens when one of the Senates

²⁶ See the Basic Law of Germany, 1949, Article 92; the Constitution of Benin, 1990, Article, 114; and FDRE, Article 61(1) & 83.

²⁷ FDRE, Article 83(1).

²⁸ The Basic Law of Germany, Article 92.

²⁹ The Basic Law of Germany, Article, 93, 100, 18, 21, 126, 98, 61, 41, and 84.

³⁰ The Constitutional Court Act of Germany (FCCA, here in after), 12 March 1951, Article 14.

³¹ The Constitutional Court of Germany website, available at https://www.bundesverfassungsgericht.de/EN/Das-Gericht/Gericht-und-Verfassungsorgan/gericht-und-verfassungsorgan_node.html?jsessionid=2E8D905E897CEAD692E2915F83DA799B.2_cid383.

wanted to depart from the previously established precedent of the other Senate.³² Members of the two Senates, which are composed of sixteen justice -eight judges for each Senate, are elected by the Bundestag and the Bundesrat.³³

The Benin Constitutional Court is also the highest organ of the State on constitutional matters and is established independent of the other branches of government.³⁴ The members of the Court are composed of seven judges, four whom are appointed by the National Assembly and the remaining three by the President of the Republic.³⁵ The President of the Court is elected by his peers from among the magistrates and legal professional members of the Court.³⁶

The case in Ethiopia is different in many aspects. As stated above, unlike the two jurisdictions, in Ethiopia, review power is exercised by the upper house of the Parliament -the House of Federation. The HoF is composed of nations, nationalities and peoples. Each nations, nationalities and peoples will have one member and an additional one member for an additional one million population.³⁷ The members are appointed by regional councils.³⁸ In practice, regional councils elect representatives from among regional government officials. As such, the HoF, as a review body, is not separately established from the other branch of the governments. While interpreting the Constitution, the HoF receives professional assistance from the Council of the Constitutional Inquiry (CCI) which is predominantly composed of legal experts.³⁹ CCI is composed of eleven members. Of which Six are appointed by the President of the Republic up on the recommendation of the National Assembly and the other three are appointed by the HoF

³²Ibid.

³³FCCA, Article 2 & 5.

³⁴ The Constitution of Benin, Article 114.

³⁵Ibid, Article 115.

³⁶Ibid, Article 116.

³⁷ FDRE, Article 61(1).

³⁸ FDRE, Article 61(2).

³⁹ FDRE, Article 82(2). Eight out of the eleven members are legal experts.

from among its members.⁴⁰ The President and vice-president of the Federal Supreme Court are ex-officio members and also serve as the President and vice-president of the CCI.⁴¹ The CCI receive application of constitutional disputes and decides on the admissibility of the application.⁴² However, applicants whose applications are declared inadmissible by the CCI can file a complaint to the HoF directly.⁴³ Where the application is directly submitted to the HoF, the HoF must refer the same to the CCI.⁴⁴ The CCI once it find out the application is admissible, it discuss on the constitutional dispute and deliver its recommendation to the House of Federation.⁴⁵ Consequently, the HoF either adopt, reject or modify the interpretation recommended by the CCI.⁴⁶ It can thus be said that the constitutional review is somehow a shared responsibility between the HoF and the CCI. In fact, in practice, only on a few occasions that the House departs from the recommendation of the CCI. Those occasions were also on matters of political importance to the prevailing political understanding of the incumbent.

2.3. Competence and Access to the Constitutional Review Bodies

In their capacity as a constitutional review bodies, the Constitutional Court of Germany and Benin enjoy a broader competence in contrast to the HoF. This can be seen from the specific jurisdictions conferred to them and the degree of access to these Courts. Firstly, both Courts check and controls the constitutionality of laws and actions of the government.⁴⁷ In Germany, the Constitutional Court- in *Lüth* case- also extended its competence to the judgement of the judiciary.⁴⁸ The Constitutional Court of Germany and Benin can review constitutionality of a law

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid, Article 84(1) & (3).

⁴³ Ibid, Article 83(3)(a). See also Proclamation No.251/2001, supra note 12, Article 5(2).

⁴⁴ Proclamation No.251/2001, supra, note 12, Article 6.

⁴⁵ FDRE, Article 84(1) & (3)(b).

⁴⁶ Ibid.

⁴⁷ The Basic Law of Germany Article 93 (2), & 100(1). See also the Constitution of Benin, Article, 114 & 117.

⁴⁸ BVerfGE 7, 198(*Lüth* Case) (1958).

of the parliament both as applied and in an abstract.⁴⁹ Yet, in Benin, the Constitutional Court also control the constitutionality of a law before its promulgation.⁵⁰ Secondly, both Courts adjudicates constitutional disputes emanating from state bodies, their operation, and dismissal of its members.⁵¹ In Germany resulting from the federal nature of the State, the Constitutional Court also resolves institutional disputes arising from the functioning of the federal structure.⁵² Thirdly, both Courts enjoys competence over cases of human rights violations.⁵³ Studies shows that, in Germany, constitutional complaints on alleged violation of human rights constitutes 95 % of the Court's caseload.⁵⁴ As well in Benin, submissions based on individual petition constitute the largest percentage of the caseload of the Court. Petitions based on individual submissions form 80% of the total caseload of the Court between 1991 to 2008, for instance.⁵⁵ The Court, till July 2018, has delivered a total 2589 decisions concerning violation of human rights.⁵⁶ Fourthly, both Courts have a jurisdiction to rule over disputes arising from election.⁵⁷ Yet, it should be noted here that in some cases these Courts may play a non-constitutional review role, which is beyond the scope of this paper. For instance, the Constitutional Court of Benin acts as a regulatory body against the functioning of state institution and activities of government officials.⁵⁸ It, for

⁴⁹The Basic Law of Germany, Article 93(2), The constitution of Benin, Article 122. Yet, in Germany, while this is limited to the government organs mentioned under article 93(2), in Benin, this is open for all citizens.

⁵⁰The Constitution of Benin, Article 117 & 121.

⁵¹The Basic Law of Germany, Article 93(1), 98 & 61. The Constitution of Benin, Article 118.

⁵² The Basic law of Germany, Article 99, & 126.

⁵³The Basic Law of Germany, Article 93(1)(4)(a). The Constitution of Benin, Article 117.

⁵⁴Tomas Gawron and Ralf Rogowski, Implementation of German Federal Constitutional Court Decisions - Judicial Orders and the Federal Legislature in Rogowski Ralf and Gawron Thomas (eds.) Constitutional Courts in Comparison: the U.S. Supreme Court and the German Federal Constitutional Court, Revised edition, 2016, pp. 210-226, p 214.

⁵⁵Theodore Holo, Decision Making and Working Practices, Handling of Petitions by the Constitutional Court of Benin, in Charles M.Fombad (eds), Constitutional Adjudication in Africa, Oxford University Press, 2017, No page number is available, available at <http://oxcon.oup.com/view/10.1093/law/9780198810216.001.0001/law-9780198810216-chapter-14>, last viewed, on 29, March 29, 2019.

⁵⁶Kangnikoé Bado, Judicial Review and Democratization in Francophone West Africa: The Case of Benin in: VRÜ Verfassung und Recht in Übersee, Seite 216 – 239, VRÜ, Jahrgang 51 (2018), p 235, available at <https://doi.org/10.5771/0506-7286-2018-2-216>, last viewed, 29 March 2019.

⁵⁷ The Basic Law of Germany, Article 41(2), The Constitution of Benin, Article 117 para. 5 & 6.

⁵⁸ The Constitution of Benin Article 114.

instance, authorizes the purchase or lease on anything that pertains to the domain of the state by the president of the Republic and members of the government (Article, 52). To this end, this paper only focuses on the constitutional interpretation competence of the Courts.

