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Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HoF)

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Ethiopia adopted a federal system de facto since 1991 and de jure since 1995 with a view to decentralizing power and resources from the center and to accommodate the diverse ethno-linguistic groups that exist in the country. As constitutionally entrenched division of power between federal and state governments is at the bed rock federalism and as the division of powers often is far from clear, it is inherent in any federal system that there must be an organ for the adjudication of constitutional issues and for the settlement of disputes concerning the competence of the two levels of governments. In the 1995 Ethiopian federal constitution, this task is entrusted to the non-legislative second chamber, other wise known as the House of Federation (HoF). This article attempts to review the experience of the HoF ever since its establishment by assessing the relevant Ethiopian laws and the decisions of the HoF. With this in view and after a short introduction, the first part is devoted, though briefly, to the discussion of the varied practices adopted in some constitutional systems. The remaining parts discuss the underlying reasons for the adoption in the 1995 federal Constitution of Ethiopia, the HoF as a unique institution for the adjudication of disputes and explores its jurisdiction vis-à-vis the judiciary and analyses its achievements and challenges. The general trend observed is that despite institutional and pragmatic challenges, the HoF has over the years evolved as a legitimate body for the settlement of disputes at least as far as issues of high political and constitutional significance are concerned. This is not, however, without implications on the role of the judiciary. While the constitution has left some grey areas for the judiciary, the new laws that define the role of the HoF and recent decisions of the HoF indicate that the judiciary is further stripped of its minimal roles.

FEDERALISM AND THE ADJUDICATION OF DISPUTES

1. Introduction and Context

Ethiopia is a multicultural, multi-religious and the second most populous country (by latest estimates 77,000,000) in Africa next to Nigeria. Except for the 20th century and leaving out some exceptions, Ethiopia existed for the most part of its long and independent history, principally under a monarchy with the Orthodox Christian faith serving as pillars of unity and various kinds of regional forces representing diversity and exercising important powers such as taxation on some economic activities, maintenance of local security and regulation of trade. Thus the seeds of what some authors call "federal Society"[1] (regionally grouped diversity) has been there for long.

[1] See William Livingston, "A Note on the Nature of Federalism," *Political Science Quarterly*, 67:1 (March

Towards the end of the 19th century when Ethiopia took its present shape, and with the emergence of strong emperors, particularly Haile Selassie (1930-1974) and the Military (1974-1991) the centre virtually abolished the autonomy of all regional forces through the introduction of centralized taxation system, modern army and police force, by sending appointees from the centre to the localities and crucial of all by imposing the motto 'one country, one culture, one language, one people, one religion.' Thus the values of the state and its institutions became exclusive. Furthermore, while the process brought all sorts of diverse groups, the state structure failed to incorporate them into the political process and this led to the state crisis that reigned for the most part of the 20th century.

There is lack of consensus in explaining the source of the state crisis but two of the most dominant perspectives include the "instrumentalists"[2] most of whom include western observers and some Ethiopian analysts who portray the centralization of political power and resources as the core of the problem and consider the proliferation of ethnicity as wrong manifestation of political and economic deprivation that will simply vanish from the political spectrum with the decentralization of power and resources and the advocates of the "national oppression thesis" who think that Ethiopia was simply the "prison house of nationalities" and hence call not only for the decentralization of power and resources but also for the accommodation of the different groups into the political process by ensuring self rule and adoption of pluralistic language policy. The latter claim that identity may change or adapt in reaction to a given situation but does not necessarily vanish from the political spectrum and hence the emphasis on accommodation.

Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), the ruling party that overthrew the military regime (1974-1991) as an advocate of the second perspective and of the right of nationalities to self-determination secession included, dominated the political scene since 1991, decided to abolish the system of unitary government and introduced the federal system *de facto* since 1991 (the Transition ranged from 1991-1994) and *de jure* since August 1995 with the adoption of the federal Constitution. Since then, Ethiopia is officially a multicultural federation forging unity in diversity constituting nine autonomous states and two semi-autonomous cities that are accountable to the federal government. The constituent units have been reorganized with a view to ensuring self-rule to at least some of the major nationalities and in some units this has created "inconvenient" local minorities. The attempt is to forge multicultural federation whose ambition is to ensure self-rule to the different nationalities, divide power and resources among the different groups and adopt an accommodative language policy.

1956): Pp. 81-95. The introductory observations draw from Assefa Fiseha, *Federalism and Accommodation of Diversity in Ethiopia: A Comparative Study,* Nijmegen: Wolf Legal Publishers (2006) Chapter one Pp. 1-87.

[2] Such thinkers are called instrumentalists because they view religious and ethnic groups as a means to achieve some political and economic goal and having no relevance thereafter. Included in this category are John Markakis, *Resource Conflict in the Horn of Africa,* London Sage Publications, (1998); Christopher Clapham, "Ethnicity and the National Question in Ethiopia," in Peter Woodward and Murray Forsyth eds. *Conflict and Peace in the Horn of Africa: Federalism and its Alternatives,* Aldershot: Dartmouth, (1994) pp. 30-35; Jon Abbink, "New Configurations of Ethiopian Ethnicity: The Challenge of the South," *Northeast African Studies* 50:1 (1998) p. 60.

Consequence of which is that unlike many constitutions, the Ethiopian Constitution commences by saying "We the nations, nationalities and peoples of Ethiopia and under Article 8 the nationalities are declared sovereign and under Article 39 they are granted with the right to self-determination that among others include the right to use one's language, to preserve once culture and history, the right to equitable representation at federal institutions and finally and if the need arises, to secede after complying with some procedures.

While some observers contend that the federal system has not in any way reduced the nature and intensity of various conflicts, a closer observation seems to reveal the point that given the political atmosphere in which we were in 1991, that is, a virtually collapsed centralized regime in which one could hardly predict what will follow shortly, the different groups have over the last decade and half shown a clear stake in the federal arrangement. Since the introduction of the federal system, there has been a significant shift of discourse from assimilation to an open accommodation of the nationalities, creating a political space to historically marginalized groups. The federal system as well has diffused the various conflicts to the local level making them less a threat to the centre. Besides, the argument that conflicts are recurring and that the federation may wither away with the ruling party is something that draws its evidences from the former failed federations of the USSR and Yugoslavia. Yet, there are ample evidences indicating that such federations were "window dressing federations"[3] and not federations in reality. One could also make positive scenarios based on the experience from multicultural federations such as Switzerland and India. As such diversity is not a threat in itself, it becomes a fertile ground for conflict only if the system fails to provide a political solution to it in the form of resource and power sharing, the accommodation of the groups to the decision-making process and by ensuring self -rule.

2. Constitutional Adjudication

Crucially important in a federation is the presence of a body that umpires disputes concerning the constitutionality of laws in general and the division of powers in particular. From the principle of constitutionally guaranteed division of power and the supremacy of the constitution follows that the last word in settling disputes about the meaning of the division of powers must not rest either with the federal government alone or with the states.[4]

The constitutionally entrenched division of power is the hallmark of federations. However, the division of powers between the federal government and the states cannot be delineated in such a way as to avoid all conflicts. As R. Davis notes the 'division of power is artificial, imperfect and a generalized skeletal thing. Political life cannot be perfectly or permanently compartmentalized. The words can rarely be more than approximate crude and temporary guides to the ongoing or permissible political activity in any federal system.'[5] Certainly disputes about the terms of the division of power are

[3] See for example Daniel Elazar, *Exploring Federalism,* Tuscaloosa, AL: University of Alabama Press, (1987).

[4] K. C Wheare, *Federal Government* 4th edn., London: Oxford University Press, (1963) Pp. 60-61.

[5] Rufus Davis, *The Federal Principle: A Journey Through Time in Quest of Meaning,* Berkley: University

bound to occur. Besides, adaptation and the need to adjust and accommodate the division to cope with the new, the unforeseen and the unintended remains crucial and interpretation is one of such methods. In the Ethiopian Constitution, this rather crucial function is granted to the HoF.

Time and space do not permit a comprehensive study of constitutional review of legislation in various federal systems. Yet in light of the relevance of this enterprise in consolidating the federal system, an attempt is made here to link federalism and the role of the judiciary, albeit with the main emphasis on the Ethiopian experience. Let it be clear from the outset that federalism has served as one of the important justifications for the introduction of the system of constitutional review of legislation.[6] Through the tribunal that interprets and adjudicates constitutional issues federal systems have been able to promote legal integration.[7] There is no exclusive claim here that federal integration is the sole function of the tribunal or the judiciary as indeed political and economic factors do play a crucial role in promoting integration. Yet the highest tribunals of federal systems or the body that adjudicates constitutional issues do also play an important role. One will note that in the Preamble of the Ethiopian Constitution an express statement is made to the effect that the federal system aims at creating 'one political and economic community' and a promise of 'common destiny.' The latter, if taken seriously, has even stronger implications in the sense that if the nationalities indeed have a 'common destiny' then they have to live together, even if they dislike each other. If this ambitious plan of federal integration is to have meaning then one avenue for such integration is through the mechanism of constitutional adjudication.

