

JUDICIAL POWER OF HOUSE OF FEDERATION AND ITS IMPACTS ON HUMAN RIGHTS IN ETHIOPIA

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Abstract

Having regard to their legal philosophy and historical background, countries opted for different organ for constitutional interpretation and checking the constitutionality of laws. Most countries, however, either established special organ within judicial system for this purpose or empower their ordinary courts. By being among a few exceptions, Ethiopia empowers the House Federation with a power of constitutional interpretation and checking constitutionality of laws. So far more 3000 cases were brought to HoF through CCI, and only on less than 50 cases that this organ exercises this constitutionally guaranteed power. Other cases were rejected by claiming that there is no need of constitutional interpretation and/or checking constitutionality of laws. Close examinations of the implications of these judgments (both cases those rejected and entertained) revealed that constitutionally guaranteed individual and group rights has been violated by CCI and HoF in course of exercising these powers. The findings of this research show that this is mainly due to structural and compositional deficit of the organs. By relying on these findings this research recommends the division of the power of constitutional interpretation and checking constitutionality of laws between ordinary courts and House of federation. This is to mean that constitutionally guaranteed individual rights are better protected if the power of constitutional interpretation is given to ordinary courts and constitutional adjudication in relation to group rights along with some modifications is reserved to the same organ.

Key Words: Judicial Power, FDRE Constitution, House of Federation, Human Rights, Ethiopia.

Introduction

Ethiopia has become a federal polity since 1991 with an intention of devolving power and resources from the central government and also to accommodate the computing diverse interests of different ethno-linguistic groups that country has neglected for centuries.¹ One of the very important organs in this federation is the presence of a body that arbitrates disputes concerning constitutional interpretation and the constitutionality of legislative acts.²

To put in simple terms, for the purpose of this research, constitutional interpretation means “*resolving disputes in relation to the meaning or application of the Constitution when there are ambiguity, silence, apparently inconsistency, and even absurdity having regard to the text of the*

¹ Fiseha, Asefa: 2007. “Constitutional Adjudication in Ethiopia” *Mizan Law Review*, Volume1(1):1

² *Ibid*

Constitution, the general social and political context in which it was adopted as well as the events immediately surrounding its adoption, the governmental structures created and recognized by the Constitution”³, while checking the constitutionality of laws simply refers to looking after laws enacted by legislators as to whether these laws are within limits set by the constitution.⁴ Thus, in the 1995 FDRE Ethiopian Constitution, these very crucial powers are granted to the HoF.⁵

On the other hands the same constitution has abundantly recognized fundamental human rights and freedoms, or in other words, a literal look at the chapter three of the text of the Constitution will make one to easily understand the fact that, the 1995 FDRE constitution has recognized most of the rights that has got due recognitions in international human rights instruments.⁶ However, to implement and thereby protect these widely recognized human rights norms, in addition to constitutional recognition and legislative protection, their practical realization have to back by courts application in case of their violations.⁷ Thus there shall be vibrant and competent judicial organ to that effect. However, the 1995 FDRE constitution stripped out Ethiopian courts from interpreting the 1995 FDRE constitution and checking the constitutionality of legislative acts enacted by House of peoples representatives and gave the same power to political organ. Now, the main task of this research is to assess the impacts that non-judiciary constitutional interpretation and checking the constitutionality of laws has brought on practical realizations of human rights as enshrined in the constitution, in Ethiopia. In particular, this research examines the judgments of HOF and CCI on cases brought before it and assess the implications of these judgments on individual and group rights. Finally it will try to give recommendations.

This research contains three major parts. Part one discusses meanings and purposes of Constitutional interpretations. Different patterns of constitutional interpretations will also be discussed in this part. In part two, we discuss about organizational competence, composition, independence and impartiality of House of Federation. Part three explores some individual and group rights that have been violated by HoF in course of exercising its constitutional interpretative power and then finally there is a concluding remark.

1. Meaning and Purposes of Constitutional Interpretation

Constitution is a supreme law of the land that primary aimed at forming and structuring different government organs, vowing basic rights and freedoms, and also regulating the relationship

³ Reggasa, Tsegaye: 2009. "Making Legal Sense of Human Rights: he judicial role of Protecting human rights in Ethiopia", *Mizan Law Review, Volume3(2):317*

⁴<https://www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-and-maps/constitutional-interpretation>, accessed on 18/3/2019

⁵ Girma, Belachew: 2018. "Constitutional Adjudication by the Parliament: Lessons from Comparative Experiences", *Mizan Law Review vol12(1):pp30* and See article 62(1),83 of FDRE Constitution and Article 9 Proclamation 251/2001

⁶ Kassie, Adem: 2011. "Human Rights under Ethiopian Constitution: A Descriptive Overview", *Mizan Law Review, Volume5(1):43*

⁷ *Supra note 3 at p.307*

between the ruler and the ruled⁸. It also confers legitimacy over government's actions.⁹ In addition, it may also play inspirational roles by envisaging a 'genre' of community and state that it wants to create through its arrangements and Decalogue.¹⁰

