A constitution without a guardian: Is the Ethiopian Constitution really supreme?

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Abstract

The Ethiopian Constitution declares in unequivocal terms that it is the supreme law of the land. However, a cursory look at the institutional architecture the Constitution establishes reveals that it does not create the necessary institutional matrix to ensure that the political organs do not abridge the constitutional restraints. Despite the fact that the Constitution incorporates an impressive collection of substantive limits and duties on those exercising political power, it leaves the discretion to comply with the limitations to those exact entities it aims to restrain. As a result, supremacy lies not with the Constitution but with the political group that controls government power. Given the absence of institutional veto points, referred to as 'horizontal accountability' mechanisms, to ensure the supremacy of the Constitution, the Ethiopian Constitution is a constitution without a guardian.

1. Introduction

The Ethiopian Constitution was adopted in 1994 and entered into force in 1995.[1] The Constitution was drafted and adopted under the dominant, if not the sole, tutelage of the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) – a coalition of 'independent' ethnic-based political parties that ousted the Derg military regime in 1991. Paul notes that 'none of the political and ethnic forces which make the opposition to [the EPRDF] had participated in the constitutional making'.[2] Young similarly observes that

> ... constitution-making under the EPRDF has little in common with the bargaining, trade-offs, and compromises that usually typify such processes; rather it reflects the weakness of the country's democratic institutions, the political objectives of the governing party, and its position of dominance within a state where serious opposition had been crushed or marginalised.[3]

The EPRDF was able to dominate the drafting process and the final content of the Constitution as it had the largest number of delegates.[4]

In stark departure from its predecessors, and as a reflection of the ethnic ideological basis of the parties constituting the EPRDF, the 1995 Constitution establishes a federal form of government, with regional states drawn primarily on ethnic lines. Both the federal and regional governments have their own

[1] Federal Democratic Republic of Ethiopia (FDRE) Constitution Proclamation no 1/1995.
[2] C Paul 'Ethnicity and the new constitutional orders of Ethiopia and Eritrea' in Y Ghai (ed) *Autonomy and ethnicity: Negotiating competing claims in multi-ethnic States* (2000) 189.
[3] J Young 'Regionalism and democracy in Ethiopia' (1998) 19 *Third World Quarterly* 191, 195. See also T Vestal 'An analysis of the new Constitution of Ethiopia and the process of adoption' (1996) 3 *Northeast African Studies* 21.
[4] M Ashenafi 'Ethiopia: Processes of democratization and development' in A An-Naim (ed) *Human rights under African constitutions: Realizing the promise for ourselves* (2003) 32.

legislative, executive and judicial organs. At the federal level, the Constitution establishes a parliamentary form of government with two chambers. The House of Peoples' Representatives (HPR), the Lower Chamber, is the principal federal law-making body composed of members directly elected by the people. The House of Federation (HoF), the Upper Chamber, is the organ in charge of adjudicating constitutional disputes, but it also has limited legislative powers.[5] The HoF is composed of representatives of nations, nationalities and peoples (NNPs) who are chosen by the state legislative councils – law-making organs of the regional states composed of members directly elected by the people − of the regional states. It is not clear from the constitutional provisions that the representatives chosen by a council should be members of that council. The legislative councils have the option to organise popular elections for the purpose of electing the members of the HoF.[6] In practice, so far the members of the HoF have been chosen by the legislative councils of the regional states. The state councils have never organised elections to directly select the members. In fact, none of the regional states has legislation that governs the direct election of members of the HoF.[7] The Executive is headed by the Prime Minister who serves as the Head of Government and Commander-in-Chief of the armed forces. As the Head of State, the President of the country enjoys ceremonial powers and is intended to serve as a uniting figure. The Constitution vests all federal judicial powers in an independent federal judiciary.

The title of this article might be, I presume, baffling to anyone who has studied constitutional law or read the Ethiopian Constitution. Why on earth will anyone question the supremacy of the Ethiopian Constitution? After all, article 9(1) of the FDRE Constitution in the most unambiguous terms declares that 'the Constitution is the Supreme law of the land'. The Constitution has conferred on itself a mythical, almost sacred, higher-law status. The consequences of the supremacy of the Constitution are as stark and unequivocal: Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect. Indeed, a declaration of constitutional

[5] The principal legislative functions of the HoF include its role in constitutional amendment and its power to determine which civil matters should be under the legislative jurisdiction of the federal or the regional states. The HoF is also empowered to perform other functions such as deciding on the rights of nations, nationalities and peoples to self-determination, resolving disputes that might arise between the states (note that there is no explicit provision empowering the HoF to resolve disputes between the federal government and the states) and also orders federal intervention when necessary. For a full list of the powers of the HoF, see FDRE Constitution, articles 62 & 105(1)(c) & 105(2)(a).