As already mentioned, one of the fundamental features of a federal system is the division of powers between the federal government and the states. Besides, in federal systems, not only is the federal constitution supreme but the federal law should also be declared supreme over contrary state law. True that the supremacy of the federal law is not without limits. The federal legislature should enact its laws and policies within the limits set by the federal constitution. Once that condition is met however, federal law breaks contrary state law.[8] Two consequences follow from this: there must be an institution that enforces the supremacy clauses and there must also be an institution that takes care of the daunting task of demarcating the boundary of the powers of the federal government and the states. Federal constitutions do attempt to define the scope and powers of the two levels of government but there is bound to exist natural imprecision in the language of the

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of California Press, (1978) p. 143.

[6] Constitutionalism, the incorporation of human rights in many national constitutions and rule of law are the other justifications. The former upholds that governmental power is limited by constitutional norms. There are, therefore, procedures and institutions established to enforce such limitations reducing the dangers of unchecked power. See for example Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law*, New York: Foundation Press (1999) Pp. 190-206.

[7] See Mauro Cappelletti, *The Judicial Process in Comparative Perspective*, Oxford: Clarendon Press, (1989): Pp. 169; 312-313; herein after called The Judicial Process in Comparative Perspective.

[8] As a result of this many federal constitutions stipulate not only about the supremacy of the federal constitution but also about the supremacy of federal over state law.

constitution.[9] Suffice it to mention here the wide meanings given to 'interstate commerce,' 'implied powers' and the 'necessary and proper' clause by the United States Supreme Court. Through the mechanism of constitutional adjudication then federal integration is given a more concrete meaning.

2.1 Differences between the Institutions

For historical and philosophical reasons, constitutions have adopted different mechanisms for reviewing the constitutionality of laws and decisions of government bodies. The (dis)trust that the states have over the judiciary, the differing commitments to natural law or legal positivism, the differing application of the notion of separation of powers, have influenced in one way or another, the nature and scope of the national institution established to review issues of constitutionality.[10] Pre-WWII Europe trusted its legislature and led to the horrors and that in turn led to a shift in paradigm, for instance, in Germany to the evolution of Constitutional Court.

Broadly speaking, one can see two patterns regarding the institutions empowered to adjudicate constitutional issues. Many federal systems have vested this important power either in their ordinary courts or separate constitutional courts. Accordingly, these courts not only have the power to interpret the constitution, but are also and even more importantly entitled to decide on the conformity of the laws with the constitution. What is common in all is the fact that there is commitment to a 'higher law,' that reflects the society's fundamental values and a law that contravenes this higher law should cease to exist by some kind of procedure.[11] The systems do not accept the 'omnipotence' of positive law, but rather subject positive law to a superior law, according to modern notions, the latter being constitutional law. Yet although constitutional review through the courts is in principle based on the principle of subjecting legislation to a higher law, it essentially has two distinct forms.

On the one hand, there is this diffused (decentralized) system also called the American-system that accords every branch of the judiciary the right to review the constitutionality of laws. In principle any court has the power to declare any law or decision of an executive body unconstitutional, if such a law or decision violates the constitution, final appeal being reserved to the federal Supreme Court. This has been the case since the famous decision of Chief Justice John Marshal of the US in *Marbury* v. *Madison*[12] in

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[9] 'Constitutional language is often imprecise or inconclusive, and the circumstances of its application often unanticipated or unforeseeable by its authors.' James Brudney, "Recalibrating Federal Judicial Independence," *Ohio State Law Journal* 64:1 (2003) at 175.

[10] M. Cappelletti, *The Judicial Process in Comparative Perspective*, *supra* note 7: Pp. 115-131.

[11] Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs-Merrill, 1971) p. 15.

[12] *Marbury* v. *Madison* 5 US 1 Cranch 137 (1803). For a detailed account of Judicial review and this famous case see R. Carr, *The Supreme Court and Judicial Review*, Greenwood Press Westport, (1970): Pp. 37-57.

1803. Since then many other countries including India have adopted it. Some traces of it also exist in Switzerland where the courts have the power to disregard cantonal laws. In Switzerland, judicial control is not, however, allowed over federal laws.

What characterizes the decentralized system of judicial review in the US is the requirement of the presence of 'real controversy and adverse parties'[13] for the Court to decide the constitutional question. Besides the US Supreme Court would insist that the matter must be justiciable and must not involve 'political questions.'[14] The ordinary courts decide constitutional issues in the process of disposing their routine function and review of constitutionality is, therefore, something that comes to the courts incidental to the case.[15] The logic of the decentralized system in a nutshell, it is the duty of the judges to apply and interpret the law and in doing so if the judges find a contradiction and inconsistency between two laws of different hierarchies, it is the duty of the judges to apply the higher law.[16]

On the other hand, the centralized system confers the power of reviewing the constitutionality of laws to constitutional courts.[17] Typical of which is the German Constitutional Court characterized by its distinctive constitutional jurisdiction. It constitutes two senates each with eight judges: one handling mainly basic human rights cases, otherwise known as constitutional complaints while the other senate decides disputes involving constitutional issues proper. Half of the judges are selected for a single non-renewable term of twelve years, by a special electoral committee of the *Bundestag* while the other half are selected by the *Bundesrat* and to that extent by the governments of the states. In

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[13] This is judicially invented doctrine from Art. III of the United States Constitution. Thus the Court declines to give advisory opinions and to adjudicate what the German Constitutional Court does by way of abstract review. It is established that federal judges will not render an opinion or decide a case unless there is an actual dispute between litigants before the Court. The Court settles the adverse interests and the decision must have effect on the parties. The case is then said to be justiciable. It is one of the mechanisms of self-restraint developed by the Court over the years to avoid head on clashes with the other branches of the government. John Ferejohn and Larry Kramer, "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Self- Restraint," *N. Y. U. Law Review* 77:4 (2002): Pp. 1003-1008.

[14] See *infra*, note 48 and the accompanying text.

[15] For more comprehensive treatment of the differences see Allen Brewer-Carias, *Judicial Review in Comparative Law* Cambridge: Cambridge University Press, (1989) Pp. 131-135.

[16] This was the essence of Hamilton's argument in the *Federalist Papers* No. 78, which John Marshal was to further develop in his famous *Marbury* v. *Madison* decision. Hamilton wrote, 'The Interpretation of the Law is the proper and peculiar province of courts. A Constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain it's meaning, as well as the meaning of any particular Act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.'

[17] As to why many of the continental systems opted for a model of the constitutional court other than the regular judiciary see Mauro Cappelletti, *The Judicial Process in Comparative Perspective, supra* note 7 Pp. 49-52; 137; for a very recent account of the personal background of the Chief Justices of the Supreme Court of the United States, indicating very rich experience in other branches of the government before assuming judicial position, indeed one was even a President of the country see William Rehnquist, "Lecture: Remarks of the Chief Justice: My Life in the Law Series," *Duke Law Journal* 52:4 (2003) Pp. 787-805.

both cases a majority of two-thirds is required which is impossible to arrive at unless there is a consensus among the major parties. Thus the federal government and the states have influence on the selection of the judges of the Court. The manner of appointment as well as some of its powers, according to some authorities, make the Constitutional Court has a hybrid role: political and legal.[18] Distinct from and independent of the ordinary courts, the Constitutional Court serves as a watchdog for the enforcement of the supremacy of the constitution. The Court as such does not involve itself in the ordinary settlement of disputes unless the case relates to a constitutional question. However, it does not restrict itself to constitutional issues emanating from specific cases. It can also decide differences of opinions or doubts on the compatibility of federal or state law with the Basic Law upon the request of a few public bodies.[19]

Compared to the American Supreme Court, the German Constitutional Court has an extensive and wide-ranging jurisdiction regarding the Basic Law. Furthermore, the source and authority of the Constitutional Court are relatively settled for there are clear constitutional provisions empowering it, whereas it remains, at least on academic level, disputed as to where the Supreme Court's power comes from and how it should be exercised. The Constitutional Court was deliberately introduced with the principal role of reviewing the constitutionality of laws, a pivotal role for protecting against the return of the evils and horrors of dictatorship. As a result broadly speaking the challenges of 'judicial activism' are less serious in Germany than in the United States. The Constitutional Court is consciously designed to play an active role in its capacity as a guardian of the Basic Law. Its 'activism'[20] is thus often tolerated.[21]

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[18] Nevil Johnson, "The Federal Constitutional Court: Facing Up to the Strains of Law and Politics in the New Germany," in Klaus Goetz and Peter Cullen eds., *Constitutional Policy in United Germany* London: Frank Cass, (1995) P. 132.

[19] See Basic Law Art. 93. For more on the German Constitutional Court see Rainer Arnold, "The German Constitutional Court and its Jurisprudence in 1996," *The Tulane European and Civil Law Forum v*. 11 (Winter 1996) Pp. 85-110; Philip Blair and Peter Cullen, "Federalism, Legalism, and Political Reality: The Record of the Federal Constitutional Court" in Charlie Jeffery ed., *Recasting German Federalism: The Legacies of Unification*, London: Pinter, (1999)Pp. 119- 154; Lars Mammen, "A Short Note on the German Federal Constitutional Court and Its Power to Review Legislation," *European Human Rights Law Review* 6:4 (2001) Pp. 433-438.