Accordingly constitutional interpretation is meant to imply the task of upholding the supremacy of a constitution and also limiting the activities of any government organs within the framework of the constitution.¹¹ By delimiting their scopes in constitution, it is also one ways of protecting the infringements of basic rights that got due recognitions.¹² The validity of any law promulgated by any organs of government has also to be checked in line with the constitution firstly with an intention of comparing as to whether such acts of any government organ violate rights that got due recognitions under the constitution, and secondly to see and uphold the balance of power among the legislative, executive and judicial organs of government.¹³ This role of the constitutional adjudicator is more relevant nowadays wherein individual rights and interest are being overridden from time to time in the pretext of promoting or ensuring public rights and interests.¹⁴

Thus depending on jurisdictions, constitutional adjudication may intend to achieve the following major goals: First it defines and limit the powers conferred to different organs of governmental, second, it protect and also promote constitutionally guaranteed rights, third, it also make sure that supremacy of constitutions is upheld and any decisions of any government organ is in line with constitution, and also to keep power balances among the three branches of government.¹⁵

When to Interpret the Constitution?

As rightly pointed out earlier, there are many reasons that entail constitutional interpretation; first, there are a times when words or phrases within the constitutional texts are not clear as to their meanings. This may be due to the fact that the drafters of this supreme law mostly adopt open-ended language to come up with a constitution that fit to the coming changing situations.¹⁶ James Madison "*identified three sources of difficulties in framing the US Constitution: the complexity of the relations to be regulated, the imperfections of human notions about politics, and the inadequacy of words to convey complex ideas with precision and accuracy.*"¹⁷ Thus, constitutions

⁸ *Supra note 5 at p.33*

⁹ *Ibid*

¹⁰ *Ibid*

¹¹ *Ibid*

¹² *Sisay, Temesgen,2012, "The Question of Independent and Impartial Constitutional Adjudicator In Ethiopia: A Comparative Study with Germany and South Africa", Bahir Dar University Law Journal, Volume 3(1): 73*

¹³ *ibid*

¹⁴ *Tracey Hughes, 1986. 'Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual', 9 B.C. Int'l & Comp. L. Rev: 294*

¹⁵ *Supra note 5, p.34*

¹⁶ *Ibid*

¹⁷ *Ibid*

are interpreted to elucidate words and sub-sections which are not crystal clear to apply to specific situations and circumstances.

Secondly, there are a times when some words or subsections in constitutional may contradict with others in order to apply them to particular points.¹⁸ In other words there are a times when some guaranteed rights by one provision is taken away what it granted by another clause. In such circumstances the way forward is constitutional interpretation.

The third justification that leads to constitutional interpretation is omissions.¹⁹ Constitution may not inculcate all issues that need regulations due many factors. However, such failures are mostly remedied by constitutional interpretation. Fourthly, new developments after the promulgation of the constitution may also entail constitutional interpretation.²⁰

Due to these reasons there is an agreement among the scholars that constitutions has to be interpreted whenever necessary. However, the issue of determining an appropriate the organ of government that empowered to interpret the constitution remains elusive.

Patterns of Constitutional Interpretations

Globally, there are three patterns regarding the institutions empowered to interpret constitutions and checking constitutionality of laws.²¹ The first is called centralized system. Many federal systems (Germany, Russia and etc.) have vested this important power to separate constitutional court.²² Accordingly, this court has the power to interpret the constitution.²³

The second one is known as a *diffused (decentralized) system also called the American system*. According to this system every branch of the judiciary has empowered to review the constitutionality of any laws. Thus any court has the power to declare unconstitutionality of any laws or decisions of any government organ, if such laws or decisions violate the constitution; however, the final appeal is reserved to the federal Supreme Court.²⁴ In relation to constitutional interpretation, it is the USA Supreme Court that had ultimate power as per article 3 section 2 of USA constitution²⁵.

The third on is a mixed system. In the mixed systems these powers are given to courts of all levels but appeal on their judgments is brought before the constitutional court (or similar tribunals).²⁶ The mixed system of constitutional judicial review has been principally practiced in

¹⁸ *Ibid*

¹⁹ *Ibid*

²⁰ *Ibid*

²¹ Seboka, Tekele: 2011. "Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to theory" *African Journal of International and Comparative law* volume 19:105

²² *Ibid*

²³ *Supra* note 1, p 6

²⁴ *Supra* note 21:pp103 and *Supra* note 1. p.62

²⁵ <https://www.quora.com/Who-gets-to-interpret-the-Constitution-Where-would-you-find-this-power-in-the-Constitution-article-and-section> accessed on 18-8-2019.

²⁶ *Supra* note 21 at p.105

*Latin American countries such as Colombia, Venezuela, Peru and Brazil, and in a few European states, namely Portugal and in a limited form in Switzerland.*²⁷

Likewise in African context, the scenario is mostly similar. For instances, *Nigeria, Botswana, Gambia, Guinea, Malawi, Ghana, Seychelles, Sierra Leone, Tanzania and Swaziland* followed a diffused system²⁸ while *South Africa, Angola, Benin, Burundi, the Central African Republic, Egypt, Equatorial Guinea, Gabon, Madagascar, Mali* had a *Constitution court pattern*.²⁹ Countries like *Burkina Faso, Cameroon, Chad, Niger, Sudan, Zaire and Zambia* have, on the other hand, vested the power of constitutional review either in the high courts or their specialized chambers.³⁰ Strangely, there are some few countries that had empowered their political organ with power of Constitutional interpretation.³¹ China and France can be raised as a good example. This is a rare institutional choice.