[6] FDRE Constitution, article 62 & 84. The HoF is composed of representatives of NNPs, essentially ethnic groups. Each NNP has at least one representative and an additional one more for every one million members of the NNP. For example, a NNP that has 20 million people will have 21 representatives. Currently, the HoF has 135 members representing 76 ethnic groups. Although the HoF is considered as a parliamentary organ, it barely has any legislative powers. It rather acts as a superior parliament that determines the constitutionality of laws enacted by the HPR.

[7] AfDevInfo: Organisation Record, House of Federation, available at http://www.afdevinfo.com/htmlreports/org/org_14504.html (accessed 26 July 2012).

supremacy is a feature of any system that constitutes a constitutional democracy. A constitutional state is by definition a state where the powers and policy choices of political organs are limited by constitutional requirements.

In terms of substance, I believe that the Ethiopian Constitution establishes satisfactory constraints on whichever political group or a coalition of political groups exercises political power. According to the Constitution, legitimate political power can only be a result of democratic elections. The political group that has the majority in the HPR has the license to rule according to its policy preferences. However, whatever the policies preferences, the winning political group in parliament cannot, for instance, enact laws that violate the Ethiopian Bill of Rights enshrined in Chapter 3. The federal parliament cannot enact laws on matters that are reserved to the regional states. Most markedly, the Constitution goes a long way to also prescribe certain responsibilities that the governing political group should do – positive duties. The conduct of public affairs, for instance, should be transparent (article 12(1)). The Government should provide access to family planning education, information and capacity to women in order to prevent harm to women that might result particularly from pregnancy and child birth (article 35(9)). The State should allocate resources to provide rehabilitation and assistance to the physically and mentally disabled, the aged, and to children who are left without parents or guardian (article 41(5)). Government must also provide special assistance to NNPs that are least advantaged in economic and social development (article 89(4)). Women are similarly entitled to affirmative action measures (article 35(3)).

My focus, however, is not on the substantive limits the Constitution entrenches. Perhaps a lot, though certainly not sufficient, has been said about the robust panoply of rights and other restraints on government power the Constitution enshrines. My focus rather is to explore if the Constitution has also provided for the necessary institutional matrix to ensure that the restraints or positive obligations on government, including those embodied in the human rights provisions, are actually complied with. It assesses the veto points that the Ethiopian Constitution has established to ensure that those exercising political power do not take measures in violation of the Constitution or fail to fulfill a constitutional obligation.

There are two principal complementary control or accountability mechanisms that constitutions establish to ensure that the limits on government power are not abridged at a stroke of legislation or other government action. The first is the vertical or direct accountability mechanism whereby citizens

hold their governments accountable through periodic democratic elections. Vertical accountability mechanisms establish external controls or constraints on the state organs exercising government power. Ideally, elections provide periodic yet regular opportunities for citizens to evaluate and, consequently, reward or punish those exercising political power. Competitive elections provide incentives for political actors to respect constitutional restraints. For elections to fruitfully discharge their accountability mechanisms, failure to comply with constitutional restraints should ideally be politically costly to any political group.

In addition to vertical electoral accountability mechanisms, constitutions establish 'horizontal accountability' mechanisms in the form of checks and balances within the state structure to ensure that political organs comply with constitutional limits.[8] The horizontal accountability mechanisms constitute veto points within the state structure that establish formal institutional safeguards to reject unconstitutional government measures. A constitution that establishes both vertical and horizontal accountability mechanisms can make legitimate claims for supremacy because it has put in place the formal institutional structures to preclude or invalidate any measure that fails the test of the constitutional yardsticks. Although vertical accountability mechanisms – elections – are important, they are not sufficient to ensure that constitutional limits on government power actually shape political behavior for several reasons. The main focus of this article is, therefore, to explore the existence of effective horizontal accountability mechanisms within the Ethiopian Constitution.