As it is the case for the Constitutional Court of Germany and Benin, House of Federation also exercise the conventional competence of review bodies to resolve the constitutionality of a law. As stated under Article 84(2) of the Constitution, where any Federal or State law is questioned to be unconstitutional, it can be submitted to the CCI/HoF for constitutional interpretation. Beyond what is stated under the Constitution, the proclamation to establish the Council of Constitutional Inquiry has extended the constitutional review power of the HoF to any customary practices, decisions of government organ and government official.⁵⁹ ‘Government organ’ in this case refers to the legislative, executive and judicial organs at a federal and state level.⁶⁰ Likewise the Constitutional Court of Germany and Benin, HoF is given a competence to rule over cases of human right violation resulting from the unconstitutional actions of the state bodies or officials.⁶¹ It is also true for Ethiopia that nearly all cases submitted to the House constitute petition on alleged violation of human rights. The majority of the petitions also came objecting the final decision of the administrative and regular court decisions. The House rule over the decision of these judicial and administrative bodies without challenging the law based on which the decision has been rendered. As such, the House is often blamed for functioning as the highest appeal court than a constitutional review body. Only on few cases the House was presented with case of constitutionality of a law.⁶²

⁵⁹The Council of Constitutional Inquiry Proclamation No 798/2013, Article 3(1).

⁶⁰ Ibid, Article 2(6).

⁶¹ Ibid, Article 5(1).

⁶²Adem Abebe, Unique but Ineffective: Assessing the Constitutional Adjudication System in Ethiopia in Charles M.Fombad eds, Constitutional Adjudication in Africa, (Oxford University Press), 2017, No page number is

The HoF doesn't have an *ex-ante* review power. It does not also have a power to review the constitutionality of a promulgated law in abstract. It only sees the constitutionality of laws as applied. This is clear from Article 83 (2) & (3) of the Constitution and Article 5(3) of the Proclamation for the Establishment of the Council of Inquiry. Accesses to the Court is limited to the interested party directly affected by the law as applied or referral from the court where the constitutionality of a law is contested in a case before it.⁶³ Where the constitutionality of a law or an action of a government body is contested outside the regular court, application to the HoF is possible only up on the final decision of the state body having competence to render final decision on the matter.⁶⁴ In Ethiopia, there is generally a restricted access to the HoF. That has also limited the competence and the type of decision the House offers.

HoF, beyond its role as a constitutional review body, it has also other functions not related with constitutional adjudication such as promoting equality of the people of the country, design a federal grant formula, resolves border disputes among regional states, vote on constitutional amendments with the National Assembly, and others.⁶⁵ It needs to be noted that HoF is originally meant to serve as an upper house of the parliament and a house of nation, nationalities and peoples rather than as a constitutional interpreter. Constitutional interpretation is just one of the many functions of the HoF. Therefore, this paper is limited to the role and decision of the HoF in its capacity as a constitutional review body.

2.4. Nature of the Constitutional Review Decision and Remedies

The nature of the remedy the constitutional review body renders or empowered to render has a bearing on the implementation of the review decisions. Such as whether the review body is

available. available at, <http://oxcon.ouplaw.com/view/10.1093/law/9780198810216.001.0001/law-9780198810216-chapter-9>, accessed on 12 Nov.2018.

⁶³ Proclamation 789/2013, Supra, note 59, Article 4(1).

⁶⁴ Ibid, Article 5(2).

⁶⁵ FDRE, Article 62.

empowered or not to issue mandatory orders, injunctions and damages are all important in determining the success of the implementation of the decisions. In Germany, the Constitutional Court Act (FCCA, here in after) provides a detailed account of the powers and nature of the decision of the Constitutional Court. To this end, the Constitutional Court can issue a decision not only that imposes on the recipient a negative obligation, but also a decision that require the recipient to take a certain corrective action. The Constitutional Court may pass a decision declaring the law void, compatible, incompatible and a decision which declares how a statute must be interpreted.⁶⁶ The decision of the Court declaring the law void nullifies the law and the law will stop to have a force of law.⁶⁷ The decision of the Court declaring the law incompatible, on the other hand, declares the law unconstitutional, but the law will continue to have a force of law until the recipient takes the corrective measures as prescribed in the decision of the Court.⁶⁸ The Court usually specify the remedial measures and a time limit with in which the corrective measures need to be taken.⁶⁹ Such decision of the Court implies that the court will void the law if the addressee fail to take the measure as ordered in the decision.⁷⁰ The decision of the Court declaring the law compatible with the Basic Law on the other hand indicates that the law is constitutional and hence, all state bodies must bound by it.⁷¹ The other form of decision of the Court is a declaration how a certain statute must be interpreted.⁷² When a provision of a statute is

⁶⁶ FCCA, Article 31(2).

⁶⁷ Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3d edition, Duke University Press, 2012, 35.

⁶⁸ Ibid.

⁶⁹ Ibid, 36.

⁷⁰ Ibid.

⁷¹ Ibid, 37.

⁷² Wolfgang Zeidler, *Federal Constitutional Court of the Federal republic of Germany: Decisions on the Constitutionality of Legal Norms*. Notre Dame L.Rev. Vol.52 Issue 4, 1987, p. 509.

ambiguous and lead to a different interpretations, the Court will declare a constitutionally conforming interpretation.⁷³

Besides, the Court, in order to prevent a grave danger/disadvantage or to prevent an imminent violence or for another important reason in the interest of the common good, it can issue an intermediary decision in the form of an injunction order before it issues a final decision on constitutionality of an act or a decision of a state body.⁷⁴ Injunction order is an important power of the Court which is conferred to it later by the FCCA.

In Benin, the type of decision which the Court can render- beyond declaring a law constitution or unconstitutional- is not explicitly stated in the Constitution and the Organic Law of the Constitutional Court. Whether the Court can issue an injunction order before making a final decision is not stated in the relevant laws. It is not also stated that whether the Court can issue a reparation to the victims of the violation of a human right. However, the Court has later developed a case law where it entrusts itself an extended power beyond declaring the constitutionality or unconstitutionality of a law.⁷⁵ For instance, the Court has later started issuing an order of reparation for individuals who have sustained human right violation resulting from the unconstitutional acts of state bodies.⁷⁶

In Ethiopia, House of Federation, if it discovers a law to be unconstitutional, it can declare the law generally void or a part or a provision of the law.⁷⁷ Somehow similar with the case in

⁷³Ibid.

⁷⁴FCCA, Article 32. See also Article 25(3).

⁷⁵Sègnonna Horace Adjolohoun, Centralized Model of Constitutional Adjudication: The Constitutional Court of Benin Ethiopia in Charles M. Fombad eds, *Constitutional Adjudication in Africa*, (Oxford University Press), 2017, no page number is available. available at, <http://oxcon.oupplaw.com/view/10.1093/law/9780198810216.001.0001/law-9780198810216-chapter-9>, accessed on 12 Nov.2018.

⁷⁶Ibid.

⁷⁷Proclamation no 251/2001, Supra, note 13, Article 12.

Germany, the House before it declares the law unconstitutional, it may require the federal or state legislative bodies to amend, modify or replace a law within six months.⁷⁸ In Ethiopia too, it is not stated in the Constitution that whether the House can issue a reparation in cases of a violation of a human rights. Nor it is addressed under the two relevant Proclamation No.251/2001 and 798/ 2013. The Council and the House of Federation have never also issued such a remedy, in practice, so far.⁷⁹ Whether HoF can issue an interlocutory decision in the form of injunction order also not addressed in any of the relevant laws and the Constitution. Despite the silence in the law in this regard, CCI has very recently started issuing an injunction order.⁸⁰

2.5. Effects of Constitutional Review Decisions

Whether constitutional review decision has a force of law and binds everyone also determines the execution of the decision. In this regard, the binding force of decision of the respective review bodies is established under the laws of the respective countries. In Germany, the Basic Law under Article 94(2) states that a federal law shall regulate the organization, procedure and in which instance the decision of the Court (i.e whether the decision of the court in an abstract review, a concrete review or a constitutional complaint proceeding) shall have a force of law. In line with this, Article 31 of the FCCA has determined the effect of the decision of the Court. To this end, Article 31(1) declared indiscriminately that the decisions of the Court shall have a binding effect up on all constitutional organs of the federal and states, as well as on all courts and authorities.⁸¹ Article 31(2), on the other hand, specifically stated that decisions of the Court on matters

⁷⁸ Ibid, Article 16(2).