As the preceding discussion would suggest, there is no specific formula to assign such constitutional interpretation task for an identified governmental body. Every country chooses its own institution which it thinks is proper to assume such a responsibility. But a close scrutiny at the institutions empowered by most countries gives as an impression that, it is a judiciary or an organ within the structure of judiciary branch of government³² that is mandated to shoulder the responsibility of adjudicating the constitution hence *judicial powers naturally include the power to interpret, apply and ensure the observance of the constitution*.³³

However, Ethiopian is among a few countries that had different approach and experience in this regard. According to article 62(1), 83 and 84 of the 1995 FDRE Constitution, and also article 3 and 4 of proclamation enacted to consolidate the power of House of Federation no: 251/2001, the power to interpret the constitution³⁴ and checking the constitutionality of laws is given to the House Federation.³⁵ In fact during the enactment of this constitution, both constitutional court and ordinary courts were envisaged by some members of constituent assembly for these powers, however the proposal was ruled out by majority vote and house of federation was selected as an appropriate organ.³⁶

²⁷ *Ibid*

²⁸ A. Mavcic, A Tabular presentation of constitutional/Judicial review around the world, available on <http://www.concourts.net/tab/index.html> (accessed 20-03-2019).

²⁹ *Ibid*

³⁰ *Ibid*

³¹ <http://www.abssinssianlaw.com> (accessed 20-08-2019).

³² See article 93 of Germany constitution and Article 167(3)(a) of South African Constitution.

³³ See article 79(1) of FDRE constitution and Seboka, Tekele. 2011. "Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to theory" *African journal of international and Comparative law* volume 19:106

³⁴ See article 3 and 4 of proclamation no: 251/2001

³⁵ See article 9 of proclamation no: 251/2001

³⁶ See Minutes of constitutional Assembly, November 1994, Volume 4, and Discussion on Article 62 of the Constitution.

2. Institutional Independence, Impartiality, Competency and Composition of HoF

Controversies on Constitutional Interpretation Power of HoF

There are seemingly two opposing views toward this trend of conferring these powers to the House of Federation. According to the supporters of vesting these powers to the said body, there are two important rationales³⁷.

The first reason is related to the view of the drafter of the constitution with regards to the 'genre' of the constitution itself and to the roles conferred to the nations and nationalities in constitution. Accordingly, it has clearly stated in the preamble and article 8 of the constitution that the '*nations, nationalities and peoples are sovereign*,³⁸ thus it only these authors that should be *the ones to be vested with the power of interpreting the constitution*³⁹. To this end, the House of Federation that is consists of the representatives of the different nations and nationalities are the appropriate organ for these functions.

The second is a related reason. The framers were well aware of the fact that "*empowering the judiciary or a constitutional court may result in unnecessary 'judicial adventurism' or what some prefer to call 'judicial activism' in which the judges would in the process of interpreting vague clauses of the constitution put their own preferences and political choices in the first place.*"⁴⁰ Thus the drafter argued, such approach may put the fate the constitution on the finger tips of the judges.

On the other hand, the one opposing this trend and such power conferred to HoF claims that, "*the HoF is a political organ operating within the context of a federal government dominated by a ruling party, the then EPRDF, which has an excess of power in all branches of government. As a political organ under the influence of the executive, the HoF should not be called upon to decide sensitive political issues because it cannot be expected to decide such matters in a fair, unbiased manner.*"⁴¹ Plus to this, these representatives of nationalities in the HoF are themselves are regional states council members and also chief executives. Therefore, how they could be called upon to determine the aptness of either its own state legislation or decisions? There is *no law that prohibits such engagements so far*⁴² and this is paradox. In such cases, it is unlikely that the HoF would declare its own exertions of authority to have exceeded constitutional bounds and impinged upon

³⁷ *Supra note 1:pp 6 and look at the Minutes of constitutional Assembly, November 1994, Volume 5, pp. 6-7*

³⁸ *See the preamble and Article 8 of 1995 FDRE constitution*

³⁹ *Supra note 1 at p.10*

⁴⁰ A. Bickel, 1994: "The Least Dangerous Branch: The Supreme Court at the Bar of Politics" "as cited in J.Perry, The Constitution in the Courts: Law or Politics?" pp16.

⁴¹ *Supra note 23:pp101*

⁴² *Tesfaye, Yonatan, 2006, 'Judicial Review and Democracy: A normative Discourse on the (novel) Ethiopian Approach to Constitutional Review', 14 African Journal of International and Comparative Law 53, Volume 14, pp.78. And the only exception is that a member of the HoF cannot simultaneously hold a seat in the HPR (FDRE Constitution, article 68.*

the fundamental rights and freedoms of state citizens.⁴³ Thus fundamental rights and freedoms that got constitutional recognition and protection may lose in vain. Therefore because of such vague arrangements under Constitution, ‘*the HoF is inefficient and is not an impartial body to adjudicate constitutional issues.*’⁴⁴

Independence and Impartiality

Many constitutional law scholars argued that any organ in charge of constitutional interpretation must be structurally independent and safeguarded particularly against any form of political influence or manipulation.⁴⁵ As per these scholars, the effectiveness of constitutional review power of depends on whether it is the work of an independent body. Fiss observes that political organs are inherently inclined to registering ‘*the preferences of the people and ‘are not ideologically committed or institutionally suited to search for the meaning of constitutional values.*’⁴⁶