[20] In the United States there is an ongoing debate on the role of the Supreme Court regarding judicial review: according to Henry Abraham, it is 'the most awesome and potentially the most effective power in the hands of the judiciary in general and the Supreme Court in particular.' Every Court in the United States has the power to declare unconstitutional and hence unenforceable any law, any official action and any other action by public officials that the Court deems to be in violation of the Constitution. In the area of constitutional interpretation, this raises concerns because it invalidates a law considered to be an outcome of a number of compromises between political actors in Congress. Thus there are those who contend that in exercising this important power the Courts must exercise 'self-restraint.' The Courts should remain faithful and adhere to the written constitution, only refer to the *original intent* as put by the framers, guided by strict construction of the text and give priority to political branches to act or not to act. More importantly, the Courts should not put their own personal preferences and philosophies under the pretext of interpretation. They should rather adhere to judicial precedents. On the other hand, there are those who contend that the Court should have some active role. Constitutions are, they contend, *living documents* to be interpreted in line with present realities. Thus the proponents adhere to a more affirmative role or even aggressive role of the Court in regulating governmental laws and actions. They do not hesitate over the fact that the courts have some 'law-making' functions and hence at times prescribe policies. As a result, they come in a head-on clash with the charge that the

2.2 The House of Federation

The practice of constitutional interpretation in Ethiopia follows a different pattern. According to the 1995 Ethiopian Constitution, the authority to interpret the Constitution is vested in the second chamber, the House of Federation. According to the Constitution Articles 62 and 83, the HoF is not only empowered to decide constitutional disputes but also to interpret the constitution.[22] Unlike second chambers in other federations, the HoF has no law-making functions.[23] The rationale for vesting the power of interpreting the constitution in the HoF, and not in the regular judiciary or a constitutional court as can be gathered from the minutes of the Constitutional Assembly emanate from two sources. One is related to the framers view of the 'nature' of the constitution in general and to the role of the nationalities in particular. The framers think that the new federal dispensation is the outcome of the 'coming together' of the nationalities. Indeed, it is clearly stipulated in the preamble and Article eight that the 'nations, nationalities and peoples are sovereign.' The Constitution is considered as the reflection of the 'free will and consent' of the nationalities. It is, in the words of the framers, 'a political contract' and therefore only the authors that are the nationalities should be the ones to be vested with the power of interpreting the constitution.[24] To this effect, the HoF that is composed of the

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judiciary usurps the function of other branches of governments. See Henry Abraham, *The Judiciary: The Supreme Court in the Governmental Process,* 10th edn., New York: New York University Press, (1996) pp. 69-70; 90-91.

[21] Apart from this rather oversimplified difference there exist other deeper variations among the institutions. The extent of the tribunal's jurisdiction has already been briefly mentioned. In many cases not only has the Constitutional Court a clear mandate but it also does not shy away from considering cases, which the Supreme Court may consider political. There are also deeper variations in the methods and doctrines of interpreting the constitutions. For more on these issues see Danielle Finck, "Judicial Review: The United States Supreme Court versus the German Constitutional Court," *Boston College of International and Comparative Law Review* 20 (1997)Pp. 123-157; James Brudney, *supra* note 9, Pp. 149-194; David Beatty, "The Forms and Limits of Constitutional Interpretation," *American Journal of Comparative Law* 49:1 (2001) Pp. 79-120.

[22] There has been some confusion in the terminologies between what constitutes constitutional disputes and constitutional interpretation, although they are of less practical significance because both powers belong to the HoF. Under Article 62(1), the HoF has the power to interpret the Constitution. Article 84 (1) as well states: 'All constitutional disputes shall be decided by the HoF.' Yet, for those who are familiar with the jurisdiction of the German Constitutional Court (it is no secret that the two new laws: Proclamations No. 250/2001 and 251/2001 that regulate the powers of the HoF and the CCI are influenced by the experience of the Constitutional Court), constitutional dispute has a very narrow meaning. It refers to cases in which a matter is referred to the CCI or the HoF arising from a real case and controversy, which some refer to incidental/concrete judicial review. However, as will be demonstrated later, constitutional interpretation could also arise in many other cases apart from real cases and controversies. Issues regarding separation of powers and federalism that are referred to the Constitutional Court or the HoF in the abstract are good examples.

[23] For details on the HoF see Assefa Fiseha, *supra* note 1 Pp. 137-158.

[24] See *Ye Ethiopia Hige Mengist Gubae Kale Gubae* v. 4 *Hidar* 14-20, 1987 E.C. (Minutes of the Constitutional Assembly, November 1994) discussions on Articles 59, 61 and 62.

representatives of the various nationalities is expressly granted the power to review the constitutionality of laws and of course other essential powers as well.[25]

The second reason is related to the first. 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 policy choices in the first place. Thus the framers argued, this might result in hijacking the very document that contains the 'compact between the nationalities' to fit the judges' own personal philosophies. It is not difficult to understand the fears and concerns of the framers in light of the fact that the judiciary in Ethiopia has not yet won 'the hearts and minds' of the ordinary citizen. As will be noted below, the good days in which the judiciary gains prestige and respect as the third branch of the government, are yet to come. Yet one could argue in favour and against the policy choices made in the Ethiopian Constitution. Elsewhere it is argued that owing to the lack of theoretically sound basis for the institutions that interpret the constitution in many jurisdictions and taking into account the fact that in many countries including Ethiopia the prestige of the judiciary is low and that establishing deep rooted institutions for democracy to operate may take time, any constitution that claims to incorporate both constitutionalism and democracy, two of the competing values, must attempt to reflect both values in the process of constitutional adjudication. The application of the two values to constitutional interpretation will result in establishing a tribunal composed of legal professionals and politicians, (similar to the Council of Constitutional Inquiry- CCI) a tribunal capable of rendering binding decisions on cases brought before it. A tribunal so composed will be in a theoretically sound and politically legitimate position. Such tribunal best suits the nature of the enterprise called constitutional interpretation.[26]

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[25] See Art. 62(1) that states 'The House [House of Federation] has the power to interpret the Constitution.' And Art. 61(1) states, 'The House of Federation is composed of representatives of Nations, Nationalities and Peoples.' Each nationality has at least one member but each nationality is represented by one additional representative for each one million of its population. I have earlier on argued as a result that the HoF is majoritarian in much the same way as the other house and the claim that it is guardian of the nationalities is rather fluid at best and pretentious at worst. At state level two patterns are evolving. In the regional states of Tigray, Amhara, and Oromia, the state constitutions established a 'Constitutional Interpretation Commission' composed of representatives from each district/*wereda* Council. In Tigray, the members of the HoF are also members of the Commission and in Amhara every nationality is also represented. In SNNPRS, however, the Constitution established a 'Council of Nationalities,' a house more or less identical with the federal HoF both in terms of power and composition. In all of the regional states mentioned, the Commission or the Council of Nationalities is assisted by the Council of Constitutional Inquiry (CCI) of each respective state. The CCI in the states as well is designed in much the same way as the CCI of the HoF. See Articles 70 and 71 of Amhara, 67-69 of Oromia, 67-70 of Tigray and 58, 59 and 78 of SNNPRS state constitutions.

[26] For a summary of the arguments see Assefa Fiseha, "A New Perspective on Constitutional Review," *Tilburg Foreign Law Review* 10:3 (2002) Pp. 237-255. The judiciary is often criticized for being anti-majoritarian, at odds with the democratic principle; judicial activism is also considered at odds with the principle of separation of powers for it takes away the role of the other branches of governments and many consider the judiciary lacks the competence to make law. But such opinions at times go too far in the sense that judicial functions have procedural and substantive limits. Judicial discretion is not as open as many think it to be. Besides modern constitutions stipulate many mechanisms of preventing tyranny and do not as such provide pure democracy. Thus we speak of horizontal and vertical

Behind the policy choice of the members of the Constitutional Assembly to vest the power to interpret the constitution and to review the constitutionality of laws in the HoF, not the judiciary, has something to do with the reputation of the judiciary and ideological matters. In historic Ethiopia adjudication of cases formed part and parcel of public administration. One finds a merger of functions within the executive, the administration of justice and the executive function proper. Indeed, adjudication of cases was considered to be the principal function of the executive. For example, in Menlik's era of appointment of the ministers in 1908, the Minster of Justice was also the Chief Justice.[27] The attempt to separate the judiciary from the executive was not that easy either. A long and tiring process of negotiation in 1942 led to a partial victory as far as the judiciary is concerned: only the highest benches, that is, the High Court and the Supreme Imperial Court were able to be relatively free from the influence of provincial administrators. In all other respects, the court structure reflected until 1992 the traditional practice of combining judicial and executive functions in the person of the local chiefs and provincial governors. At the apex of the court structure one found until 1974, the emperor, dispensing justice in the *Zufan Chilot* (Crown Court).[28]

This blend of judicial and executive functions in the latter is not without implications. As briefly noted in the introduction, the crisis of the state had its effect on the judiciary as well. Indeed, it is difficult to see the judiciary in isolation from the whole political system under which it operates. First and foremost the judiciary never had a separate existence of its own as an institution. It was subject to all kinds of pressures from the other branches. Thus, external pressure on the judiciary has deep roots and is not without some hangovers on the new federal judiciary. Administrators at state level, even today, think that it is natural to order the judge or at times even close benches at the lower level of administration.[29] Second, the judiciary never survived the regime it established. It was no surprise to see every new regime setting up its own version of the judiciary that suits its mission. It was never designed to be an institution as the third branch of the government in the real sense. This has left an impression on ordinary citizens to the effect that

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separation of powers, federalism, supremacy of the constitution, checks and balances, human rights and so on. Apart from this the legitimacy of the court and legitimacy of the other political branches come from different sources. For the judiciary, it is its impartiality and its procedural fairness that it provides to the parties that serves its legitimate existence. For the other branches, it is democratic accountability to the electorate. More importantly, even in the area of constitutional review, the courts may have the last say, but it is only for a time. The Court may modify or even reverse its former decision. More importantly, the legislature may modify or even reverse the decision of the court, and constitutional amendment as well can reverse the decision of a court. The decision of the Court may thus be overruled by other branches of government. See Cappelletti, *The Judicial Process in Comparative Perspective, supra* note 7 P. 151; H. Abraham, *The Judiciary, supra* note 20, Pp. 72; 94-95.