⁷⁹ Adem Abebe, *supra*, note 62.

⁸⁰ An email conversation with Belachew Girma (Former legal expert at the Council of Constitutional Inquiry), November 7, 2018. Also, an email conversation with Ato Zelalam Gudeta (an officer at the Council Constitutional Inquiry), March 19, 2019.

⁸¹ FCCA, Article 31(1).

stated under Article 13 (6, 6a, 11, 12, 14 and 8a) of the FCCA have a force of law.⁸² This indicates that the decisions of the Court rendered in an abstract review, concrete review and constitutional complaint proceedings have all the effect of a force of law. This in other words means that the decision of the Court pertaining to those matters will be regarded as part and parcel of the legal system and hence enjoys a status of a law of a parliament. The binding nature of the decision extends not only to the final judgment but also to the reasoning part.⁸³ The Court in its decision in the *Southwest State* case (1951, no.3.1) also indicated that a law which has been declared unconstitutional prevents the legislature from reenacting such a law.⁸⁴ This indicate that all state bodies including the Parliament is bound by the decision of the Court. However, the Constitutional Court is not necessarily bound by its prior decision. The Court can reverse or modify its prior decision- as the case may demand. The decision of the court has generally a prospective effect. However, exceptionally, the decision of the Court may have a retroactive effect. In a criminal proceeding where a criminal offender was convicted based on the law which is later found unconstitutional, a fresh trial to challenge final conviction can be made.⁸⁵ The operative part of the decision of the Court declaring the law either compatible or incompatible with the Basic Law is required to be published in the Federal Law Gazette by the Federal Ministry of Justice and Consumer Protection.⁸⁶ Similar with the decision of the regular judiciary, the principle of *Res judicata* applies to the decision of the Constitutional Court as well.⁸⁷ But this

⁸² Ibid, Article 31(2).

⁸³ Kromars and Miller, *supra*, note, 67, p 37.

⁸⁴ Ibid.

⁸⁵ FCCA, Article 79(1).

⁸⁶ Ibid, Article 31(2).

⁸⁷ Zeidler, *supra*, note 72, p.519.

is only true to the operative as oppose to the reasoning part of the judgement.⁸⁸ The principle of *Res judicata* also equally binds the Court itself.⁸⁹

In Benin, the binding nature of the decision of the Constitutional Court is acknowledged at a constitutional level. The decision of the Constitutional Court is regarded final and is not subject to appeal.⁹⁰ The decision of the Court is binding on all state bodies, authorities and military jurisdiction.⁹¹ A decision which is declared unconstitutional cannot be reenacted and enforced consequently.⁹² The decision is also required to be published in the official Gazette.⁹³

In Ethiopia, the Constitution is generally silent about the effect of the interpretative decision of the HoF. The matter is however addressed later under the subsidiary laws. Accordingly, the decision of the House is regarded final, has a binding effect on all state organs and in all similar future cases.⁹⁴ The HoF, as a federal institution, its decision equally binds state bodies at regional level. It is not, however, stated under the Constitution and the relevant subsidiary laws whether the reasoning part of the judgement is equally binding. Unless stated otherwise in the decision, the review decision of the House will be binding as of the date of the delivery of the judgement.⁹⁵ This indicates that the decision of the House- unless the House states a specific date, will have a prospective effect. This imply that the House enjoys a discretionary power in determining the effective date of the decision. The judgments of the House are also required to be published in a special publication.⁹⁶

⁸⁸ Ibid, 519.

⁸⁹Ibid, 521.

⁹⁰ The Constitution of Benin, Article 24.

⁹¹ Ibid.

⁹² Ibid.

⁹³The Organic Law of the Constitutional Court of Benin, 91-009 of March 1991, Article 28.

⁹⁴ Proclamation No 251/2001, supra note 13, Article 11(1) & Article 56(1).

⁹⁵ Ibid, Article 16(1).

⁹⁶ Ibid, Article 11(2).

Chapter Three: Mechanisms of Implementation of Constitutional Review Decisions

3.1. Mechanisms of Implementation of Constitution Review Decisions

Once a decision by a constitutional review body is made, what happens after that is not clear in many countries legal systems. While review bodies are often boldly noted and are established as a constitutional organ in many country's constitutions, the mechanisms of implementation of their decision is, however, often unaddressed. As opposed to judicial decision of regular courts, how and who executes a constitutional review decision is often not well stated in the legal system in many countries. Yet, a closer look to some legal system shows that there are different experiences in this regard.

In some countries, the responsibility to execute the decision of the review body is given to the executive. For instance, in Croatia, the Constitutional Court Act states that the government shall ensure, through the bodies of the central state administration, the execution of the decision of the Court.⁹⁷ In some other countries, the review body ensures the execution of its own decision. For instance, in Russia, a department within the Constitutional Court ensures the execution of the decision and monitor the implementation of the decision of the Court.⁹⁸ The other type of mechanism of implementation is where the review body determines in its decision how and who may execute its decision. A good example for this model is Germany. As per Article 35 of the FCCA, the Court is empowered to indicate how and who may execute its decision. The experience in many other nations- including Benin- on the other hand- shows us that a law only declares the binding nature of the decision of the review bodies while not addressing how and who executes the decision. In fact, in these countries, the recognition of the binding nature of the

⁹⁷The Constitutional Act on the Constitutional Court of the Republic of Croatia, the Official Gazette No. 49/02 of May 3, 2002, Article 31(3).

⁹⁸Anahit Manasyan, Execution of the Constitutional Court Decisions as a Guarantee for Strengthening the Constitutionalism: Example of the Republic of Armenia, *Juridiska zinatne/Law*, No 8, 2015, P. 194.

decision of review bodies assumes that the body or a person to whom the decision is addressed ensures the execution of the decision. As such, the responsibility to execute the decision resides on the recipient of the decision. In Ethiopia, even if a specific body and mechanism of implementation is not stipulated precisely, there is a law which imposes a duty on the concerned bodies to observe and execute the decision of the House.⁹⁹ The concerned bodies in this case refer to the bodies which will be implicated in the decision of the House as a recipient of the decision.

The other issue in relation to the mechanism of enforcement of constitutional review decision is what will happen if the recipient of the decision refuse to comply or implement the decision. Concerning enforcement of judicial decision of regular courts, it is common to find in every legal system a defined procedure on what will follow when the judgment debtor fails to fulfil its duty. It is not, however, common to find a legal system regulating the consequence of failure to comply with constitutional review decisions. Remarkably, however, the Constitution of Ghan and Gambia have provisions providing a specific sanction for failure to comply with constitutional review decisions. In Ghana, any person or group of persons who refuses to comply with the orders and direction of the Supreme Court is/are subject to a criminal punishment (Article 2(2&4). If it is the President or Vice President who refused to comply or implement, the refusal shall cause him/her a removal from office (Article 2(2&4)). Again, under the Gambian Constitution, failure to comply with constitutional review decision of the Supreme Court is criminally punishable, and in the case of the President and Vice President, it causes an impeachment procedure (Article 5 (3) (A & B)). Yet, these two constitutions have not provided a

⁹⁹ Proclamation No 251/2001, *supra*, note 13, Article 56(2).

sanction for the Parliament in case it fails to comply with the directions or orders of the Supreme Court to amend or repeal a law declared unconstitutional.

The 2010 Kenyan Constitution, in a similar context, provides a sanction against the Parliament in the event of failure to comply with the direction of the High Court to enact a law. The 2010 Kenyan Constitution- as part of ensuring the implementation of the Constitution- stipulates a time limit where the Parliament must enact the required laws. In the event of a failure of the Parliament to enact the laws within the deadline, the Constitution entitles citizens to file a petition to the High Court demanding the Parliament to enact the required laws.¹⁰⁰ As a result, the High Court may give a direction to the Parliament to take the necessary steps to ensure the required laws are enacted.¹⁰¹ Consequently, however, if the Parliament fail to comply with the direction of the High Court, the Chief justice shall advice the President to dissolve the Parliament and the President shall dissolve the Parliament.¹⁰² The Kenyan experience also not presented directly in connection with implementation of constitutional review decisions, it is still a useful experience. Constitutional systems may apply such procedures to make sure the parliament comply with constitutional review decisions.