The underlying thesis of this article is that in the absence of effective institutional arrangements to test the validity of legislative and executive acts against the constitutional template, a constitution cannot make credible claims to supremacy. A constitution can be supreme only when it establishes multiple veto points that provide opportunities to either prevent the enactment of laws, policies, regulations and other measures that contravene the Constitution, or lead to the invalidation of such measures if and when they have been adopted. A claim for supremacy can only be legitimate and acceptable if there are

[8] A third variant of accountability mechanisms, which can also be considered as a form of vertical but non-electoral accountability mechanism, is what has been referred to as 'social accountability' whereby the media, civil society groups and social mobilization enhance the responsiveness and responsibility of office holders. Social accountability is important because it enhances the potential success of the other accountability mechanisms. For instance, intense media coverage of government failures enhances electoral accountability. For a discussion on the different variants of accountability, see Guillermo O'Donnell 'Notes on various accountabilities and their interrelations' in Enrique Peruzzotti and Catalina Smulovitz (eds) *Enforcing the rule of law: Social accountability in the new Latin American democracies* (2006) 334-343; see also Enrique Peruzzotti and Catalina Smulovittz 'Social accountability: An introduction' in Enrique Peruzzotti and Catalina Smulovitz (eds) *Enforcing the rule of law: Social accountability in the new Latin American democracies* (2006) 3-33.

institutional mechanisms to ensure that the limits imposed by the Constitution are complied with. This article is basically about horizontal accountability mechanisms, the checks and balances that the Ethiopian Constitutional establishes to ensure that unconstitutional measures are not adopted, and, if and when they have already been adopted, are subsequently invalidated.

With a view to explore the institutional architecture engineered by the Ethiopian Constitution to ensure its supremacy, section 2 makes the case for effective horizontal accountability mechanisms, in addition to vertical (electoral) accountability mechanisms. Section 3 assesses the (non)existence of horizontal accountability mechanisms within the institutional architecture crafted by the Ethiopian Constitution. It looks at the parliamentary form of government, the constitutional review system, and the claw-back clauses that accompany most of the constitutional rights guarantees. Section 4 presents the concluding remarks. It concludes that due to the absence of effective horizontal accountability mechanisms, the Ethiopian Constitution is a constitution without a guardian. As a result, the constitutional declaration of supremacy is an empty promise. Compliance with constitutional provisions rests on the absolute discretion of the political group in charge of the legislative organs.

2. The insufficiency of vertical accountability mechanisms

Elections are mechanisms of determining who can rightfully and legitimately govern a polity. They constitute the principal vertical accountability mechanisms whereby the people exercise control over the fate of their political leaders. Elections are perhaps the most common accountability mechanisms practiced around the world. They provide ordinary voters with periodic opportunities to evaluate and hold their leaders accountable and reward or punish them accordingly.[9] They, therefore, play an indispensable role in the political life of any society and in ensuring that constitutional rules are complied with. There is no country in Africa that does not conduct elections, although the powers of the elected representatives vary.[10] Because of their rewarding and punishing potential, elections can serve as crucial control mechanisms. A ruling party that fears that flouting the constitution can lead to loss of

[9] Elections have two principal functions. First, they allow citizens to select good policies or policy-bearing politicians (a 'mandate' conception of elections); secondly, elections serve to hold governments responsible based on their past actions (an 'accountability' conception of elections) – see generally A Przeworski, S Stokes and B Manin 'Elections and representation' in A Przeworski, S Stokes and B Manin (eds) *Democracy, accountability, and representation* (1999) 29 *et seq*.

[10] In the last absolute monarchy in Africa, the Kingdom of Swaziland, for instance, although the members of the lower chamber of parliament are directly elected, its powers are limited by the overriding powers of the King and the upper chamber, which consists of members nominated by the King. Moreover, political parties are not allowed to operate. The current system of political representation in Swaziland is very similar to the system that was established under the 1955 Revised Constitution of Ethiopia.

votes will almost certainly be reluctant to violate constitutional rights and other limits. Elections are therefore important institutional tools to ensure constitutional supremacy.