[27] Aberra Jembere, *An Introduction to the Legal History of Ethiopia 1434-1974*, Hamburg: LIT Verlag Munster, (2000) Pp. 219, 227, 240.

[28] Under the unitary systems, the judiciary was contained within the executive branch. The federal Supreme Court was separated from the Ministry of Justice in 1992. It suffers from a severe shortage of qualified legal and judicial personnel to operate its many layers of courts.

[29] The experience of the state courts for example in the Somali, Oromia and Afar regional states indicate the level of executive intervention particularly at *Wereda/*District levels. This was made clear in a workshop on judges held in Addis Ababa in mid February 2007.

changes in government will entail another round of appointments and dismissals of judges. Thus in 1991 when EPRDF came to power and introduced the new federal system, the prestige and reputation of the judiciary was at its ebb, associated with all forms of nepotism, corruption and worst of all, an arm of the most despotic regime on earth, well-known for execution of life without any semblance of due process of law.[30]

The judicial system in Ethiopia is under serious pressure both from what Cappelletti calls 'the consumers of law and justice,'[31] that is the citizens and the government of the society under which it operates. There is a serious complaint that the judiciary is dragging its feet in rendering decisions both at state and federal level and as a result its role in enforcing contracts and creating an atmosphere of stability and predictability for business thereby promoting economic development, is questioned. The judiciary, on the other hand, complains about a whole list of factors affecting its performance: salary, lack of trained judges, resources and absence of economic security, political pressure and commitment of its own judges. Added to this is the ideological challenge of the ruling party. Until recently its commitment to the judiciary, despite the constitutional provisions was far from clear. The judiciary was a suspect. It was associated with pre-democratic regimes or is considered as hostile to reform. Often top executive officials spoke about the importance of *hizbawi dagna*, 'popular judge' maybe implying one who is ideologically affiliated to the ruling party or perhaps an elected one. Only recently has the importance of an autonomous judiciary been realized. No doubt this outlook will have a bearing on the judiciary's limited role in the Ethiopian context.[32]

The framers of the Constitution, however, recognized the fact that interpretation involves legal technicalities. As a result, the HoF is assisted by the Council of Constitutional Inquiry (CCI), consisting of eleven members that among others comprise the Chief Justice and his deputy of the federal Supreme Court, who also serve respectively as chairman and vice chairman of the CCI, six other legal experts appointed by the President of the Republic with the recommendation of the lower house, as a matter of practice coming from different constituent states, and three persons designated by the HoF from among its members. The CCI has the power to investigate constitutional disputes.[33] The investigation may result in a *prima facie* case calling for interpreting the Constitution, in which case the CCI is required to 'submit its recommendations' to the HoF or remand the case and render a 'decision' if it finds there is no need for constitutional interpretation. In the latter case, the party dissatisfied with the decision of the CCI may appeal to the HoF.[34] Thus it is clear that the CCI is merely an advisory body to the HoF, lacking the

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[30] For a detailed account of the arguments behind the dismissal of judges in the Transition period both from the side of the victims and the government see Frode Elgesem, *The Derg Trials in Context: A Study of Some Aspects on the Ethiopian Judiciary*, Human Rights Report No. 1, Norwegian Institute of Human Rights, University of Oslo, (1998).

[31] Cappelletti, *The Judicial Process in Comparative Perspective*, *supra* note 7 P. 58.

[32] Only in his 2003 parliamentary report in July 2004, the Prime Minister mentioned signs of improvement in civil matters. See PM's Performance Report of 2003/4 at http://www.waltainfo.com/Amnews/1996/Ham/meles_report.htm as visited on 09/07/04.

[33] Art. 82 of the Constitution; Art. 4 of Proclamation No. 250/2001, Council of Constitutional Inquiry Proclamation, *Federal Negarit Gazeta*, 7th Year, No. 40, Addis Ababa, 6 July 2001; Art. 84 of the Constitution.

[34] Art. 84 of the Constitution; Art. 6 of Proc. 250/2001, *supra* note 33.

competence to give a binding decision. The HoF as well has been at liberty to disregard the CCI's opinions in some cases.[35]

3. The Jurisdiction and Procedures of the HoF

Although the Constitution has been less clear on the scope of powers of the HoF and the procedures to be employed in the process of adjudicating constitutional issues, the 'law consolidating the HoF and defining its powers and responsibilities' has attempted to clarify some of the ambiguities.[36] For the sake of completeness let us first remark on this new 'law.'

3.1 Defining the Respective Role of the HoF and the Courts within the 1995 Constitutional Framework

The first question that comes to mind when one thinks of a law enacted by the House of Peoples' Representatives (HoPR) that defines the 'powers and responsibilities' of the HoF itself established by the constitution to check the constitutionality of the laws of the HoPR, is whether the law itself is constitutional or not. Could the HoPR really define the powers and responsibilities of the HoF? More specifically, does the HoPR have competence to do so? Would not such a power, if it existed at all, lead to a conclusion that the HoPR may in the process limit, extend or even take away the competence of the HoF? Is not the HoF competent enough to define its responsibilities in light of the broad powers indicated in the Constitution? These are interesting questions and perhaps one day they will be dealt with by the HoF. In the early phase of the process of drafting such law, some experts, aired their concerns in a small gathering organized by the HoF and HoPR and stated that in light of the function of reviewing constitutionality of laws, the attempt to define the powers of the HoF through the HoPR is questionable. However, their opinion did not seem to have won the support of the actors.

More important, however, is the compatibility with the Constitution of the two new laws[37] dealing with the HoF and the CCI regarding the jurisdiction of the HoF and indirectly 'stripping the jurisdiction' of the regular judiciary, a judiciary already weakened because it lacks the competence to review the constitutionality of laws. In an earlier

[35] The practice so far indicates that the HoF has for the most part endorsed the decisions of the CCI but in the case of the Benishangul-Gumuz case (discussed in *infra*) it disregarded the opinion of the majority and the minority and came up with an entirely new decision. It also appears that the CCI's opinion in many cases is not well-articulated and often is very brief. This is perhaps because the members are quite busy with other functions and have little time to do research concerning the cases.

[36] Proclamation No. 251/2001, Consolidation of the House of the Federation of the Federal Democratic Republic of Ethiopia and to Define its Powers and Responsibilities, *Federal Negarit Gazeta,* 7th Year No. 41, Addis Ababa, 6 July 2001; see also Proc No. 250/2001 *supra* note 27. Except for the general clauses that empower the HoF to 'interpret the constitution and to decide constitutional disputes' the constitution was silent on the exact contours of the vague clauses.

[37] The two laws referred to are Proc. 250/2001, *supra* note 33, and Proc. 251/2001, *supra* note 36.

study and before the enactment of the laws, this author tried to define the respective roles of the Courts and the HoF.[38] In light of the generality of the clauses of the Constitution on the respective role of these bodies, the author's main finding was to restrict the role of the HoF to reviewing the constitutionality of laws enacted by the legislature: federal and state; resolution of disputes among high federal organs mainly dealing with the horizontal separation of powers and umpiring federal disputes. The three important reasons for this view were as follows.

Firstly, the Constitution does not seem to wipe out the role of the judiciary completely. If one sticks to the terms employed by the text, the relevant Article states: 'Where any federal or state *law* is contested as being unconstitutional...' and the Amharic version which according to Article 106 has the final legal authority in case there is contradiction between the English and the Amharic versions is even more explicit in stating that the term 'law' refers to laws enacted by federal and state legislative bodies.[39] Thus it was logical to argue that other subordinate regulations issued by the executive and decisions of governmental bodies other than 'laws' were left to the courts. There is another second reason for concluding the same. In parliamentary systems, of which Ethiopia is one, the supremacy of parliament, subject of course to the supremacy of the Constitution, requires that all other branches of government are bound to assume that legislation enacted by parliament is constitutional and the courts are prohibited from nullifying such legislation. The presumption of constitutionality has expressly been incorporated in the new law.[40] Thus, administrative acts and decisions of public bodies could be questioned for their constitutionality as well as for their conformity with the enactment of parliament by the regular judiciary. Thirdly, the practice of the CCI as well hinted at this position, at least until the enactment of the laws. In the case of *Addis Ababa Taxi Drivers Union* v. *Addis Ababa City Administration*[41] and in the case of *Biyadiglign Meles et al v. Amhara National Regional State*,[42] the CCI ruled that remedies concerning the conformity of regulations with the enabling legislation, as well as violations of rights by the executive do not amount to reviewing constitutionality of laws and thus parties have to seek remedy from the courts.