Hence the HoF is a political body operating within the federal government structure under the influence of omnipresent ruling party EPRDF, there is absolutely no requirement, in the Constitution or any other law, that the members be independent from political influence in determining the constitutionality of any legislative or executive measures and/ interpret the constitutional clause.⁴⁷ Even if there was such a requirement, given that the members represent certain ethnic groups and are members of political parties, it will be a paradox to require them to be independent enough to ignore the interest of the ethnic group they represent or the political party they belong to while deciding constitutional issues.⁴⁸ Thus it is possible to proclaim that, there are conceptual and practical contradictions in requiring the independence of the members of the HoF in determining constitutional issues. In short, as an organ working within such tense sphere of influence of the other branches of government, the HoF cannot be expected to make impartial judgments.⁴⁹ In fact, the possibility that the HoF might almost exclusively be composed of members of a single political group is very real. Actually it was practically demonstrated when the EPRDF ‘won’ all seats of both the federal parliament and the regional state councils’ following 2015 national election.

⁴³ *Chimngako and etl:2008, ” Silencing Ethiopian Courts: Non-Judicial Constitutional Review and its impacts on human rights”, Fordham international law journal volume 32(1):pp285*

⁴⁴ *Supra note 1.*

⁴⁵ *Adem Kassie,2012, The Potential Role Of Constitutional Review In the Realization of Human Rights In Ethiopia, Pretoria University, LLD thesis,p,81.*

⁴⁶ *M Fiss, 1980, ‘The Forms Of Justice’, Harvard Law Review, Volume 93(1):9-10*

⁴⁷ *Supra note 1.*

⁴⁸ *Ibid*

⁴⁹ *T Twibell, 1999, ‘Ethiopian constitutional law: The structure of the Ethiopian government and the new Constitution’s ability to overcome Ethiopia’s problems’, Loyola of Los Angeles International and Comparative Law Review, Volume 21:447*

The same procedure holds true to the appointments and removal of members of Council of Constitutional Inquiry.⁵⁰ Unfortunately, there is not even a legal requirement that the members of CCI, the advisory organ to the HoF largely consisting of legal experts, be independent and impartial while adjudicating constitutional issues.⁵¹ The purely political process of appointment breeds, especially in the absence of any legal duty to be independent, dependency and partiality among the members of the Council.⁵² As a result of the absence of a requirement to be independent, for instances in 2019, except the president and vice presidents of Federal Supreme court, all the left members of the CCI were active politicians.⁵³ Now the question to be answered here is that, how can anyone expect these members to decide cases against the position of their superiors in the party or state apparatus? In sum, the HoF and the Council, under their current form and organization, cannot serve as independent and impartial forums for constitutional adjudication.⁵⁴

Competence and Composition of the HoF and the Council

Another major problem with the constitutional review system in Ethiopia is the fact that the HoF is unsuited to follow a principled, coherent, reasoned and detailed approach to constitutional interpretation primarily due to its size and regular change of membership. Currently, the HoF has more than 153 members. The large size of the HoF precludes any possibility of engaging in complex arguments that constitutional interpretation inherently requires.⁵⁵ One possible way to circumvent the problem of the size of the HoF is by establishing smaller committees, as the HoF does in relation to other issues, that do the initial constitutional analysis to enable a small group of experts to deliberate on technical and complex constitutional issues.⁵⁶ However, as Adem kassie observes, such a smaller committee will be superfluous in the presence of the Council, which does the preliminary constitutional analysis, and given that the HoF appoints three members of the Council from among its own members.⁵⁷ Sometimes, the house refers the cases recommended to it by CCI, to a team of legal experts within the office of HoF, who are much less in legal knowledge and experiences when compared with the members of CCI, for recommendation and make judgments thereon.⁵⁸

⁵⁰ *Supra note 45.*

⁵¹ *See the revised Proclamation no: 798/2013.*

⁵² *Supra note 45, p.81*

⁵³ *Interview with Ato Desalegn Wayesa, the head of CCI office, 24/09/2011 E.C. During this time, except to the President and Vice President of the Federal Supreme Court, all other members of the CCI include; the special advisor to the Prime Minister, Head of Amhara regional state, special legal advisor to National Intelligence and Security Service, Head of Oromia Culture and Tourism office and members of HPR are active politicians.*

⁵⁴ K Wigger, 1998, 'Ethiopia: A Dichotomy of Despair and Hope' 5 Tulsa Journal of Comparative and International Law, Volume 5, number 389, pp. 401

⁵⁵ *Supra note 45, p. 89.*

⁵⁶ *See article 18(1) of proclamation no: 251/2001.*

⁵⁷ *Supra note 45, p.84*

⁵⁸ *Interview with anonymous expert in HOF on 20-10-2011.E.C*

The competence of members of majoritarian political institutions to engage in complex constitutional issues is also questionable. Bickel also observes that ‘*courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess*’.⁵⁹ Given that the members of the HoF are political office holders nominated not for their knowledge and experience in constitutional law but for their political affiliations, the lack of competence is unsurprising. Thus, the HoF is unsuited for the task of constitutional adjudication.⁶⁰ The Constitution establishes the Council in recognition of the fact that the members of the HoF are not constitutional law experts. However, the Council only has re-commendatory powers; as such, it can only assist and not take over the role of the HoF. In fact, in the *Election Rights Case*,⁶¹ one of the only two cases that the Council has referred to the HoF, the HoF did not accept the recommendations of the Council.