In Ethiopia, the only constitutional and legitimate way to seize political power is through democratic elections. The Constitution establishes a federal and parliamentary form of government. The principal legislative organ at the federal level, the House of Representatives, is composed of members directly elected by the people every five years on the basis of universal adult suffrage through direct, free and fair elections held in secret ballot.[11] For this purpose, article 38 of the Constitution guarantees the right to vote and stand for elections to every Ethiopian. The Constitution adopts a plurality electoral system (First-Past-the-Post) in single member electoral districts.[12] To ensure that voters have continuous control over their elected representatives, the Constitution allows voters to recall their representatives in case of loss of confidence.[13] In Ethiopia, as in any other country that holds elections, elections provide direct and vertical accountability mechanisms.

However, elections are not perfect.[14] Elections are often rigged or otherwise fall short of the standards of free and fairness. Even when they are flawless and impeccably undertaken in line with the rules in the governing books, they do not guarantee compliance with constitutional rights and other constraints. To begin with, elections only happen periodically. As a result, citizens have only limited opportunities and therefore limited power in influencing government decisions and in holding governments accountable. There is, therefore, need to provide for accountability mechanisms within the state structure in between election times. Most importantly, more often than not, voters do not have constitutional rules in mind while voting. There are often extra-constitutional motives, such as ethnic or religious identity or economic factors, or normative policy preferences which overwhelmingly guide their electoral

[11] FDRE Constitution, article 54(1).
[12] FDRE Constitution, article 54(2).
[13] FDRE Constitution, article 12(2). For detailed procedures on who can apply for recall and when, see Loss of Mandate of Members of the House of Peoples' Representatives Proclamation no 88/1997, and Procedure for Recall on Loss of Mandate Regulation no 2/1999.
[14] For a criticism of the accountability function of elections, see Buchanan, who talks about 'electoral fallacy', the idea that electoral constraints are sufficient to restrain government - J Buchanan 'Constitutional restrictions on the power of government' in J Buchanan and R Tollison (eds) *The theory of public choice—II* (1981) 443; J Cheibub and A Przeworski 'Democracy, elections, and accountability for economic outcomes' in A Przeworski, S Stokes and B Manin (eds) *Democracy, accountability, and representation* (1999) outlining their skepticism on the accountability functions of elections. See also J Maloy 'The fallacy of electoral accountability' (February 2012) http://wpsa.research.pdx.edu/meet/2012/maloy.pdf (accessed 27 July 2012) arguing that 'elections are suitable for purposes of selection only, not of accountability'.

calculations and preferences.[15] Constitutional requirements are not the most important reasons that determine voting behavior and patterns. A government that blatantly violates constitutional provisions may still win elections, if it manages to make the majority of voters satisfied. Voters need not and do not justify their voting in terms of constitutional standards of good government conduct. More often than not, elections lead to the coming to power of the most popular political group for whatever reason. Constitutional standards are, if at all, peripheral to the electoral calculations of most voters. In any case, individual voters are barely aware of what the constitution requires in particular circumstances. Pervasive voter ignorance and apathy about constitutional and policy issues, except some sensationalized socio-political and economic issues, reduces the effectiveness of the accountability function of elections. The deficit of information makes it difficult for citizens to sufficiently evaluate the performance and decisions of political actors. Electors are, therefore, not the best judges in constitutional matters. Furthermore, elections are won or lost based on policy issues rather than constitutional matters. As important as they are, elections are not the most reliable mechanisms to ensure compliance with constitutional ordinances. They alone cannot ensure the supremacy of a constitution.

Constitutions should, therefore, establish additional and continuous accountability mechanisms in the form of checks and balances. Checks and balances establish horizontal accountability mechanisms within the state structure to ensure that each government organ wields the power to cabin the exercise of power by other state organs in accordance with the constitutional rules of the game. Checks and balances establish horizontal accountability mechanisms within the state structure to complement, and not substitute, vertical accountability mechanisms through periodic and regular elections. In the words of Madison, one of the Founding Fathers of the American Constitution and a staunch follower of Montesquieu's separation of powers doctrine, 'ambition must be made to counteract ambition'.[16] Power provides the best way to confine and stabilize another power. In a constitutional design, each government organ should be empowered to oversee the functions of the other organs in terms of constitutional requirements. While vertical accountability enables citizens to oversee the actions of their governments, horizontal accountability enables each state organ to oversee the activities of other

[15] Identity politics is particularly pervasive in societies that are sharply divided on ethnic, linguistic or religious lines. In such fractured societies, elections are like a census. Horowitz observes that 'under conditions of free elections, groups in polarized societies will line up behind ethnically based political parties representing their respective groups' - D Horowitz *A democratic South Africa? Constitutional engineering in a divided society* (1991) 96.