The Constitution of Sierra Leone (Article 127(4)) also provides a criminal sanction on the recipient who refuses to comply with the constitutional review decision of the Supreme Court.

Coming to the three countries under study, the Constitution of the respective countries- beyond establishing the interpretive bodies as a constitutional organ- lacks a detailed provision/s addressing the modalities of execution of constitutional review decisions. These countries also lack a specific body purposely established for the purpose of overseeing the execution of the

¹⁰⁰ The Constitution of Kenya, 2010, Article 261(5).

¹⁰¹ Ibid, 261(6).

¹⁰² Ibid, 261(7).

review decisions. The responsibility of ensuring the execution of the review decision is generally left to the recipient of the decision or the body specifically mandated by the decision to take care of the execution of the decision. In Ethiopia, the House sometimes assign its secretariat to follow up the enforcement of the decision.¹⁰³ Often times, however, the House totally leaves the enforcement of the decision to the addressee. In the letter notifying the recipient of the decision, the House often remind the recipient that the decision of the House is final, binding and that it oblige the recipient to observe and execute it in accordance with Article 11(1) and 56(2) of the proclamation no 251/2001.

A full-fledged system of coercion or sanction for non-compliance with the decision of the review bodies is not also put in place in the legal system of these countries. Yet, in Germany, the Court's case law and the Constitutional Court Act have provided some coercive measures in the event of failure to comply. The measures are discussed below.

3.2. Process of Implementation

In practice, for instance in Germany, once the Court rule over the constitutionality of a statute, the decision will be send to the federal ministry which is in charge of drafting a legislation- the Ministry of Justice- as opposed to the Parliament which is the addressee in such a decision.¹⁰⁴ The Ministry of Justice then discerns from the judgement the law which has been declared unconstitutional, the specific orders, and the reasoning.¹⁰⁵ In so doing, the Ministry exercises some degree of discretion in understanding and interpreting the essence of the decision of the

¹⁰³For instance, the letter of the House addressed to the Supreme Court of the Amhara Regional State to notify its decision on a case between *W/ro Kelbe Tesfa V Ayelgn Derbew*(2015). Also See the letter addressed to the Supreme Court of Oromia Regional States to notify its decision on the case between *W/o Halima Mohamed v Ato Adem Abdi (2015)*. (files with the author).

¹⁰⁴Gawron and Rogowski, *supra*, note 54, p.218.

¹⁰⁵*Ibid*, p. 218.

Court.¹⁰⁶ This may even be truer in the judgements of the Court which are ambiguous, complex and lacks clarity. It is after this that the legislature then implements the orders of the Court. Where the decision of the Court is outside the issue of a constitutionality of a statute, the decision of the court is referred to and executed by the body specifically mentioned in the Court's decision. For instance, concerning a decision of the Court on the constitutional status of a political party, once the Court decides on the ban of the party, the Court may assign a specific body of a government for the execution of its decision such as the prohibition of the establishment of a substitute party or the forfeiture of the asset of the party. In its decision in the Communist Party of Germany (KDP) in 1956, for instance, the Court assigned the Ministers of the interior to execute its decision at State level.¹⁰⁷ It also confer an authority to the identified authorities (the Ministers of the interior) to direct public authorities in the course of executing the decision.¹⁰⁸ Accordingly, the Ministers of interior takes care of the execution of the Court's decision in this particular case. In a concrete review proceeding, on the other hand, once the Court make its decision it directly communicate its decision back to the lower court where the concrete case is pending. The lower court then rules over the case based on the decision of the Court.

Publication of the decisions is also an important step in the process of implementation of review decision. The decisions of both Senates of the Court -as discussed above- are required by law to be published in Federal Law Gazzete. The decisions of the Court are published in the Court's website. As such, everyone can take a notice of the decision of the Court and therefore, guided by it.

¹⁰⁶Ibid, p. 221.

¹⁰⁷The Communist Party of Germany (KDP) case, 1956, available at http://ghdi.ghi-dc.org/sub_document.cfm?document_id=3097, last viewed, 29 March 2019.

¹⁰⁸ Ibid.

In Benin, once a decision is made, the decision is formally communicated to the applicant and all those that are connected to the implementation of the decision.¹⁰⁹ Therefore, the recipients expectedly implement the decision. More so, the decision will be published on the official *Gezatte*, as indicated above. As a way of facilitating the implementation of the decision, the information technology department of the Court also takes a responsibility of publishing the Court's decision in the website of the Court.¹¹⁰ Likewise, in Ethiopia- once the decision is made, the House communicate the decision to the respective stakeholders that are related to the decision including the applicant and the addressee. The House communicate its ruling to the recipient of the decision together with a separate letter- which is addressed directly to the recipient institution- stating the status of the decision (whether it is constitutional/unconstitutional).

The decision of the House-as required by the law- are published in a special journal as opposed to the *Negarit Gazetta*- where laws of the Parliament are published.¹¹¹ In my view, the publication of the constitutional review decision in a special journal has limited the publicity of the decisions among the population. The logic for preferring the publication of the decisions in a special journal is not also clear.

3.3. The Role of the Interpreting Bodies

Even if review bodies cannot execute their own decisions, they can, however, influence or indirectly control the execution of their own decision. This depends on the power given to them by the law or their ability to assert a power over time through their own case law. To this end, whether review bodies can issue decision involving orders or a follow up action, or whether they

¹⁰⁹Holo, *supra*, note 55.

¹¹⁰ Ibid.

¹¹¹The Federal *Negarit Gazetta* Establishment Proclamation number 3/1995, Addis Ababa, Ethiopia. This law requires every law to be published in *Negarit Gazetta*.

can choose who executes the decision and the method of execution would enable them to influence the implementation of their decision. This section discusses the nature of decision of the review bodies and their specific role in influencing the implementation of their decision.

3.3.1 The Nature of Decision which Review Bodies Render

The nature of the decision offered by the review bodies is an important element which determines the executability of their decision. Whether the decision they make is commanding or permissive, engaging or a mere declaration of a constitutional status of a law or an act of a state body all determines the prospect of the implementation of the review decisions. This section discusses the nature and type of decision the review bodies- in the three jurisdictions- issues or entitled to issue while interpreting a constitution.

A. The Case in Ethiopia

As discussed above, the House has a power to resolve constitutional disputes arising from all acts of state bodies. The House also acts as a protector of human rights of individuals which are guaranteed under the Constitution. As such, any individual, who takes a view that his/her human right is violated resulting from the act of a state body, can file a constitutional complaint directly to the CCI/HoF up on the final decision of the concerned state body or a judicial body. If a constitutional dispute arises in a court proceeding, the court which is handling the case can refer the matter to the House.

In the 21 years of service, the House has found a law contrary to the Constitution only in a single case.¹¹² As such, nearly all decisions of the House are concerning the decisions of administrative and judicial bodies. To this end, much cannot be said about the nature of the decision of the House pertaining to constitutionality of a law. In the rest of its decision, the nature of the

¹¹²Adem Abebe supra, note 62. The case was about a provision of a law which restrict appeal right of higher officials. Currently, there are several cases pending before the CCI/HoF concerning constitutionality of different regional and federal laws.

decision of the House is limited to a declaration of constitutionality and unconstitutionality of the final decision of the judicial or administrative body. Apart from this, the House neither give a specific direction, guidelines or remedies. For a long time now, the CCI/ HoF were not also willing to issue orders of injunction despite request from the applicants.¹¹³ Since recently, however, CCI has started issuing such an order pending the investigation and final decision on the constitutionality.¹¹⁴

B. The Case in Benin

In Benin, even if access to the Court is very open, the type of decision the Court offer is very limited.¹¹⁵ The Court's decision is largely limited to a judgement declaring a law or an act of a state body constitutional or unconstitutional. In this respect, a law or an act of a state body which is declared unconstitutional is considered null and void.¹¹⁶ A conditional declaration of unconstitutionality- like the case in Germany (see below), is not known in Benin. In the event the Constitutional Court- in the *ex-ante* proceeding (peculiar to Benin)- declares a draft law or a provision of a draft law contrary to the constitution, the decision of the Court prevents the promulgation of the law or the provision.¹¹⁷ The decision of the Court declaring the law, or the provision of the law compatible with the constitution terminate the suspension to promulgate the law.¹¹⁸ Concerning election, the Court also gives final decision on the validity of the election of deputies and the regularity of legislative elections in accordance with the Article 117(3) of the Constitution.