However, the constitutional position as well as practice have been confused with the enactment of the new laws. According to the new laws 'law' (that is subject to the investigation for its constitutionality by the HoF) shall mean proclamations issued by the

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[38] See Assefa Fiseha, "Constitutional Interpretation: The Respective Roles of the Courts and the House of Federation," in *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution*, Addis Ababa: Birhanina Selam, (2001) Pp. 6-26.

[39] Article 84(2) reads in full: 'Where any Federal or State *law* is contested as being unconstitutional and such a dispute is submitted to it by any court or interested party, the Council shall consider the matter and submit it to the House of Federation for a final decision.' In this provision, the term law might look ambiguous so as to include even subordinate regulations of the executive. However, its Amharic version makes it relatively clear by specifying the point that 'laws' or *Higoch* refers to an act of the *legislature* (*Be Federalu Mengistim Hone Be Kilil Hig Awchi Akalat Ye Miwotu Higoch*) at federal and state level.

[40] Art. 9 of Proc. No. 251/2001 sub 1 states: 'Unless otherwise proved to the contrary, the enacted law is presumed to be constitutional while the House starts to review its constitutionality.'

[41] Decision of the CCI on *Tirr* 17/1992 E.C. (25 January 2000, unpublished).

[42] Decision of the CCI on an application made on *Miazia* 30 1989 E.C. (8 May 1997, unpublished).

federal or state legislative organs, and regulations and directives issued by the federal and states government institutions and it shall also include international agreements that have been ratified by Ethiopia.'[43] Thus by defining 'the law' too broadly to include all conceivable acts of the legislature and the executive, the drafters of the new laws that are supposed to define the role of the HoF and the CCI, have themselves apparently come up with an unconstitutional law. This is so because the federal constitution is at least clear on this point: it never intended to include regulations, directives and decisions of administrative bodies in the way the laws attempted to include. By so doing the drafters have wiped out or at least attempted to wipe out the jurisdiction of the courts: federal and state. It thus remains to be seen how this anomaly is to be settled by the HoF.[44]

But at least in the case of Coalition for Unity and Democracy (*CUD) vs PM Meles Zenawi*[45], a recent case brought before the CCI requesting the latter to declare unconstitutional a directive issued by the PM following the May 2005 election crisis and its aftermath banning demonstrations in the capital for a month was entertained by the CCI and considered as constitutional although the CUD started its case and applied to the relevant Federal First Instance Court. This is a very interesting case because the Federal First Instance Court to whose bench the case first appeared wilfully relinquished its constitutional mandate in its decision held on June 3, 2005 by referring the case to the CCI. This trend seems to conform to what is provided in the new laws for which we have questioned their constitutionality. This also implies that the courts are further stripped of their jurisdiction.

On the issues of horizontal separation of powers and umpiring the federal system, the main argument justifying the power of the HoF emanated from the nature of the HoF as well as from the experience that one draws from the Supreme Court of the United States

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[43] See Art. 2(2) and Art. 2(5) of proc. No. 251/2001 and 250/2001 respectively.

[44] When this fact was brought to the attention of participants in a seminar held in December 2002 at the Ghion Hotel by this author at which federal and state court judges as well as representatives of both federal Houses attended, it was like a surprise. Nobody really knew that so much power is being taken away from the courts and the Deputy Chief Justice did not hide his astonishment.

[45] *CUD vs PM Meles Zenawi*, Decision of the CCI rendered on 14 June 2005. This is a very interesting case because the Federal First Instance Court to whose bench the case first appeared wilfully relinquished its constitutional mandate in its decision held on June 3, 2005 by referring the case to the CCI. The Court in its brief remark on the application of the CUD rejecting the case for lack of mandate, adopted a very literal and positivist approach on the meaning of the 'law' and failed to analyze the link between the law and the Constitution. The case could have enlightened our understanding of constitutional practice better if the Court adopted a different interpretation. The HoF's position would then have been clearly tested in the case. The CUD is a coalition of four opposition parties that participated in the May 2005 parliamentary election and that secured 107 seats but decided to boycott its seats because of allegations of election fraud and vote rigging. While the government argued that there were objective reasons for the one-month ban on demonstrations in the capital, the claim being the opposition is ready for street violence to overthrow the government on unconstitutional means and hence the directive, the opposition on its part claimed it was undertaking peaceful demonstration as provided in the Constitution and wanted to declare the directive as unconstitutional. While there are still controversies on the constitutionality of the directive and no one is able to give conclusive verdict, it is possible to argue that the PM would have been in a much defensible position if he resorted to emergency declaration through the Council of Ministers as provided under the Constitution Article 93.

and the German Constitutional Court. The latter is empowered to adjudicate disputes among the highest federal institutions: the federal president, the two federal chambers and the federal government in respect of their constitutional powers. Through the procedure of abstract review as well it reviews the compatibility of legislation with the constitution. In doing so and despite express constitutionally based power, it has been at times criticized 'for making political choices between competing legislative programs for which it is neither competent nor equipped.'[46]

The American Supreme Court does not have as extensive power as the German Constitutional Court to adjudicate abstract review or differences of opinion among federal branches. The Supreme Court adjudicates concrete disputes arising from cases and controversies between parties. The object of judicial review in the United States is the vindication of the rights of a party to a case.[47] Besides, the Supreme Court has developed self-restraining doctrines, albeit not always consistent, to minimize its active involvement in the competence of the legislative and executive branches. The Court has avoided cases brought before it by invoking the 'political question doctrine.'[48] Broadly speaking such cases included matters concerning the 'republican form of the government,' 'the conduct of foreign affairs,' war power, impeachment, 'presidential powers discretion,' and recognition of foreign governments. For these kinds of issues, it is argued, the political branches rather than the Supreme Court are legitimized to address the resolution of disputes among the branches of the federal government. The exact contours of the political question doctrine is less precise though. It appears that the doctrine has some relevance when it concerns the exercise of powers within the confines of the (horizontal) separation of powers. It becomes relevant when the question is whether one of the institutions is alleged to have encroached upon the powers of the other branches. There and then the Court does not seem to hesitate to adjudicate the matter. But the doctrine becomes less relevant, for instance, if the issue is as to whether the executive made the correct use of its executive powers because discretion is often left to the same institution and the judiciary cannot replace the executive. While this has been the general trend, some, like Jesse Choper, went even further in stating that:

> The federal judiciary should not decide constitutional questions concerning the respective powers of Congress and the President *vis-à-vis* one another; rather the ultimate constitutional issue of whether executive action (or inaction) violates the prerogatives of Congress or whether legislative action (or

[46] Donald Kommers, "Comparative Constitutionalism: German Constitutionalism a Prolegomenon," *Emory Law Journal* 40:3 (1991) Pp. 837-874.

[47] Christopher Wolf, *The Rise of Modern Judicial Review*, New York: Basic Books Inc., (1986) p. 102.

[48] This notion is far from clear but according to the opinion of the Court, the constitution has reserved certain kinds of questions for ultimate decision by the political branches and such questions are beyond judicial examination or considered as non-justiciable. It is in a way one other item of judicial self-restraint. The Court removes some cases from consideration because the matter is deemed inappropriate for resolution by judges. But the borderline between what constitutes a constitutional or political case is never easy to draw. See for example Tim Koopmans, *Courts and Political Institutions: A Comparative View*, Cambridge: Cambridge University Press (2003) P. 52, 98-104; The most often cited cases indicating the Court's inconsistent interpretation on this matter is *Baker v. Carr*, 369 US 186 (1962) and *Bush vs Gore*, 531 U.S. 98 (2000).

> inaction) transgresses the realm of the President should be held to be non-justiciable, their final resolution to be remitted to the interplay of national political process.[49]

At any rate, issues concerning the horizontal separation of powers often fall within the grey areas of law and politics and the settlement of such disputes truly involves political matter, which the regular judiciary may lack the competence to deal with. However, the HoF would be the most suitable candidate as it is more a political than a judicial body. It is in recognition of this fact that it is stated: 'A case requiring constitutional interpretation which may not be handled by courts may be submitted to the CCI by, at least, one-third of the members of the federal or state councils or the federal or state executive bodies.'[50] No specific case has yet been reported under this procedure but it may be interpreted to cover two crucial aspects: horizontal separation of powers both at federal and state level as well as vertical division of powers between the federal and state governments. This appears to be so from the nature of the parties.