Another potential problem is the fact that both the HoF and the Council are adhoc bodies that meet a few times in a year⁶². In addition to the fact that the HoF is an adhoc organ, it is also tasked with several other time consuming functions. Constitutional adjudication is not a light task to be discharged by an adhoc body.⁶³ The absence of a permanent constitutional adjudication body can potentially undermine the value attached to constitutional rights and constitutional adjudicators and thereby severely affect the promotion and protection of human rights that widely recognized under the constitution. However, it has to be underlined that due to a huge number constitutional complaints has been significant in now days, the adhoc nature of the Council and the HoF has been a challenge in practice.

3. The Implications of Constitutional Interpretation Power of HoF on Human Rights in Ethiopia

The Status of Human Rights under FDRE Constitution

The current Ethiopian Constitution entered into force on 21 August 1995.⁶⁴ In a stark break from its predecessors, the FDRE Constitution establishes an ethnic based federal state consisting

⁵⁹ *Supra* note 3, p, 25

⁶⁰ *Supra* note 47, p. 90.

⁶¹ *The election right case was a conflict arose between highlanders and indigenou communities living in Beneshangul Gumuz national regional state. In cases courts decided that hence highlanders that include Amhara, Oromo, Tigree living in the region did not understand a local vernacular language, they cannot run for seat. It was by opposing this judgment that the case was brought before CCI, and HoF ruled that they can run for the seat as long as they can speak the regional working language Amharic. For more see, <file:///C:/Users/user/Desktop/Journal%2520of%2520Constitutional%2520Decisions.pdf>*

⁶² *The HoF holds two regular sessions a year as clearly indicate in proclamation no: 251/2001. The Council meets on monthly bases as stated in article 23 of proclamation 798/2013. Both the HoF and the Council may hold extraordinary sessions.*

⁶³ *See article 3 of Proclamation no: 251/2001.*

⁶⁴ *Supra* note 7

of regional states delineated on the basis of settlement patterns, language, identity, and consent of the people concerned.⁶⁵ The Constitution also represents a major breakthrough in terms of human rights.⁶⁶ It was crafted to respond to the underlying causes that triggered the widespread conflict and the ultimate downfall of the Dergue military junta in 1991. It addresses the volatile issues of ethnicity and self-determination.⁶⁷

The relevance accorded to human rights is reflected from the outset by the preamble of the FDRE Constitution which emphatically affirms “*the full respect for individual and people’s fundamental rights*” as a condition precedent and foundational principles for the success of this sparkling ambition.⁶⁸ The Constitution devotes more than one third of its content to provisions on fundamental human and people’s rights.⁶⁹ Moreover, there are provisions that deal with national policy principles and objectives which either establish important guarantees or have direct relevance to the interpretation of fundamental rights. The Constitution imposes a responsibility and duty to the respect and enforcement of fundamental rights and freedoms at all levels of the federal and state legislative, executive and judicial bodies.⁷⁰

The Constitution further elevates the horizon of human rights through reference to international and regional human rights instruments as thresholds for the interpretation of its human rights provisions.⁷¹ Another prominent feature is the implicit recognition of the independence, interrelatedness and indivisibility of all generations of human rights by incorporating them on equal footing without any difference in consequence.⁷² In terms of substantive guarantees, the Ethiopian Constitution is the only one in Africa to recognize the right to self-determination of “nations, nationalities and peoples”. This right extends up to creating regional states within the federal state and can even extend up to secession under the conditions stated in the Constitution.⁷³

The Constitution also establishes separate procedures for the amendment of the human rights and fundamental freedoms.⁷⁴ To avoid any possible regression and safeguard the gains, a more stringent and rigorous procedure is required to amend the provisions relating to the fundamental rights and freedoms than the remaining parts of the Constitution.⁷⁵

The Ethiopian constitution offers little guidance on how the constitution should be interpreted where the need arises. In other words there is no clear constitutional interpretation principles

⁶⁵ See generally G Krzeczunowicz (1984), ‘Hierarchy of laws’ 1(1) *Journal of Ethiopian Law*, p. 11 in *Supra note 7*

⁶⁶ *Supra note 8*.

⁶⁷ *Ibid*

⁶⁸ *Supra note 6, p.43*.

⁶⁹ *Supra note 6, p.44*

⁷⁰ See FDRE Constitution, Art. 13(1). This reinforces the supremacy of the Constitution and the general responsibility and duty the Constitution imposes on “all citizens, organs of state, political organizations, other associations as well as their officials” to obey and ensure its observance (Arts 9(1) and (2)) in *supra note 6*

⁷¹ *Supra note 6*.