¹¹³ Gebrmeskel and Teguadda, *supra*, note 16, p. 67.

¹¹⁴ *Supra*, note 80.

¹¹⁵ Rotman, *supra*, note 21, p. 307.

¹¹⁶ The Organic Law of the Constitutional Court of Benin, *supra*, note 93, Article 31 par.2 & Article 33 par.2.

¹¹⁷ *Ibid*, Art 30 and 31.

¹¹⁸ *Ibid*, Article 29.

Whether the Court can issue orders and injunctions beyond declaring the constitutional status of a law or an act challenged is not stated in the Constitution of Benin and other laws.¹¹⁹ The Constitutional Court has had also a position that principle of separation of power forbid the Court from issuing order against the state bodies.¹²⁰ The Court later changed its position and started issuing decisions that order state bodies to take certain actions. Gradually, the Court has started issuing orders such as a reinstatement orders, reparation for human right violation, order for the release of a wrongly convicted or imprisoned persons and injunction orders. For instance, in 2003 in DCC 03-078, following the failure of the Parliament to comply with its first decision in the DCC-03-077- which declared the suspension of the election of the Bureau of National Assembly unconstitutional, the Court ordered the Parliament to take a specific measures.¹²¹ The Court ordered the Parliament to resume the election process within 48 hours of the decision of the Court; if not, the incumbent oldest Member shall be replaced by another oldest Member of the Parliament in accordance with the Parliament's rules of procedure.¹²² On another similar case (DCC 04-065) in 2004, the Court ordered the election to take place within 72 hours of the decision of the Court.¹²³

In DCC 02-052 of 31 May 2002, the Court, contrary to its previous position in DCC 02-037(in which it says that the court based on Article 114 and 117 cannot order damage and reparation), made a ground-breaking decision ordering a compensation for the victim of a violation of human right resulting from the unconstitutional act of the state body.¹²⁴ The Court, however, did only declare the reparation without stating from whom, what, how and when the victims can receive

¹¹⁹ Adjolohoun, *supra*, note 75.

¹²⁰ *Ibid.*

¹²¹ Bado, *supra*, note 56, p 231.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ Rotman, *supra*, note 21, p. 304.

the compensation.¹²⁵ Consequently, the victim instituted a new action before a courts of law for the realization of the reparation declared by the Constitutional Court. In another case in DCC 02-002, the Court made a judgement ordering the prison center to improve the treatment of the applicant in the prison.¹²⁶

C. The Case in Germany

In Germany constitutional proceedings generally takes the following forms: a concrete review, an abstract review, and a constitutional complaint proceeding. The type of the proceeding somehow determines the nature of decision the Court renders. Yet, the issue of constitutionality of a statute arises in almost all forms of the proceedings.¹²⁷ Irrespective of the type of the proceeding, whenever the constitutionality of a statute came in to question, the Court may render the following decision as regards the law: null and void, incompatible, compatible and declaring the constitutional interpretation of a statute.

When the court renders a decision declaring a law *null and void*, the law stop to function.¹²⁸ The decision imposes a negative obligation on state bodies not to apply and rule by it. As it appears, such decision does not involve issue of *implementation* per se. Yet, it can be said that such decision involves issue of compliance. Whether state bodies have in fact refrained from applying the law which is declared null and void is a matter of compliance with the decision of the Court. The Constitutional Court also prohibited the legislature from reenacting a law that has been declared unconstitutional.¹²⁹ Besides, the decision of the Court declaring the law null and void- on some occasions, may require corrective measures on the legal action that was taken based on

¹²⁵Ibid, 304-305.

¹²⁶ Ibid, 302.

¹²⁷Wiltraut Rupp- v.Brunneck, Admonitory Functions of Constitutional Courts, American Journal of Comparative Law Vol.22, 1972, 287- 493, P.389.

¹²⁸ Kommers and Miller, supra, note 67, p.35.

¹²⁹ Kommers and Miller, supra, note 67, p. 37

the law that is later declared unconstitutional. For instance, if a person has been convicted based on a law which is later found unconstitutional, a new trial may start to challenge the conviction (Article 79(1) of the Constitutional Court Act). This is possible even when the convicted person has died; his/her relative can claim a reputation.¹³⁰

Beyond this, the Court when it declares a law null and void, it may state a follow-up action which require the legislature to take a corrective measure.¹³¹ The good examples often mentioned are the Party Finance case II and the Abortion case I. In the Party Finance Case II, the Court after declaring the law unconstitutional, it indicated that the Parliament need to make a new law which allows parties with 0.5 % votes in national election to receive state funding.¹³² As such, the Court not only stated a follow up action, it provided the legislature a substantive standard by stating the constitutionally protected minimum threshold of vote for parties to be eligible for funding. As well, in the Abortion Case I, the Court suggested a content for the new law to be enacted by the legislature by indicting grounds for abortion and prohibiting abortion in demand.¹³³ In some instance, the Court also provides an interim legislative solution or an executive order pending the legislation by the Parliament. For instance, in 1991 in its decision invalidating the provision of a law, which stated that the name of the husband would automatically appear as a family name where the spouses had not indicated another family name, the Court provided an interim legislation saying that ‘if the spouses do not choose a common family name, they both retain their respective names for the time being.’¹³⁴ Such decisions of the court refute the argument that

¹³⁰Supra, note 3, Page 6.

¹³¹ Kommers and Miller, supra, note 67, p. 37

¹³² Ibid.

¹³³ Kommers and Miller, supra, note 70, p. 380 & 37.

¹³⁴ Supra, note 3 citing BVerfGE 10, 59, p. 7.

the decision of the Court is always declaratory in effect or not self-executing- the execution of which require action of another state body.¹³⁵

The other form of decision is a decision declaring a law *incompatible* with the constitution.¹³⁶

The law which is declared *incompatible* will remain conditionally functional awaiting corrective measures by legislature as required in the decision of the Court. Rupp-v-Brunneck call this type of decision of the Court as an ‘*admonitory*’ decision.¹³⁷ The Court developed such form of decision in order to avoid legal vacuum and to deal with the socio-legal and political predicament of declaring a law null and void.¹³⁸ Such innovation of the court has later backed up by the Act of the Parliament.¹³⁹ In such form of decision, the Court often times state instructions and time limit within which the legislature is expected to take the corrective measure.¹⁴⁰ Sometimes, the Court also states specific content in way denying the legislature a discretion to determine the subject of the corrective measure.¹⁴¹ Accordingly, in this type of decision, the issue of the *implementation per se* is more visible. The instructions and content indicated in the Court’s decision- as they are part and parcel of the decision of the Court- are expected to be obeyed by the legislature while remaking or modifying the challenged law.

The third form of decision is a decision declaring a law compatible with the constitution. When the law is declared constitutional, it means that state bodies must respect and abided by it. As such, it is predominantly an issue of compliance. As mentioned above, a law declared constitutional has the same status with other laws made by the Parliament. Such decision also

¹³⁵ Kommers and Miller, supra, note 67, P.37. They argue that the decision of the Constitutional Court is exclusively declaratory-which means not directly enforceable.

¹³⁶ Kommers and Miller, supra, note 67, p.35. see also Zeidler, supra, note 72, p. 511.

¹³⁷ Wiltraut Rupp- v.Brunneck, supra, note 127 p. 387.