The same could be said about the task of defining the respective powers of the federal government and the states, an essential aspect of federal systems. In the United States the conventional wisdom until the 1990s has been that federalism in general and the right of states in particular provided no judicially enforceable limits on Congressional power.[51] The Court relied on the political safeguards of federalism. It was argued that a final solution on the federal government's encroachment on state power disputes should be sought from the political process. The states are well-represented in Congress. On the other hand, the Supreme Court should invalidate state laws if they encroach upon federal power.[52]

However, the Supreme Court has since 1992 changed its position and established itself as a guardian of the federal system. In *New York* v. *United States*[53] and *Printz* v. *United States*,[54] the Court made a remarkable shift from its earlier position in controlling Congress from violating the constitutional power of the states. To this one may add its decisions on commerce clause, *US* v. *Lopez*[55] and *US* v. *Morrison*.[56] In all these cases, the Court argued, it is its duty to protect the authority of the states, albeit, in many cases by a majority.

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[49] Jesse Choper, *Judicial Review and the National Political Process*, Chicago: The University of Chicago Press, (1983) p. 263.

[50] Art. 23(4) of Proc. No. 250/2001. This clause specifies the parties who have standing before the HoF as far as issues involving constitutional interpretation are concerned. Needless to say the courts cannot handle cases involving constitutional interpretation.

[51] Notable exception is *National League of Cities* v. *Usury* 426 US 833 (1976).

[52] Choper, *supra* note 49 at 175, 206; Edward Rubin and Malcolm Feeley, "Federalism-Some Notes on the National Neurosis," *UCLA Law Review* 41:4 (1994) Pp. 903-952; Erwin Chemerinsky, "The Values of Federalism," *Florida Law Review* 47:4 (1995) Pp. 499-540.

[53] *New York* v. *United States* 112, S. Ct. 2408 (1992).

[54] *Printz* v. *US* 521 US 98, 117 S. Ct. 2365, (1997).

[55] *US* v. *Lopez*, 115 S. Ct. 1624 (1995).

[56] *US* v. *Morrison* 529 US 598, 608, (2000).

In Germany, decisions of the FCC on two of its important powers, namely the settlement of disputes between major political institutions[57] and abstract review,[58] have at times been criticized for encouraging litigation by actors in the federal system, to frustrate political projects of their opponents at another level. Losers in the political process often resort to the Court to reverse a political decision. It is important to note that most of the federal powers in Germany belong to concurrent and framework powers. The federal government extensively used these powers and the FCC on its part insisted that whatever conditions stated in the Basic Law for the exercise of concurrent and framework powers is a matter for the discretion of the federal legislature. It subscribed to the political question doctrine and in the end the states lost much of their powers. In 1994 the Basic Law was amended, which has a bearing on the exercise of not only framework and concurrent powers but also on the jurisdiction of the FCC. An attempt is made to narrow down the discretion of the federal legislature in the exercise of concurrent and framework powers.[59] By doing so the Basic Law tries to extend the legislative autonomy of the states.

The failure by the FCC to exercise its power under the old provisions of the Basic Law to regulate the discretion of the federal legislature in the areas of framework and concurrent powers also prompted an amendment on the jurisdiction of the FCC. Accordingly, the Basic Law stipulates the FCC has jurisdiction 'in the event of disagreements whether a law meets the requirements of paragraph (2) of Article 72 [this paragraph sets the conditions that should be complied with for the federal government in order to enact concurrent law], on application of the *Bundesrat* or of the government or legislature of the Land.'[60] Thus in Germany, unlike the United States, the jurisdiction of the FCC is express even in areas, which the United States Supreme Court would consider to be political. The new amendment is clear enough in this respect. It is an attempt to reverse the FCC's earlier position at least in the areas of concurrent powers.

In the Ethiopian situation, it does not seem there is a need to consider the federal issues at two levels in the way the literature about the American system provides. Nor is there any ground to trust the political process to safeguard federalism. Indeed the federal system in Ethiopia is unique, as the states have no role in the law-making process at federal level. When the Americans suggest that the political processes can provide a better alternative, it is because the federal government and the states are actively involved in the federal legislative process. The Senate is expected to check the lower house and safeguard the interests of the states. No such comparable guarantee exists in Ethiopia. The only

[57] This refers to the FCC competence to decide disputes as to the rights and duties of the federation and the states. It is basically a question of defining the respective jurisdiction of the concerned organs.

[58] Refers to the determination of whether a norm of federal or state law is in conformity with the Basic Law or whether a state law conforms to federal law. It can be initiated by federal or state government, one-third of the members of the *Bundestag* without reference to any concrete case. This procedure is unique in the sense that it has no parallel, for instance, in the United States. In the United States safeguarding the constitution is only possible as long as there is a case. See Basic Law Article 93.

[59] See Artiles 72 (2) and 75 (2) of the Basic Law.

[60] Basic Law Article 93 (1) 2a. It is remarkable that the *Land* legislature has the right to bring this action before the FCC. They are the ones who lost much of their power because of excessive exercise of federal concurrent power.

guaranty for the nationalities appears to be the vigilant exercise of their powers as ultimate interpreters of the constitution. Yet, the same House, although considered by many as the House of nationalities, is a house dominated by the nationalities with the highest population count. Thus composed in a more or less similar fashion like the lower house. At any rate federalism in its broad sense, that is, defining the respective powers of the federal government and the states as well as checking the compatibility of federal and state laws with the constitution, is one area of jurisdiction for the HoF.[61] The issue of the political question doctrine becomes less relevant in this respect because from the outset the HoF is a political body. The debate on 'judicial activism' versus 'judicial self-restraint' is thus less relevant in the Ethiopian context. As the following cases illustrate, the HoF as a quasi-judicial/political body seems to be legitimate organ for cases that are of high political and constitutional significance.

The first controversial case concerns the *Silte* decision[62] a case in which a certain community that were perceived to be part of the *Guraghe* ethnic group wanted to secede from the latter and set up a local government in the Southern Nations, Nationalities and Peoples Regional State (SNNPRS-one of the nine constituent units of the federation-inhabited by more than 56 small ethnic groups). The process involved, as required by the federal Constitution Arts 39 and 47, the local population, the regional parliament (constituted of the diverse groups) and the HoF but the respective role of these actors was never clear. The matter was finally resolved in 2000 by a referendum organized by the HoF in which large majority of the *Silte's* chose to secede and form a local government within the constituent unit. Given the complexity of the case (who is the 'self' that determines the right to self-rule at local level?) and the number of institutions involved (the two ethnic groups at local level, the state parliament composed of the various ethnic groups and the HoF), the final decision of the HoF to submit the matter to a referendum, though the issue of who should participate in the referendum is far from settled, and the fact that the final verdict was gracefully accepted by all concerned indicates the wise approach adopted by the HoF.

A second and more controversial one is the Benishangul-Gumuz case that involved the tension in the region between the indigenous groups (Berta, Gumuz, Shinasha, Komo and Mao) and the highlanders (Amhara, Oromo and Tigray nationalities). Candidates from Amhara, Oromo and Tigray nationalities for the 2000 election for the regional council were prohibited on the basis that they were not able to speak any one of the five languages namely Berta, Gumuz, Shinasha, Komo and Mao. Particularly the Berta insisted that the candidates should not be allowed to run for office if none of them are versed in Berta language. It accordingly petitioned the Election Board and the latter decided to bar them from running as candidates stating that they were not able to speak the Berta language. The Amharas, Oromos and Tigrayans, most of them transferred to the region during the *Derg's* (military junta that ruled the country from 1974-1991) resettlement program (constituting some forty seven per cent of the population in the region), complained to the HoF against the decision of the Electoral Board on *Yekatit* 10, 1992 E.C. (February 2000). The applicants argued that the decision of the Board violated

[61] This is implied under Article 23(4) of Proc. 250/2001.
[62] See the opinion of the CCI written on 25 January 2000 (unpublished).

their constitutional right to be elected granted to every citizen without any discrimination and asked the House to quash it as it contravenes the supremacy clause of the federal constitution (Article 9).

The CCI gave its opinion on *Sene* 29, 1992 (6 July 2000) to the HoF admitting that the application raises constitutional interpretation questions. The expert opinion constitutes majority and a dissenting one. The issues formulated were: as to whether the law[63] which sets the conditions for candidature, one of which is knowledge of the vernacular of the state, is in violation of the constitution or not? And as to whether the decision of the Electoral Board based on such law is constitutional or not.[64]

The majority, after considering the relevant law and the Constitution[65] rather briefly opined that because the proclamation stated knowledge of the local language as a condition for candidacy, it violated the constitutional provision on the right to take part in conducting public offices as well as to be elected. It stated that the proclamation discriminates against those who are not versed in one of the local vernaculars and concluded the proclamation violated the Constitution. On the Board's decision it stated that it is based on this unconstitutional provision and because the law is referred to the HoF the viability of the decision hinges on the constitutionality or unconstitutionality of the proclamation referred to the HoF.

The minority view is more elaborate and is mainly based on the constitutional argument that the issue has to be seen in light of the letter and spirit of the whole constitutional text rather than on a single provision and it needs balancing between two or more competing constitutional values. The minority acknowledged that there is an express clause on the right to elect and to be elected as well as the fact that the Constitution does not allow discrimination on the basis of language. However, it articulated that in this case there is no discrimination on the basis of language and considered the decision of the Board, not in violation of the Constitution.