⁷² *Supra note 8 at p. 44*

⁷³ *Ibid*

⁷⁴ *Ibid*

⁷⁵ *Ibid*

developed so far⁷⁶. However, the following constitutional interpretation principles are frequently used by CCI and HoF so far in courses of interpreting the constitution and checking the constitutionality of laws.⁷⁷ These include balancing and proportionality principle,⁷⁸ originality principle,⁷⁹ doctrinal principle⁸⁰, Textualism principle.⁸¹ In fact there is a little guidance on constitutional interpretation in relation to fundamental rights and freedoms specified in chapter three of the constitution wherein it stipulates to ‘*be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia*’.⁸² However, the general reference to international instrument in the interpretation of fundamental rights and freedom does not help much if it is not specified.⁸³ Moreover, a mere invocation of the phrase ‘international convention which Ethiopia is a party’ in the reasoning of the CCI cannot be considered as a helpful practice as envisaged in Article 13(2) of the Constitution if it is not well articulated.

So far more than 3000 cases have been filed before these two institutions demanding for constitutional review⁸⁴, out of which 90 percent of it comprises of land and property related issues. To date the HoF has pronounced the need to interpret the Constitution in less than 50 cases worth interpreting the constitution.⁸⁵ The bulk of cases, however, are rejected due to lack of the need for constitutional interpretation.⁸⁶ Now let us look at some cases that entertained by HoF that had detrimental implications both on individual and group rights.

⁷⁶ Interview with Ato Desalegn Wayesa, Head of CCI office, on 24/9/2011 E.C

⁷⁷ *Ibid*

⁷⁸ Balancing and proportionality refers to, since constitutional adjudication inevitably deals with principles, and not only with rules, the procedure is to balance principles in accordance with their weight, which corresponds to a rational methodology for deploying basic rights in constitutional cases.

⁷⁹ Originalism implies that a constitutional norm means exactly what it meant or must have meant when it was originally adopted. The mainstream originalists give much emphasis on the original intentions of the framers of the constitution. Despite disagreement between various proponents of this methodology, almost all originalists agree that the linguistic meaning of each constitutional provision was fixed at the time that constitutional provision was adopted.

⁸⁰ Doctrinalism is a method of constitutional interpretation where considerable attention is given to the decisions, reasoning, and dicta of previous cases. The interpretation of a constitutional text over a long period of time will result in an accumulation of precedents that may come to assume more importance than the original text.

⁸¹ Textualism is a method of constitutional interpretation often labeled as *legal positivism* essentially regards constitutional norms as rules, requiring that constitutional interpretation strictly respect the text of the constitution as well as the original meaning of that text which can be deduced from its preparatory works and historical background

⁸² Article 13 (2) of the FDRE Constitution

⁸³ Mustafa Nasser, 2017, *Methods of Constitutional Interpretations in Constitutional Dispute Settlement in Ethiopia*, LLM thesis, Addis Ababa University, unpublished, pp17

⁸⁴ Archive of the CCI, June 2019.

⁸⁵ Archive of the HoF, June 2019.

⁸⁶ *Ibid*

Implications on the Right to Access to Justice

The case of *Ashenafi Amare et al vs. the Ethiopian Revenues and Customs Authority*⁸⁷ can be cited as a good example at this point. The claim by Ashenafi Amare who dismissed by the Ethiopian Revenue and Custom Authority state that Article 37 (2) of the regulation no: 155/2008⁸⁸ is contrary to the constitutionally guaranteed right of access to justice which provides that everyone has the right to bring any justiciable matter to courts...

In this regard the CCI in its reasoning simply accepts the constitutional limit by the legislature without justifying the need to limit the right in question is legitimate or not as per the constitution and dismiss the claim presented before it by compliant. The decision of the CCI for not meriting a constitutional interpretation in this case gave a green light for the legislature to limit any constitutional right even with a simple majority. This interpretation in turn could make entrenching fundamental rights in the constitution valueless,⁸⁹ since this right is an absolute right which cannot be limited by the legislature. The same analysis could be made with the right to appeal. Hence, the regulation which states '*an employee who has been dismissed from duty in accordance with sub article 1 of this Article may not have the right to reinstatement by the decision of any judicial body*', fails to pass legality test.⁹⁰ Therefore, without going through the legitimacy test, the provision of the regulation which limits these rights should be annulled unconstitutional. But as stated above the CCI approval of executive measure that limits the right to access to justice and appeal in course of exercising constitutional interpretation power these make these entrenching fundamental rights valueless.

Implications on the Right to Bail

The other case on which individual constitutional rights put to jeopardy by the decision of CCI and HoF was the case of *Seeye Abraha*.⁹¹ Following a split within the Central Committee of the

⁸⁷ See the *Ashenafi Amare et al vs. the Ethiopian Revenues and Customs Authority case Council of Constitutional Inquiry (CCI) File No 101/2009, 9, 2010*

⁸⁸ See Administration of Employees of the Ethiopian Revenues and Customs Authority Council of Ministers Regulation, 2008, Art.37, Reg. No.155, Fed. Neg. Gaz., 14th Year No.49. This article states that "notwithstanding any provision to the contrary, the Director General may, without adhering to the formal disciplinary procedures dismiss an employee from duty whenever he has suspected him of involving in corruption and lost confidence in him." Sub-article 2 of same provides that 'an employee who has been dismissed from duty in accordance with sub article 1 of this Article may not have the right to reinstatement by the decision of any judicial body.'