[16] James Madison, The Federalist Papers, no 51 available at http://www.constitution.org/fed/federa51.htm (accessed 9 May 2012).

coordinate state organs. Horizontal accountability mechanisms create the opportunity for dialogue between functionally distinct yet related organs of government based on constitutional standards. The most important horizontal accountability mechanisms include bicameralism, where each legislative organ is armed with the power to veto the initiatives of the other legislative chamber, presidential (executive) veto, judicial review and federalism. The next section assesses whether the Ethiopian Constitution anchors its rhetorical supremacy with effective horizontal accountability mechanisms.

3. Horizontal accountability mechanisms in the FDRE Constitution

Horizontal accountability mechanisms provide the necessary checks and balances between the different branches of government. According to O'Donnell, horizontal accountability 'depends on the existence of state agencies that are legally empowered − and factually willing and able − to take actions ranging from routine oversight to criminal sanctions or impeachment in relation to possibly unlawful actions or omissions by other agents or agencies of the state'.[17] It relates to the different institutional veto points whereby each branch of the government is empowered to preclude the enactment of laws or the adoption of other measures which, among others, contradict constitutional prescriptions. The U.S. and South African Constitutions, for instance, provide for protracted mechanisms to ensure that transient political groups do not undermine constitutional limits on government power.

In the U.S., the head of the government (the President) is empowered to veto the legislative initiatives of the Congress (the Senate and the House of Representatives). The presidential veto may in turn be overridden by a two-third vote of the Congress. The Congress may also impeach the President. The courts have the power to review the constitutionality of legislative and executive measures. The legislature and executive can in turn overturn decisions of the courts through, among others, constitutional amendments. Together they also appoint the members of the judiciary which ensures that judges have some sort of democratic pedigree.[18] In addition, laws can only be enacted if both the Senate and the House of Representatives endorse a bill – the bicameral legislative structure serves to prevent the enactment of laws that, among others, contradict constitutional prescriptions. Once adopted by both houses, the President should assent to the bill before it takes effect. The US

[17] Guillermo O'Donnell 'Horizontal accountability in new democracies' (1998) 9 *Journal of Democracy* 112, 117.

[18] C Eisgruber *Constitutional self-government* (2001) 4 observing that judges 'owe their appointments to their political views and their political connections as much as (or more than) to their legal skills' which contributes to their democratic pedigree; see also C Eisgruber 'Democracy and disagreement: A comment on Jeremy Waldron's *Law and disagreement*' (2002) 6 *Legislation and Public Policy* 35, 45 claiming that democratic pedigree ensures that 'judges will not be idiosyncratic political radicals, but rather will express moral judgments more or less consistent with some current of mainstream... political thought'.

Constitution therefore establishes two different institutional veto points, bicameralism and presidential veto, before a law is promulgated and one veto point, judicial review, after the law has been officially enacted.

In South Africa, as well, the Parliament consists of two legislative houses: the National Assembly composed of elected representatives, and the National Council of Provinces composed of representatives of the Provinces. A bill must be endorsed by both Houses before it is sent for assent to the head of the Executive (the President). The President of the Republic is authorized to veto bills passed by Parliament if he or she has concerns that any provision in the bill may violate any of the provisions of the Constitution.[19] The President must, if he or she has doubts about its constitutionality, refer the bill back to the National Assembly for reconsideration. If the President and the two legislative houses fail to agree on the constitutional implications of the bill, the matter has to be referred to the Constitutional Court for final resolution.[20] The President is elected by the National Assembly from among its members. Once elected, however, he or she ceases to be a member.[21] The National Assembly may remove the President from office through a two-thirds-majority vote and only where the President has committed a serious violation of the Constitution or the law or another serious misconduct, or where the President is unable to perform the responsibilities the position requires of him.[22]

In addition to the bicameral system of legislature and the presidential veto, the Constitutional Court of South Africa has the power to review the constitutionality of any law or executive measure.[23] The Constitutional Court is even empowered to review the constitutionality of constitutional amendments.[24] Constitutional review by an independent court, therefore, provides additional veto points to prevent the adoption of or invalidate legislation and other executive measures.