¹³⁸ Ibid, Gawron and Rogowski, supra, note 54, p 215-16. See also Zeidler, supra, note 72, p. 511.

¹³⁹ FCCA, Article 31(2). The decision of the Court on constitutionality of a statute can include: null and void, compatible, and incompatible.

¹⁴⁰ Kommers and Miller, supra, note 67, p 36. See also Gawron and Rogowski, supra, note 54, p 215-16.

¹⁴¹ Kommers and Miller, supra, note 67, p 36.

involves issue of compliance. Finally, the last decision rendered by the Court is *interpretation*.¹⁴²

The Court without declaring a statute unconstitutional, it may declare an appropriate interpretation of a statute or a provision that conform with the Basic Law. Accordingly, it imposes a duty on state bodies, particularly on the judicial bodies to apply the law in accordance with the new interpretation of the Court.

In a nutshell, decisions concerning the constitutional status of a statute are primarily addressed to the legislative body. Yet, other state and judicial bodies can also become addressees to such decisions. In a concrete review proceeding, for instance, the lower court- which has a case before it, is expected to resolve the case-based on the decision or interpretation of the Court.

Outside decisions concerning a constitutionality of a statute, the Constitutional Court also give other decisions. These include decisions of the Court in relation to the status of a political party and a decision of the Parliament affirming election results. In a political party proceeding, the Court while declaring the unconstitutionality of a party, it may also give decision the implementation of which requires actions of public authorities. Such decision of the Court may include confiscation of the property of the party, forfeiture of the rights of leaders or members of the party or prohibition of establishment of a substitute party. Likewise, in election cases, the Court may give a decision either confirming or rejecting the decision of the Parliament approving the election result.

The other most important decision of the Court is an order of the Court in the form of injunction as per Article 32 and 25(3) of the Constitutional Court Act). The Court may give an injunction order pending its final decision ordering a state body to take either a negative or a positive action in order to prevent sever disadvantage and imminent violence or to protect public interest. The

¹⁴²Zeidler, *supra*, note 72, p. 509.

grounds are open ended in way giving the Constitutional Court a discretion to determine what constitute a sever disadvantage, imminent violence or a public interest in order to issue an injunction order. Moreover, according to Article 38(1) of the Act, the Court can also issue order of a seizure and search in accordance with the criminal procedure law.

The above two forms of orders of the Court are more commanding and self-executing as opposed to the conventional job of a constitutional review body i.e. declaring a law constitutional or unconstitutional.

3.3.2. Whether Review Bodies Can Choose the Manner and Who Executes their Decision
In Ethiopia and Benin, whether the respective bodies can command the execution of their decision by choosing the method and the body which shall execute the decision is not explicitly addressed under the relevant laws in the respective countries.¹⁴³ A specific law or a provision of a law which permit these review bodies to dictate in their decision as to how and who shall execute their decision is absent in both countries. Accordingly, the extent of the competence of these bodies to take measures necessary to ensure the proper and prompt execution of their decision is unknown. Yet, a specific restriction or prohibition to invoke such power is not also imposed up on them. It should, however, logically be possible for them to choose a specific body or the manner of execution, if a need arises. As discussed above, in Ethiopia for instance, the House, in some of its decision, assign to its secretariat a responsibility to follow up the proper implementation of the decision. In the majority of the cases, however, the implementation is left to the default addressee (who is the defendant in the case).

¹⁴³The relevant subsidiary laws here refer to the: The Organic Law of the Constitutional Court of Benin, 91-009 of March 1991, the proclamation to consolidate the powers of the House of Federation Proclamation no 251/2001, and the Council of Constitutional Inquiry Proclamation no.798/2013.

Unlike the case in the two jurisdictions, in Germany, the Constitutional Court is explicitly entitled by law to choose the method and the body which shall execute its decision (Article 35 of FCCA). In relation to this, the Court in its case law has elaborated the essence of this specific power in the following statement:

“By taking due account of the rank of this court and its special position as one of the supreme constitutional bodies within the constitutional order, the Federal Constitutional Court Act has provided the Federal Constitutional Court with all the competence necessary for enforcing its decisions. This is the sense and the meaning of Section 35 of the Federal Constitutional Court Act. Relying on this competence, the Court ex officio, that is, irrespective of any “applications” or “suggestions” issues all the orders which are necessary for its substantive decisions that conclude proceedings to gain acceptance. Here the type, the extent and the contents of the execution orders depend, on the one hand, on the contents of the substantive decision that is supposed to be executed and on the other hand on the concrete circumstances that must be brought in harmony with the decisions; it depends in particular on the conduct of the persons, organizations, authorities and constitutional bodies to or against whom or which the decision is addressed. Not only judgments which oblige a party to perform or refrain from, or to tolerate, a certain act are amenable to execution within the meaning of Section 35 of the Federal Constitutional Court Act but also declaratory judgments; Here, execution is ‘the epitome of all measures that are required for realizing the law established by the Federal Constitutional Court’ ... Section 35 of the Federal Constitutional Court Act assumes that the orders concerning the enforcement of the decision are issued in the decision itself. From the comprehensive contents of the decision, which actually makes the court the master of the execution, it follows, however, that

those orders can also be issued in an independent order by the court, if their necessity becomes evident only subsequently."¹⁴⁴

Accordingly, the Court based on Article 35 enjoys a great deal of power in directing the implementation of its decision by determining how and who shall execute it. The Court is free to pick the executer and the manner of the execution it thinks suitable to the individual case.

In Germany, the Court further controls the execution of its decision through the grievance procedure. As the Constitutional Court doesn't execute its own decision, an entity or an individual on whose favor the decision was made may take a view that the decision has not been executed as stated by Court. Since this is not addressed in the law, the Court- in one of its decision- has developed a complaint procedure.¹⁴⁵ The procedures read as follows:

"1. Whoever is affected by an act performed by an administrative authority executing a decision of the Federal Constitutional Court can only invoke the Federal Constitutional Court's jurisdiction directly by means of a complaint against such act of execution if the authority has acted on account of a concrete mandate to execute that has been issued by the Federal Constitutional Court, and that does not leave any latitude to the authority's discretion; 2. If the Federal Constitutional Court has assigned the execution of its decision to an authority in a general manner the acts of execution are performed in the authority's own discretion and can only be challenged by means of the remedies generally available against such acts."

To this end, a person or an entity- on whose favor the decision of the Court has been made- may file a complaint to the Court if he/she has a view that the decision in his/her favor has not

¹⁴⁴ Supra, note 3 citing BVerfGE 6, 300 (303-304), p.5.

¹⁴⁵ Supra, note 3 citing BVerfGE 2, 139, p 5.

been executed in accordance with the specifics of the Court's decision. Nevertheless, this procedure cannot be invoked always. The procedure will be summoned only when the Court's decision has been provided with a specific solution or detailed set of procedure for the execution or without leaving the recipient a discretion to determine the manner of execution. However, when the decision of the Court is provided with autonomy, the procedure cannot be invoked. In such a case, the regular procedure in the relevant procedure law applies (eg. action to oppose execution).¹⁴⁶

In the two-party dissolution cases, the Court has gone further indicating a punishment failing to comply or intentionally obstruct the enforcement of the decision. In the Socialist Reich Party case in 1952 and the German Communist Party case in 1956, the Court indicated in its decision that any intentional infringement to the decision of the Court or to the effort in the enforcement of the decision is punishable with six months' imprisonment.¹⁴⁷

In another case, in order to persuade the legislature to implement the decision promptly, the Court set conditions. In a case concerning the civil service law and the law dealing with the federal judges, the Court ordered for a payment to be made to the judges and civil servants if the parliament fails to enact the law within the deadline set by the Court.¹⁴⁸

More importantly, - as discussed above- the nature of the decision- which the Court renders -is a determinant factor in the Court's control over the execution of its decisions. As it is stated above, the Court renders a more commanding and engaging decisions beyond merely declaring the law constitutional or unconstitutional. As such, the Court controls the implementation or leaves little room for the addressee to determine the fate of the execution of its decision.

¹⁴⁶Ibid, p.6.