⁸⁹ *Article 37 (1) of FDRE Constitution stipulates that: everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.*

For more see http://eprints.lse.ac.uk/64584/1/lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content

⁹⁰ *Supra note 85, p.40*

⁹¹ *In this case, the Council ruled that a law that completely excluded the right to bail in corruption cases did not violate the constitutional guaranteed right, the right to bail. For more see*

ruling EPRDF party over the handling of the 1998-2000 Ethio–Eritrean war, the winning faction, which included the Prime Minister, enacted anti–corruption laws.⁹² The laws provided the basis for the arrest and prosecution of most of the opposing faction, which included the former defence Minister, *Seeye Abraha*. This was, however, not the end. When the First Instance Court, later confirmed by the High Court, ruled that the accused should be released on bail, security forces prevented the release of *Seeye Abraha*. In less than two working days after the order of the court to release the accused on bail, the parliament rushed to enact this a new law that deprived bail to all persons accused of corruption offence. A subsequent constitutional challenge against the law was rejected by the Council, which ruled that parliament has the power to determine not only the conditions under which bail may be refused but also to completely preclude bail in relation to certain offence. Quite surprisingly, the Council did not consider whether the application of the law on the accused persons violated the constitutional prohibition of the retroactive application of criminal law. In such ways the Council rejected the appeal and put the constitutional right to bail and non retrospectivity of criminal law principle in trash.⁹³

Right to Assembly and Demonstration

The right to assembly and demonstration is the other constitutionally granted rights⁹⁴, and in course of interpreting the constitution for what so ever the HoF has a duty bound to uphold this right. However on *Coalition for Unity and Democracy (CUD) vs. Prime Minister Meles Zenawi Asres* case⁹⁵, the CCI turned down the case for not meriting constitutional interpretation. In its reasoning the CCI based its analysis on Articles 49, 72(1) and 74(13) of the FDRE Constitution that there is nothing wrong with the decree of the Prime Minister prohibiting demonstration in Addis Ababa for one month on the ground that the Prime Minister is the highest executive organ vested with wide powers and Addis Ababa city is accountable to the federal government under Article 49 of the Constitution and Article 61 of Addis Ababa City Charter.⁹⁶

http://eprints.lse.ac.uk/64584/1/_lse.ac.uk_storage_LIBRARY_Secondary_libfile_share_d_repository_Content

⁹² *Federal Ethics and Anti-Corruption Commission Establishment Proclamation no 235/2001, and Anti-Corruption Special Procedure and Rules of Evidence Proclamation no 236/2001. .For more see* http://eprints.lse.ac.uk/64584/1/_lse.ac.uk_storage_LIBRARY_Secondary_libfile_share_d_repository_Content

⁹³ See article 22 of FDRE Constitution and Supra note 91.

⁹⁴ See article 30 of FDRE Constitution

⁹⁵ Mulu, Anchinesh Shiferaw (2019), 'The Jurisprudence and Approaches of Constitutional Interpretation by the House of Federation in Ethiopia', *Mizan Law Review*, Vol. 13, No. 3, pp. 419-441. For more see <file:///C:/Users/user/AppData/Local/Temp/195077-Article%20Text%20493190-1-10-20200422.pdf>.

⁹⁶ Supra note 83 at p.41.

However, we argue that the CCI should have reached a different conclusion had it analyzed the case by employing proportionality and balancing methodology.⁹⁷ When we analyze the decree of the Prime Minister, it banned the right totally for a period of one month which is against the Constitution. That is the Prime Minister does not have the mandate to limit constitutional rights by his discretion let alone banning it. If it has to be limited on the grounds enumerated in the Article, then the legislature has to prescribe the limitation by law. Moreover, unless in the event of state of emergency, the Prime Minister cannot suspend or ban constitutionally guaranteed right by a simple decree, hence, the Decree is illegal. Accordingly, the decree failed to pass the legality test hence, without going through the legitimacy test (i.e. suitability, necessity and proportionality analysis) the decree of the Prime Minister should have been ruled as unconstitutional. If the CCI carried out this sort of analysis, it would help to rationally analyze the issue by looking in to the legality and legitimacy of the action in question. Moreover, it has been forwarded that the interpretations of human rights norms should be interpreted in line with international human rights instruments which the CCI failed to do so. In such away the CCI had made a fatal mistake in course of interpreting the constitution and thereby violate the right to assembly and demonstration that has constitutional recognition. The very important point that should be underlined here is that, the limitations or barring made on a single rights has a tendency to affect the full exercise of other constitutionally recognized rights. Due to this nature, the realization and protection of one rights has both visible and invisible roles for realization and protection of other rights, and vice-versely the violation of single rights has a tremendous negative effects on exercising other rights. Coming to the case under consideration, banning imposed on the right to demonstration and assembly can significantly affect other rights individual and also group rights.