It stated that the proclamation does not discriminate on the basis of language. In much the same way as in the Oromia, Amhara or Tigray regional states, that is constituent states in which the regional official language is the language of one of the dominant nationalities,

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[63] The law in question is the Proclamation to make the Electoral Law of Ethiopia conform with the Constitution of the Federal Democratic Republic of Ethiopia Proc. No. 111/1995, *Negarit Gazeta* TGE, 54th year, No. 9 Addis Ababa, 23 February 1995.

[64] See the opinion of the CCI (unpublished).

[65] Article 38(1) of the federal constitution states 'every Ethiopian national, without any discrimination based on colour, race, nation, nationality, sex, language, religion, political or other opinion or other status has the following rights:

a. to take part in the conduct of public affairs, directly and through freely chosen representatives,

b. on the attainment of 18 years of age to vote in accordance with law,

c. to vote and to be elected at periodic election to any office at any level of governments.

While Article 38 of proclamation 111/1995 stating the criteria on candidacy states 1. Any person registered as an elector shall be eligible for candidature where he ...

b. is versed in the vernacular of the national region of his intended candidature and the Amharic version states Y*e Miwedaderbetin Ye Biherawi Kilil Kuanka Ye Mi Yawik*.

anyone who is not versed in the regional government's official language cannot run for office as a candidate. By the same analogy, anyone who does not speak any of the local vernacular languages in Benishangul-Gumuz, whatever his or her nationality may be, cannot run for office and the minority insisted that this cannot be considered a violation of the Constitution on grounds of discrimination. The minority focused on the peculiarity of the Ethiopian federal system and its emphasis on the sovereignty of nationalities and the fact that language constitutes one essential attribute of identity.

The HoF considered both opinions but rendered a different decision which was more in line with the opinion of the minority than with that of the majority.[66] It emphasized that no doubt if the candidate is to speak for the people he/she claims to represent in parliament or to introduce his/her aims and programs to the electorate, he/she is required to know the regional official language. By virtue of the proclamation, the candidate is required to know the official language of the *region* and to that extent the proclamation does not contradict the principles of the Constitution. On the other hand, the House found the Board's interpretation of the proclamation to mean a candidate should be versed in any of the indigenous languages, particularly the Berta language, one of the five languages spoken in the region that is not the official language of the regional state, unconstitutional and declared it null with prospective effect. Of interest in this regard is the fact that because of the multi-ethnic nature of the regional state and because Amharic is widely spoken by a large majority of the people in the region, the regional Council has adopted Amharic as the official language.

Comment

It is easier to start with the expert opinion of the CCI majority. They emphasized the constitutional provision of the right of the citizen to elect and to be elected and the principle of non-discrimination stipulated in the same text. According to the majority it does not matter whether the candidate who is elected in the regional council speaks or understands the local vernacular. The candidate has the right to be elected and cannot be prohibited because he/she does not speak the language. This misses the fundamental virtue of not only the Ethiopian Constitution, which is apparently based on the free will of nationalities, but also the values of federalism, unity in diversity. The nationalities are declared sovereign under the Ethiopian constitution and constituent states are established to empower at least some of the major nationalities to have their own 'mother' states, the right to administer themselves, to use their own language and even to secede. In multicultural federations in as much as we need to have a politically and economically integrated society, we also have to respect and promote diversity. The crucial issue is to draw the balance between the two.

[66] See decision of the HoF of *Megabit* 5, 1995 E.C (12 March 2003) that in a nutshell upheld the law as constitutional but declared the decision of the Board as unconstitutional and hence of no effect with prospective effect. It articulated that Article 38 of the proclamation is not in violation of Article 38 of the Constitution. It also underscored that whoever wants to run as a candidate is required to know the working language of the *regional state, and not one of the local vernaculars* (unpublished).

The minority opinion, even though it emphasized the importance of investigating the whole text and the fact that the nationalities are considered as the building bricks of the federation, was not specific enough as in the decision of the HoF to emphasize the point that what is required under the proclamation is the candidate's knowledge of the working language of the regional state, and not of any of the local vernaculars. But in doing so the minority have touched upon one of the thorny issues in the federal system to which neither the majority nor the HoF was able to provide an answer. Could one really argue with a lot of emphasis that a candidate cannot run for office as long as she/he cannot understand even one of the local languages? Would it be possible to give an affirmative answer to this question under the constitution or should these multi-ethnic regions be subject to a different treatment: they do not have their own regional governments and because many ethnic groups are living there they had to adopt Amaharic for communication and because of this highlanders are not required to know any of the local vernaculars. This raises the central issue of the dilemma in the federal system[67] on the one hand declaring the equality of states and nationalities whereas on the other hand only some nationalities have their own constituent states. Those who do not have their own constituent states cannot impose the language requirement on the candidate as is the case in other regional states, for example Amhara, Somali, Oromia and Tigray. This is a question that opens Pandora's box.

There are two options here. One may be tempted to state that if in the states of Amhara, Oromia, Afar, Tigray and Somali knowing a local language is a requirement to run for public office, there is no reason to deny multi-ethnic regions the same right. Because they do not have their own constituent state, they should not be subjected to different treatment. Otherwise a clear constitutional asymmetry is going to evolve between those nationalities that have their own 'mother states' and those that do not. Or should we simply reiterate that after all the Constitution has made that clear by recognizing only nine constituent states with its own implications?[68]

A related argument can be deduced from the federal Constitution. As several sections of the Constitution indicate, at least formally speaking, the Ethiopian Constitution is closer to a confederation than a federation.[69] It emphasizes the sovereignty of nationalities, it grants nationalities the right to self-determination, secession included; there is no federal supremacy clause unlike many other federal constitutions. It appears that the nationalities are considered as building bricks as if they preceded the federation. All this taken together seems to indicate that at the time of the federal bargain the forces of diversity

[67] This dilemma is clear under Article 46, which recognizes only nine members of the federation, while in fact there are more than eighty ethnic groups and secondly there is the dilemma we are noting in this section: ethnic versus multicultural federation.

[68] His Excellency Dr. Gebreab, former Minister of State at the Ministry of Federal Affairs, speaks of 'minority states,' in reference to these multi-ethnic states, particularly Harari, Gambela and Benishangul-Gumuz states, in which the numerical minority is permitted to dominate the local political process, consequence of the inherent feature of the federal system. Speech made at the First National Conference on Federalism, Conflict and Peace Building, Addis Ababa, May 5-7, 2003.

[69] See the Preamble, Articles 8, 39 that among others proclaim sovereign nationalities with right to self-determination including secession, coming together to establish a federation, granting the federal government only limited powers and maintaining the residue for themselves; yet this has been counterbalanced by a centralized federal practice.

prevailed over the forces of unity whereas in many working federations one finds a balance in which forces of unity slightly prevail over the forces of diversity. If this argument is pushed further then it may imply that the Constitution has taken a position as far as the tension between collective versus individual rights is concerned, in favor of the former. If so, the decision of the Electoral Board, however absurd it may be in creating 'small islands' everywhere, forcing every citizen to find out where his 'mother state' is, could be justified.

This is, however, contrary to the political and economic integration envisaged by the federal Constitution. In the Preamble it is stated 'We, the nations, nationalities and peoples of Ethiopia: strongly committed, to *building a political community* founded on the rule of law.... Convinced that to live *as one economic community* is necessary in order to create sustainable and mutually supportive conditions...have, therefore, adopted this Constitution through representatives we have duly elected for this purpose as an instrument that binds us in mutual commitment to fulfil the objectives and the principles set forth above.' Thus, it is a clear political and economic integration that the federation envisages. It is good to note the emphasis given to the free movement of labour and capital across the country as a means to enhance this project in a recent federal document.[70] Seen from this angle, the position of the minority is an extreme.

Another argument against the minority could be deduced from the Constitution. The Constitution has for one reason or another made a choice (Article 46). By outlining only nine member states it seems to have defined what constitutes majority and minority nationalities. One can then conclude that the language test under Article 38 of the proclamation is only applicable to those states defined under Articles 46 and 47 and not to other states. Lastly, the position of the minority in the CCI's decision not only enhances majority-minority tension but goes even further and creates minority tyranny over majority in some of the constituent states. The CCI minority by adopting such a position closes its eyes to the rights of economic migrants. Yet, the decision of the HoF skilfully escapes this thorny issue by focusing on the technical interpretation of the provisions of the proclamation without substantively addressing the concerns of the indigenous ethnic groups.

Despite the above mentioned limitations, the decision on this case is perhaps one of the most celebrated decisions of the HoF that attempted to strike a balance between the concerns of the different groups.

The third case concerns the border dispute between Oromia and the Somali regional state.[71] A controversy that ensued following the restructuring of the regional states in line

[70] See *Be Ethiopia Ye Democrasiyawi Sirat Ginbata Gudayoch*, Ginbot 1994 E.C. (Addis Ababa, Ministry of Information) Pp. 32-35; 169, 180, 207, 214.