¹⁴⁷The Communist Party Case (1956) & The Socialist Reich Party Case (1952).

¹⁴⁸Supra, note 3 citing BVerfGE 99, 300 (304), p 7.

In general, the Constitutional Court of Germany -after more than 50 years' of service, has managed to receive a high regard by the population despite reproaches to some of its decision.¹⁴⁹ German citizens and politicians proudly invoke the jurisdiction of the Court whenever they think that the constitution or constitutional guarantees are violated.¹⁵⁰ This trust and confidence over the Court is an indication to the compliance and implementation of its decisions in general in those five and more decades. This has become true because the Court, through its own decision, has managed to increase its control over the execution of its own decision. It has done so through expanding the scope of the decision it renders from declaring a law unconstitutional to stating orders, solutions and guidelines. More specifically, it has done so through setting a grievance procedure where its decisions have not been executed properly.

¹⁴⁹Anke Eilers, The Binding Effect of Federal Constitutional Court Decisions up on Political Institutions, a paper presented on a seminar on the effect of constitutional court Decisions, organized by Vince Commission, Tirana, 28-29 April 2003, p.11.

¹⁵⁰Ibid.

Chapter Four: Challenges of Implementation of Constitutional Review Decisions

Problems of implementation of constitutional review decision is universal. It happens in every system irrespective of the type of the constitutional review system. This is true partly because of the disregard of constitutional systems to provide a specific mechanism of implementation for such decision. Unlike the case for the decision of regular courts, it is not common to see legal system specifying mechanism of enforcement for constitutional review decision. This is also generally true for the countries under investigation.

4.1. Implementation Challenge in Ethiopia

Until September 2017, a total of 2610 constitutional petitions had been submitted to the CCI/HoF. From among these cases submitted, the House/CCI ruled on 1804 cases -where it gave constitutional rulings on the 44 of them (which was only 3 until 2014/2015) while rejecting 1760 cases.¹⁵¹ The 1760 cases were rejected both for lack of a constitutional cause and other procedural irregularities. The rest of 806 petitions had been pending.¹⁵² The number of petitions flowing to the CCI/HoF has, however, kept rising. The petition, for instance, from a total of 2610 in September 2017, it has raised to 3350 by June 2018,¹⁵³ showing a raise by 740 cases in a period of less than 10 months.

Even if the number of cases on which the House gave a ruling has raised from 3 until 2014/2015 to 44 in 2017, a resistance by state bodies to comply with some of these rulings has also observed. The resistance mainly came from administrative bodies of the state.¹⁵⁴ A resistance also came from the courts. For instance, in a case between *W/ro Azeb Tufa v Alemyahu Mingstu* (2017), the Oromia regional court resist to comply with the decision of the House which declare

¹⁵¹Gebremeskel & Teguadda, supra, note 16, p.60

¹⁵² Ibid, p.61.

¹⁵³ Supra, note 17.

¹⁵⁴ Supra, note 80. See also Gebermeskl & Teguadda, supra, note 16, p. 67.

its pervious decision unconstitutional and hence is void. The House then wrote a letter demanding the court to comply with the decision indicting that the court has obligation under the law.¹⁵⁵ As there is no any defined system, the House could not able to take coercive measure on the court beyond writing a letter reminding its obligation under the law. Besides, even if there is no a legally defined complaint procedure, whenever a recipient of a decision of the House refuses to comply, the party on whose favor the decision is made usually file a complaint back to the House. The House then write a letter to the recipient demanding compliance.

Because the House has not yet sufficiently dealt with laws, the compliance of the Parliament has not yet tested in Ethiopia.

4.2. Implementation Challenge in Benin

The Benin Constitutional Court is one of the emerging Courts in Africa which are playing an important role in consolidating democracy and constitutionalism. Since its establishment in 1993, it has made decisions which restrain government power and promote rule of law and human rights. It has resisted incumbent constitutional amendment proposals-which is the challenge in Africa- several times.¹⁵⁶ It has also served as a protector of human right through resolving several cases of human right violations.¹⁵⁷ Citizens have increasingly shown their confidence over the Court by seizing the Court's jurisdiction. As discussed above, the Court- in around 27 years of service- has ruled over 2589 cases of allegation of human right violation. The increasing submission of cases to the Court shows the impact as well as implementation of the decision of the Court. It is generally reported that there is a better compliance and

¹⁵⁵A letter addressed to the Oromia Regional Wereda Court concerning the execution of a decision on case between *W/ro Azeb Tufa v Alemyahu Mingstu* (2017) (file with the author).

¹⁵⁶Bado, *supra*, note 56, p 216.

¹⁵⁷*Ibid.*

implementation of the decisions of the Constitutional Court.¹⁵⁸ Yet, it cannot be said that the implementation of the Court's decision has been immune from a challenge in those whole years of service. Aboudou Latif Sidi (Director of Legal Studies and Recourse Management of the Constitutional Court of Benin) stated- in his paper- that *'we can without hesitation affirm that the Achilles' heel of this jurisdiction is the problem related to the execution of its decisions by both the public authorities and the individuals. The phenomenon is so obvious that it inspires on a theoretical level, many doctrinal writings and, on a practical level, exchanges between the constitutional judge and his different interlocutors as attested by this seminar.'*¹⁵⁹ (translated using deepl translator).

Attempts to disregard and resist the decision of the Court has happened in some cases. For instance, in the case(DCC- 03-077) concerning the suspension of election of Bureau of the Parliament by the oldest Member of the Parliament, the Court declared the suspension of the election unconstitutional.¹⁶⁰ The oldest Member of the Parliament sustained the suspension despite the decision of the Court declaring the suspension unconstitutional.¹⁶¹ This oldest Member of the Parliament resisted to comply claiming that the Court had not made clear the subsequent measure. Then the applicants took the case back to the Court and asked the Court to specify the subsequent measures. The Court consequently asserted that the continuation of the suspension or the failure to proceed with the election is a non-compliance with the Court's first decision.¹⁶² The Court also stated, as discussed above, the follow up actions to be taken by the

¹⁵⁸ Adjolohoun, supra, note 22. See also Bado, supra, note 54, p 226.

¹⁵⁹ Sidi, supra, note 9, p. 3.

¹⁶⁰ Bado, supra, note 56, p. 231.

¹⁶¹ Ibid.

¹⁶² Ibid.

Parliament. The second decision of the Court was, however, observed by the Parliament.¹⁶³ Similarly in 2008- in DCC 08-072, the Parliament resisted the decision of the Court declaring unconstitutional the decision of the parliament postponing- without any future date- the adoption of a bill enabling the government to concluded loan for costal erosion projects.¹⁶⁴ The Parliament refused to proceed with the decision of the Court arguing that the decision of the Court is contrary to the principle of separation of power.¹⁶⁵ The Parliament finally approved the bill in accordance with the specification of the decision of the Court.¹⁶⁶

There are also few instances of resistance from the branch of the executive. The first case relates with a failure to release an imprisoned person whose conviction and sentence is declared unconstitutional by the Court.¹⁶⁷ The other case relates to government's failure to pay reparation for victims of violation of human rights.¹⁶⁸ Regarding compliance by the regular judiciary, the researcher could not able to trace cases of resistance. Yet, Aboudou Latif Sidi (Director of Legal Studies and Recourse Management of the Constitutional Court of Benin), describing the reaction of the lower court to its first reparation decision, states that the response and attitude of the judge in this case were archetypal in terms of enforcement of the Court's Decision.¹⁶⁹ In enforcing the decision, the lower court had condemned the Beninese State and ordered a sum of five million CFA francs as a compensation to the individual victim of violation of human rights.¹⁷⁰

¹⁶³ Adjolohoun, *supra*, note 22, p. 30.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ Bado, *supra*, note 56, p. 226.

¹⁶⁸ *Ibid.*

¹⁶⁹ Sidi, *supra*, note 9, p. 13.