Implications on the Right to be Heard and Appeal

According to national, regional and international human rights instruments that Ethiopia has embraced, any detained person has both the right to present and be heard while his case is being entertained by competent organ and also the right appeal in case when the judgment rendered has detrimental effect on his/her interests. But there is no room for these rights when HoF entertains the cases brought before them. This is to mean that the accused is not summoned by both CCI and HoF in course of entertaining the cases. Sometimes the judgments on the merit of the case by HoF

⁹⁷ *In proportionality method analysis, the conflicting constitutional principles in the above case would be 'maintaining public peace and order' vis-à-vis 'freedom of assembly including right to public demonstration'. Proportionality analysis basically analyzes both the legality and legitimacy of the decree of the Prime Minister. Legality refers to the requirement that the limitation to be 'prescribed by law'. Hence, the first question that should be asked is 'total ban of the right under discussion' prescribed by law or not. The right is not an absolute right hence it could be limited 'for the protection of democratic rights, public morality and peace' relating to the location and route of movement of demonstration. Yet, a total ban of the right is not allowed. However, for the enumerated grounds the legislature could limit the right accordingly which has still to pass the legitimacy test i.e. the suitability, necessity and proportionality.*

may take place without awareness of accused person. There is no room for the accused make his concern to be heard even though the judgments rendered by this organ had effects on his/her interests.

Plus to that, the judgments of HoF are not appealable due to the fact that its judgments are made final and conclusive by law. Furthermore, the judgments of the HoF had a precedential value, meaning that it will apply to any similar cases that will appear thereafter.

Identity Claims and the Right to Self-Determination

According to the 1995 FDRE constitution, every Nation, Nationality and People of Ethiopia has an unconditional right to self-determination, including secession, and also has the right to a full measure of self-government which includes the right to establish institutions of government in the territory that they inhabits.⁹⁸ As stated herein above however the constitution has a gap in relation to the right to identity claim. Even if it went extra miles in giving recognition to the rights of ethnic groups, it is silent on how identity claims can be entertained when brought to the table by certain ethnic groups. However this constitutional gap was settled by HoF by *Silte* case. Thus this '*Silte*' case can serve as precedent for future similar cases in this regard. It is an important case to set forth the procedures and the methodology in dealing with similar identity claims where it fills the gap of the constitution. In the process of interpretation of the '*Silte*' case the decision of HoF has developed the following procedures and methodologies in dealing with identity claims:-

1. In order for a community to assert itself as a distinct ethno-identity group, it has to conform to the criteria set forth in Article 39 (5) of the FDRE Constitution.
2. A referendum should be undertaken to ascertain the interest of the concerned community.

As per this precedence, if certain ethnic group or people pose identity claims, their claim should be entertained, if they fulfilled the criteria set out in article 39(5) and the concerned community ascertain the claim through referendum. But the HoF has been disregarding identity claim questions posed by different ethnic groups that fulfilled these criterions. Even though this identity right is a constitutional granted rights and the *Silte* case can serve as precedence, so far it is only is the *Silte* and *Kiment* people that has managed to assert themselves a status of 'nationality', even the processes especially case of *Kiment* case was the hard won battles. Other identity claims presented to the HoF by other ethnic groups like, menja, kontoma were denied by the decision of the HoF by claiming that it is failed to meet with the criteria set forth in article 39(5) of the FDRE Constitution. Yet, the 'welene' and 'denta' communities' cases are pending or remained unanswered to date. There is no clear justification forwarded by the HoF so far why these claims were denied and hijacked beyond a mere rhetoric that their claim failed to meet the criteria stated under the constitution.

In addition to that about dozen ethnic groups that were under the Southern Peoples Nation and Nationality regional state and the Berta ethnic group from Benishangul Gumuz have presented their claim for the statehood to the HoF after fulfilling the criteria's indicated above. But the HoF

⁹⁸ See article 39(1 and 3) of FDRE constitution

has denied the claim like that of Berta or responds to claim after very long and catastrophic causalities like Sidama case or failed to give answer at all yet. The case of Walayita, Hadiyaa and Gurage, can be cited as a good example at this critical juncture. These all implies that even if group rights like identity claim and self administration rights(statehood) had constitutional recognition and protection, the HoF, the organ empowered to provide responses these questions is not protecting these rights (self determination and identity claims), in course of exercising its constitutional interpretation power.

As stated herein above, in spite of these and other related problems however, some steps taken by HoF to protect group rights are promising compared to its efforts to protect individual rights. The case Silte, Kiment and now Sidama can be cited as good example. Thus this research recommends that it is better if the power of constitutional interpretation of individual rights reserved to an independent constitutional adjudicator, like courts, hence individuals rights are severely violated by HoF and CCI as some cases discussed above rightly demonstrated, while leaving the right to self-determination and other issues relating to ethnic groups to the determination of the HoF with some modifications. These modifications may include making the CCI the permanent adjudicator of cases along with HoF. The appointment procedure should also be transparent. Most importantly, individuals who are members of legislative or executive organs or political parties or who are otherwise politically active should not be allowed to be appointed to the Council.

Conclusion

One of the main motivations behind setting a system of constitutional review is the desire to have independent and effective organ for protection of human rights. Given the lack of an independent organ in charge of constitutional review, the Ethiopian system of constitutional adjudication cannot properly restrain the government and protect fundamental rights. It puts the fate of human rights on the finger tips of political organs. This happened due to the fact that, the current constitutional review system represents an institutional and functional design deficit, at least regarding the protection of individual rights..

Thus, this article recommends a possibility of dividing a jurisdiction of the HoF and the courts between group and individual rights. Accordingly, human rights are better protected if power of interpreting group rights is reserved to the HoF and the power of interpreting individual rights is given to ordinary courts. In addition, this research suggests that the CCI be established as a permanent constitutional adjudicator.