[71] The two regional states share more than 1000 km border area. In the border areas inhabited by nomadic people, the tension between communities over grazing land and water predates the present federal set up. But with the introduction of the state restructuring after 1991, mobility was somehow restricted which intensified resource competition. For more on the conflict regarding Babile see Ahmed Shide, "Conflicts Along Oromia-Somali State Boundaries: The Case of Babile District," in *First National Conference on Federalism, Conflict and Peace Building* (Addis Ababa: United Printers, 2003) Pp. 96-

with the 1995 Constitution with a view to ensuring self rule to the nationalities. There arose a boundary dispute between the two regions covering long disputed boundary and that was finally resolved by a referendum organized by the HoF. Because of its sensitivity and magnitude, the HoF entered into extensive dialogue with the communities involved, the two regional governments and finally reached at an amicable settlement.

Indeed given the comparative experience -the Supreme Court of the US imposing self restraint on it self based on the 'political question' doctrine and the German FCC hesitating to enforce matters that it felt belongs to the political branches, the HoF's bold assertion in the three cases indicate the point that the HoF is an appropriate body for issues in the grey area between law and politics. Yet the HoF's jurisdiction needs to be confined to cases that have a high political and constitutional significance. These are matters with significant political flavour for which the judiciary may be ill suited to handle with care.

Two other areas of jurisdiction for the HoF include the concrete review and individual complaints. There is an interesting similarity in this respect between the FCC and the HoF.[72] In case of concrete review, the regular judiciary, if it comes across a case the disposition of which requires the interpretation of the constitution or the checking of the compatibility of the law at issue with the constitution, must refer the constitutionality issue to the FCC or the HoF, because reviewing the constitutionality of laws is the jurisdiction of the Constitutional Court or the HoF. The court adjudicating the merits of the case does not have the jurisdiction to investigate the constitutionality issue. The reference to the FCC or the HoF could be made by the court on its own initiative or on the application of parties. There is thus a split of function between the regular court that decides on the merits of the case and the FCC or the HoF that decides the conformity of the legislation with the constitution without going into the merits of the case. This is distinct from the American courts in which in principle any court decides the constitutionality of the law in the process of deciding the merit of the case. The monopoly power of the FCC or the HoF in many parliamentary federations is justified by the respect for the legislature. Not every court should be allowed to disregard the will of parliament.[73]

An interesting issue in this respect concerns the question when the court is bound to refer the matter to the HoF or the FCC. Is it enough for the court to refer the constitutionality issue so long as an objection to this effect is raised by one of the parties or should the court wait until there is some doubt on the law's constitutionality or should the court convince itself beyond doubt that the law is unconstitutional? This is crucial because if the court has to establish for itself that there is a *prima facie* case of unconstitutionality, before referring the matter, then the court is in a way reviewing, albeit not conclusively, the constitutionality of the law. It is only that it cannot repeal or declare the law

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112. As of September 2004, the long overdue issue of settling the border between Oromia and Somalia regional states seem to be finally subject to a referendum organized by the HoF on 463 *Kebeles* claimed by both regions. See *Reporter* (Amharic) *Meskerem* 30, 1997.

[72] See Article 84 of Ethiopian Constitution; Art. 21 of Proc. 250/2001; Article 100 of the Basic Law.

[73] William Karl Geck, "Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices," *Cornel Law Review* 51 (1965-66) p. 279.

unconstitutional. Apart from this, if mere objection by a party leads to a reference of the case to the FCC or the HoF then the jurisdiction of the court could practically be hampered for trivial reasons. It is in recognition of this fact that the law stipulates: 'The Court handling the case shall submit it to the CCI *only if it believes* that there is a need for constitutional interpretation in deciding the case.'[74]

The last procedure concerns what the Basic Law calls 'constitutional complaints.'[75] The same is stipulated under the new law in Ethiopia. 'Any person who alleges that his fundamental rights and freedoms have been violated by the final decision of any government institution or official may present his case to the CCI for constitutional interpretation.'[76] This is significant in the sense that the constitution was silent on constitutional complaints. In Germany this procedure has both subjective and objective purposes. It was introduced to serve as a form of legal protection to the individual once certain procedures for its exercise are complied with. It is an extraordinary remedy available to the individual for protecting the individual's basic rights and in that sense it is there to render a legal remedy to an individual against any law, directive or final decision of any branch of the government, including the judiciary. On the other hand, it also has an objective function. The decision might clarify a general constitutional issue or might preserve the legal system in general. In the latter case even if the complaint is withdrawn the FCC may continue to render its decisions because it is of general interest to the legal system.[77]

The relevance of the complaint procedure is not yet familiar practice in Ethiopia. Nor is the distinction between objective and subjective purposes of the complaint well understood. In one case[78] (before the issuance of the new law), the CCI rendered a decision that gave the impression that this procedure has only a subjective purpose. The real parties in dispute were husband and wife involved in a divorce case. A *Sharia* Court already decided the case but the wife who was not happy with the outcome of the case took the matter to the Federal First Instance Court, to reverse the decision of the *Sharia* Court. The husband, on the other hand, applied to the Islamic Affairs Supreme Council requesting this body to intervene on behalf of the Muslim community in general in finding out whether the regular judiciary has the competence to review decisions of religious courts. The alleged unconstitutionality is related to the fact that the *Sharia* Court has already rendered a binding decision to the parties. The Supreme Council applied to the CCI on the matter. The issue before the CCI was a resolution of the question whether or not the ordinary courts (at whatever level) have a constitutional mandate to review the decisions of the *Sharia* Courts pursuant to Articles 34(5)[79] and 78(5) of the Ethiopian

[74] Art. 21(2) of Proc 250/2001. The Basic Law Article 100 stipulates the same principle. See also Martin Borowski, "The Beginnings of Germany's Federal Constitutional Court," *Ratio Juris* 16:2 (June 2003) p. 156.

[75] See Article 93 (1) 4a of the Basic Law.

[76] Article 23(1) of Proc. 250/ 2001.

[77] Borowski, *supra* note 74 at 174.

[78] The case was submitted to the CCI by the Islamic Affairs Supreme Council in *Tikimit* 1992 (October 1999) and decided by the CCI on *Tirr* 17, 1992 E.C. (25 January , 2000).

[79] Article 34(5) states: 'This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute.' And Article 78(5) partly provides: 'Pursuant to sub-Article 5 of Article 34 the HoPR and State Councils can establish or give official recognition to religious and customary courts.'

Constitution. The CCI sadly dismissed the case on the ground that the parties to the dispute, not the Supreme Council, have the standing to refer the matter to the CCI. Yet, the CCI's position is subject to criticism. Although the decision of the CCI or the HoF in the end would have an implication for the parties in dispute, the case mainly sought an abstract or general remedy from the CCI. The Supreme Council was as representative of the Muslim community seeking to define the scope of legal pluralism tolerated by the Constitution. It was an attempt as such to define the role of religious and traditional institutions within the general constitutional framework.

It is important to mention that the procedure of constitutional complaint both in Germany and Ethiopia is subject to rigorous scrutiny before the FCC or the HoF admits the application. In Germany because the number of constitutional complaints increased in the course of time, a committee of three judges usually undertakes preliminary examination before the complaint is admitted.[80] The applicant is also required to exhaust remedies in the lower courts before applying to the FCC. The new law in Ethiopia stipulates similar requirements. Not only is exhaustion of remedies in the relevant government institution required but the applicant is also required to have a final decision, that is an adjudication that has been exhausted and against which no appeal lies along the same path way. These requirements, rigorous as they might appear, try to sift out only the most relevant ones preventing the excessive flow of cases to the FCC or the HoF. It should not be forgotten that these bodies are established to adjudicate only constitutional issues, distinct from the practice with decentralized forms of review.

Conclusion

As illustrated in the cases, the HoF has played an important role in the adjudication of constitutional matters particularly those cases that are of high political significance. The fact that the HoF is composed of representatives of nationalities indirectly elected by the electorate at regional level seems to give the HoF an impression of a political organ than a judicial one. Nevertheless this is not without possible implications as to its impartiality as Ethiopia is venturing into a multiparty politics. So far, there has been one ruling party at federal and state level and the HoF's impartiality has not been brought to test. With the emerging multiparty politics, however, it remains to be seen how far the HoF will serve as an impartial adjudicator on important intergovernmental conflicts. A more challenging issue to the HoF however is the fact that it is composed of important figures coming from the regions. While this may positively contribute on the HoF's ability to serve as a forum for addressing regional concerns, it may at the same time serve as an obstacle because the HoF is in a way becoming a part time House. In reality and unless extra-ordinary circumstances dictate, records so far indicate that it meets only twice a year. Apparently, the Constitution (Article 83) imposes a duty on the HoF to decide cases *within thirty* days of receipt of opinion from the CCI, while it is *actually* holding its regular session once in six months. Under such circumstances and with the increase in the number of intergovernmental conflicts, the House certainly will be an inefficient institution. It is thus suggested that in the long run it should aim to have its own permanent members. In relation to the jurisdiction of courts, the new laws and the recent case seem to leave no

[80] Article 13 paragraph 8 (a) of the Law on FCC (1958).

room for the judiciary as far as adjudication of constitutional matters is concerned. It is, however, the contention of this author that the new laws need to be challenged for their constitutionality as it was not the intention of the framer's of the Constitution to deny jurisdiction to the judiciary from all constitutional matters.

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