¹⁷⁰ *Ibid.*

The Court at a various occasion has indicated that the *res judicata* effect of the decision of the Court, based on Article 124 of the Constitution, imposes a positive and negative obligation on the addressee to enforce the decision of the Court.¹⁷¹ Accordingly addressees, depending on the kind of the order issued in the Court's decision, are bound to enforce the order by taking the necessary measure or by refraining from their unconstitutional act. In a nutshell, despite a temptation by state bodies to disregard the decision of the Court, the Court often saw defending its decision and ensures the implementation of its decision.¹⁷² The Court also affirmed that the principle of *res judicata* indicates that 'what has been judged cannot be judged again; what has been judged cannot be disregarded; and what has been judged must be enforced.'¹⁷³

4.3. Implementation Challenge in Germany

In Germany, even if the decision of the Court is binding on the addressees, the actual implementation is greatly dependent on the commitment of the later. It is not clear, for instance, what will happen if the Parliament or the judiciary or the executive as state bodies fail to execute the decision of the Court. There is no a constitutionally envisaged mechanism to deal with such a problem. Even the law establishing the binding nature of the decision of the Court is an act of the Parliament.

In practice, the Parliament is reported to be generally responsive to the decision of the Court. In many of the decision of the Court, the Parliament has either repealed or amended the law declared unconstitutional on time and pursuant to the specification of the decision of the Court.¹⁷⁴ Yet, there were also times where the legislature was diffident to actively react to the decision of the Court. For instance, its reaction on the decision of the Court concerning the

¹⁷¹ Ibid, p. 10-11.

¹⁷² Adjolohoun, supra, note 75.

¹⁷³ Sidi, supra, note 9, p.12.

¹⁷⁴ Wiltraut Rupp- v. Brunneck, supra, note 127, p.387.

amended Section 1628 of the Civil Code is one good example. This law used to give the father a casting vote to decide on parental custody if the two parents unable to come to an agreement.¹⁷⁵ In 1959, the Constitutional Court declared the provision unconstitutional claiming that it goes against with the right to equality of the female parent.¹⁷⁶ In this case, the Parliament responded to the decision after twenty years. In 1980, after 20 years, the Parliament adjusted the provision giving the court a veto to decide on the custody of a child if the parents are unable to agree.¹⁷⁷ In another case- in 1991- the Court declared a law- which states that a woman who fails to state her own preferred family name shall receive as a family the name of the husband- unconstitutional.¹⁷⁸ The legislator, in this case, responded after four years. In 1994, the Parliament amended the law circumventing the obligation to have common family name altogether.¹⁷⁹

A report is not available about the compliance or otherwise failure by other bodies of the decision of the Court. Yet, the recent story of friction between the Constitutional Court and the Supreme Labor Court is worth mentioning here. The case was concerning an employee of a hospital of a Catholic Church who was fired because he remarried. The Supreme Labor Court referred the case to the Constitutional Court and the Constitutional Court upheld the independence of the Church to adopt stricter regulation on its believers.¹⁸⁰ Rather than applying the decision of the Constitutional Court, the Labor Court then referred the case to the International Court of Justice seeking its opinion concerning the application of the Council

¹⁷⁵Supra, note 3, p. 7.

¹⁷⁶Supra, note 3, Citing BVerfGE 10, 59, p. 7.

¹⁷⁷Supra, note 3, p.7.

¹⁷⁸ Supra, note 3, citing BVerfGE 84, 9, p.7.

¹⁷⁹Supra, note 3, p.7

¹⁸⁰ Frank Cranmer, Religion and the genuine occupational requirement: JQ v IR again in Law & Religion UK, 23 February 2019, <http://www.lawandreligionuk.com/2019/02/23/religion-and-the-genuine-occupational-requirement-jq-v-ir-again/>.

Directive 2000/78/EC of 27 November 2000.¹⁸¹ Ultimately the Supreme Labor Court (on February 2019) made a final decision in favor of the employee and contrary to the decision of the Constitutional Court.¹⁸² Even if this has happened in the context of the existence of the supranational constitutional system, it can be cited as an example of as a disregard of the decision of the Constitutional Court.

¹⁸¹ Ibid.

¹⁸² Ibid.

Conclusion

Constitutional review is a prominent mechanism to safeguard the supremacy of the Constitution. It is now common to find a constitutional review system in each country which has a constitution. Despite this, constitutional systems in many countries are not equally diligent in anticipating a mechanism for the implementation of the decision of a constitutional review. A constitutional review system without a proper and prompt implementation of constitutional review decision cannot ensure the supremacy of a constitution. Absences of a mechanism specifying how such decisions need to be implemented clearly hinders the proper implementation of such decisions. As such, it is equally important that constitutional systems detail out that the mechanisms of implementation and the sanction failing to do that. A mere declaration of the binding nature of such decision does not suffice to ensure the implementation of the decisions. This is- in fact- one of the experiences which one can learn from the countries under study. Despite the decision of the review bodies are proclaimed binding and final, incidents of non -compliance and failure to implement are common in all the three jurisdictions. No coercive measures or sanction for non- compliance with the decision of the review bodies are originally envisaged in the constitutional system of these countries. Notwithstanding the silence of the texts as to the specific modalities of implementation of the decisions, the review bodies have made decisions over time which enabled them to have control over and ensure the implementation of their decision. This is particularly true for Constitutional Court of Germany. The Court has over time took the liberty to assert and develop a case law that made the Court able to control- to some extent- the fate of the implementation of its decision. This, in particular, include the case law of the Court where it authorized itself to declare a statue conditionally constitutional while providing the legislature guidelines solutions and time limit. In another

important case, the Court also developed a procedure where refusal to comply with decision can be protested and filed to the Court. In Germany, beyond the progressiveness of the Court, a law (the Constitutional Court Act) has later been enacted. The Act-beyond affirming what had been developed in the Court's case law- it has also expanded the role of the Court in ensuring the implementation of its decision. The Act more importantly entitles the Court to dictate the manner and who executes the decision. It has also empowered the Court to issue injunction order, and orders on search and seizure. Yet, in Germany, it can't be said that there is a full-fledged mechanism of implementation. It is not- for example-clear as to what will happen if the legislator fails or refuses to comply with the decision of the Court.

The Benin Constitutional Court had stayed for long being self-restrained in issuing orders against the other branches. The Court has had the understanding that it is against the principle of separation of power to issue orders against the other branches of the government. As a result, it had limited its role only ascertaining and declaring the constitutionality of a law or an act of a state body. Since few years back, however, the Court departed from its long hold position that separation of power prohibits the Court from issuing orders. Thus, the Court later started issuing orders such as a reparation, reinstatement and other forms of orders. That has then given the Court some degree of control over the enforcement of its decision. Unlike the Constitutional Court of Germany, the Benin Court has not yet reached to a level of issuing decision which are more engaging and commanding so that it can increase its control over the execution of its decision. As a result, it can be said that the Benin Court has a limited role and influence over the execution of its decision. The Organic law of the Constitutional Court of Benin has not also addressed the issue of implementation.

In Ethiopia, on the other hand, beyond the lack of a law regulating the mechanism of execution, the House has not yet able to develop a relevant case law that expand its influence on the implementation of constitutional review decision. When the recipient refuses to comply, the House has not able to do further than sending a letter reminding the recipient that it owes a legal obligation to enforce the decision.

Even if implementation challenge is a common problem in all the three jurisdictions, there is yet a lesson Ethiopia can learn from the experience of the other two jurisdiction. The House/CCI need not to be self-restraint in asserting and expanding their control in the enforcement of their decision. The House/CCI can assert more roles to ensure the proper enforcement of constitutional review decision. Yet, it is more important that Ethiopia enact a detailed law that regulate the specific modalities for implementation of the decision and provide sanction in the event of a failure to comply the decisions. The stipulation of mechanism of implementation and the resultant sanction failing to comply enable the constitutional review system to play an important role in strengthen democracy and constitutionalism in the country. It also strengthens the confidence of citizens on the constitutional review system and the review body. Beyond the situation in the countries under investigation, the writer suggests that constitutional systems beyond establishing constitutional review bodies must equally anticipate the enforcement mechanism for constitutional review decisions.

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