Given the existence of these institutional veto points, the declaration of supremacy by the U.S. and South African Constitutions has to be taken seriously, regardless of the actual constitutional practice in these countries.

[19] Constitution of the Republic of South Africa no 108 of 1996, section 79. The Premieres of the Provinces also have similar powers to refer bills passed by provincial legislative organs to the Constitutional Court – see section 121.
[20] Constitution of South Africa, sections 79 and 121.
[21] Constitution of South Africa, section 87.
[22] Constitution of South Africa, section 89.
[23] Constitution of South Africa, section 167.
[24] Constitution of South Africa, section 167(4)(d).

The following subsections assess the presence or absence of horizontal accountability mechanisms within the Ethiopian Constitution to ensure that each branch of government ensures compliance with constitutional requirements by the other branches.

3.1. A parliamentary form of government

The Ethiopian Constitution establishes a parliamentary form of government whereby the head of government is elected by and from the members of the HPR, which is composed of representatives directly elected by the people based on equal suffrage. The HPR is the highest authority of the federal government. As a result, the head of government (the Prime Minister) is selected by and from the political party or coalition of political parties that controls the majority seats in the HPR. Upon election, the Prime Minster retains her/his seat in parliament. As a result, the legislative and executive organs of government will often, if not always, have similar views, at least on matters of great importance to the political party controlling the parliament. Parliamentary systems naturally lead to the lack of or weak checks and balances between the legislative and executive organs of government. The Head of Government (the President) does not have any powers to question the decisions of the HPR. Although the President may refuse to sign laws enacted by the HPR, the laws will take effect within fifteen days without the signature of the President.[25] Reminiscence of parliamentary systems, there is no possibility of a presidential veto in the Ethiopian constitutional system.[26]

In practice, as well, the principle of 'democratic centralism' that the EPRDF ardently follows ensures that the heads of the ruling party in the Central Committee make all the important decisions and the legislative organ serves as mere rubber-stumping institution.[27] Democratic centralism as a central tenet of the organisation structure of the EPRDF was outlined in a 1995 document entitled *Guideline for EPRDF's Structure and Operation*.[28] According to the Guideline, democratic centralism is a tool to 'secure the highest unity between the thoughts and actions of the Front [EPRDF]'. There has not been any

[25] FDRE Constitution, article 57.

[26] Surprisingly, the Constitution does not provide for procedures through which the Prime Minster or any other member of the Cabinet (the Council of Ministers) may be impeached. It does not also establish the grounds that may justify impeachment. The Prime Minster may dissolve the HPR but only with the consent of the HPR itself. Due to the parliamentary form of government the Constitution constitutes, which ensures that the highest executives are elected from and represent the political group which has the majority in the legislature, there is no real check and balance and effective control mechanisms between the legislative and executive organs. The legislature and the executive do not, therefore, have any effective tools to control the actions or inactions of teach other based on constitutional standards.

[27] M Wolde 'A critical assessment of institutions, roles and leverage in public policymaking: Ethiopia, 1974-2004' unpublished PHD Thesis, University of Stellenbosch 2005, 258 & 262.

[28] T Vestal *Ethiopia: A Post-Cold War African state* (1999) 103&104.

instance where members of the ruling party voted against a legislative proposal tabled by the head of the executive. As a result of the principle of democratic centralism, the Ethiopian legislative organ, the HPR, has never initiated any legislative proposal, nor has it substantively modified any legislative proposals from the executive. In simple terms, in a parliamentary form of government with a strong tradition of party discipline, the legislature and the executive are practically one and the same, and cannot reasonably be expected to effectively constrain each other.[29] A parliamentary form of government almost necessarily leads to a fusion of legislative and executive functions and interests, and, therefore, no or weak horizontal accountability mechanisms.

Moreover, despite the fact that the Ethiopian Constitution establishes a bicameral form of parliament, the Upper House, the HoF, does not have any role in the enactment of laws. According to the Constitution, the HoF does not have any role in the law making process. Only the HPR has the power to make laws on matters assigned to the federal government. As such, the HoF does not have the power to prevent the enactment of laws that contravene the Constitution. Thus, within the Ethiopian constitutional structure, bicameralism does not serve as an effective horizontal accountability mechanism.

In the absence of a presidential veto and effectively constituted bicameralism, the only potential institutional veto is provided by the constitutional review system. Unfortunately, the unique constitutional review system the Constitution establishes can hardly play its role as a buffer against unconstitutional laws and other government measures adopted by the political organs. As argued below, the constitutional review system in Ethiopia is designed not to constrain government power.

3.1. Lack of an independent constitutional review system

An independent constitutional review system is largely considered as a *sine qua non* for constitutional supremacy. Constitutional review is one of the basic features of checks and balances. In the absence of a procedure through which laws made by parliament and executive measures are scrutinized for their constitutional validity, a constitution cannot make credible claims to supremacy. Constitutional review provides for procedures through which aggrieved parties can challenge the decisions of the political

[29] It should be noted that in cases where no party has an absolute majority in parliament enabling it to establish the executive, there is need to create a coalition with other competing parties. In such instances, the possibility that the legislature may reject executive proposals and vice versa is real, as the coalition may not have similar views on all important issues with the parliament. If one party has an absolute majority, however, the executive and the legislature are one and the same for all practical purposes.

organs based on constitutional standards. It is an important mechanism to keep the political organs within the terrain set by a constitution. Today, most constitutions around the world establish constitutional review systems to ensure the supremacy of the Constitution. Constitutions around the world empower either regular courts or establish independent constitutional courts or councils with the task of reviewing the decisions of political organs in line with constitutional standards.[30] The constitutional recognition of human rights and the establishment of a system of independent constitutional review has become a common feature of constitutional democracies worldwide.[31] Constitutional review is particularly important in the Ethiopian context because of the parliamentary form of government the Constitution establishes. Given the institutional conflation between the legislature and executive organs, only a constitutional review system effectively removed from the two organs can ensure compliance with constitutional prescriptions.

The Ethiopian Constitution establishes a unique constitutional review system that is different from the common trend internationally. The two most dominant constitutional review systems are the concentrated or centralized or European or Kelsenian review system, where only one constitutional court or the highest court of the land is granted the power of constitutional review, and the American or diffused judicial review system where all courts in the judicial hierarchy have the power to review the constitutionality of decisions of the political organs.[32] The Ethiopian Constitution empowers the HoF, which is composed of representatives of NNPs, to adjudicate all constitutional disputes.[33] Since members of the HoF are not legal technocrats, the Constitution establishes the Council of Constitutional Inquiry (Council), composed predominantly of legal experts, to assist the HoF in determining whether there is need for constitutional interpretation and, if so, to provide recommendations to the HoF for final decision.[34]

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[30] As at 2008, 158 of the 191 constitutional systems in the world include some formal provision for constitutional review – see T Ginsburg 'The global spread of constitutional review' in K Whittington *et al* (eds) *Law and politics* (2008) 81 & 87. For a tabular presentation of constitutional review systems around the world, see A Mavcic 'Constitutional/judicial review around the world' http://www.concourts.net/comparison.php (accessed 9 February 2012). Although most constitutions in the world have established constitutional review systems, there are also constitutions that include clear provisions excluding any possibility of judicial review in respect of all or a certain category of statutes. For instance, article 120 of the 1983 Constitution of the Netherlands unequivocally prohibits any form of judicial review of primary statutes. However, such countries are guided by the idea of parliamentary sovereignty.

[31] L Keith *Political repression: Courts and the law* (2012) 2 observing that 'the global script for state legitimacy calls for a written constitution or the equivalent, with an embedded bill of rights, democratic processes and institutions and, increasingly, a judicial check on state power to protect an internationally recognized set of rights'.

[32] For a discussion of the variety of constitutional review systems in the world, see M Sachor 'Mapping comparative judicial review' (2008) 7 *Washington University Global Studies Law Review* 257.

[33] FDRE Constitution, articles 62(1) and 83(1).

[34] FDRE Constitution, articles 62(2), & 82 – 84.

Although many Ethiopian scholars have argued that the Constitution has left residual constitutional review powers to ordinary courts,[35] the most convincing understanding is that the Constitution did not wish to divide constitutional review power between the HoF and the courts. The scholars who argue that Ethiopian courts have the power to decide the constitutionality of all acts and omissions except that of legislative statutes seem to rely almost exclusively on article 84(2) of the Constitution, which appears to refer only to constitutional challenges against primary statutes. They disregard article 83(1) which simply says that 'all constitutional disputes' shall be decided by the HoF. Similarly, article 62(1) clearly provides that the HoF has 'the power to interpret the Constitution'.[36] 'All constitutional disputes' necessarily includes any constitutional issue whether legislative, executive or judicial as long as the determination of the meaning of a constitutional provision is necessary. Consideration of the constitutionality of primary legislation is but part of the broader spectrum of constitutional disputes.[37]

Most importantly, it is articles 62 and 83 that determine the substantive issue relating to the organ that has the power to interpret the Constitution. Article 84 is intended to merely outline the power relationships between the Council and the HoF and the procedure that should be followed to address constitutional disputes that arise in judicial proceedings. Hence, whenever there is a case that can only be resolved after determining a constitutional issue, courts have no choice but to refer the

[35] See Assefa Fiseha 'Constitutional interpretation: The respective role of the courts and the House of Federation' in Assefa Fiseha & Tstegaye Regassa (eds) Courts and the Constitution: *Proceedings of the symposium on the role of courts in the enforcement of the Constitution, June 2000* (2001) 6-26; Assefa Fiseha 'Federalism and the adjudication of constitutional issues: The Ethiopian experience' 2005 *Netherlands International Law Review* 1; D Donovan 'Levelling the playing field: The judicial duty to protect and enforce the constitutional rights of accused persons unrepresented by counsel' (2002) 1 *Ethiopian Law Review* 31; Ibrahim Idris 'Constitutional adjudication under the 1994 FDRE (Federal Democratic Republic of Ethiopia) Constitution' (2002) 1 *Ethiopian Law Review* 62; Memberetsehai Tadesse *Yeethiopia higna fitih getsitawochi [The features of law and justice in Ethiopia]* (2006) 144; Tsegaye Regassa 'Courts and the human rights norms in Ethiopia' in Assefa Fiseha & Tsegaye Regassa (eds) Courts and the Constitution: *Proceedings of the symposium on the role of the courts in the enforcement of the Constitution, June 2000* (2001) 116; L Besselink 'The protection of human rights in federal systems – the case of Ethiopia' in Bayaa Yimam *et al* (eds) *Proceedings of the 14th International Conference of Ethiopian Studies* Vol. 3 (2002) 1372 - 1379.

[36] Some authors have attempted to distinguish between 'constitutional interpretation' and 'constitutional disputes' to understand the exact role of courts, and the Council and the HoF. However, it is only when there is a constitutional dispute of some sort that constitutional interpretation becomes necessary. The two phrases should therefore be understood to refer to the process that ultimately results in determination of the meaning of a constitutional provision or provisions. Getachew Assefa espouses similar views after considering the minutes of the Constituent Assembly – see Getachew Assefa 'All about words: Discovering the intention of the makers of the Ethiopian Constitution on the scope and meaning of constitutional interpretation' (2010) 24 *Journal of Ethiopian Law* 139, 166. See also A Fiseha 'Some reflections on the role of the judiciary in Ethiopia' 2011 *Recht in Afrika* 1, 5 observing that such a distinction is of no practical significance as the HoF exercises both powers.

[37] Getachew Assefa similarly observes that 'so long as there is a constitutional dispute or a question of constitutionality that needs resolution, it has to be submitted to the CCI\HoF whether the question is clear or simple or complicated' – Getachew Assefa (note 36 above) 165.

constitutional issue to the Council.[38] This was clearly the intention of the Constituent Assembly that adopted the Constitution.[39] In an exhaustive and excellent article that considered not only the intention of the drafters but also all the major publications on constitutional adjudication in Ethiopia, Getachew Assefa concluded that the 'HoF commands all the powers to interpret the Constitution or decide on all constitutional disputes' and that there was no desire to divide these powers between the courts and the HoF.[40]

Unfortunately, the HoF is a purely political organ which is designed to have more or less similar composition with the HPR. In fact, the HoF is more likely to be absolutely dominated by a single political group than the HPR, since the members of the HoF are appointed by the political groups dominating legislative councils of the states. So far, for instance, all members of the HoF have belonged to the EPRDF and its affiliates. The HPR has never been absolutely dominated by a single political group – the closest it has come to such an absolute dominance was in the 2010 elections where the EPRDF won 99.65 of the seats. Quite simply, the political group that has the majority in the HPR will almost certainly have a majority in the majority of the legislative councils of the regional states. As a result, the political group that has the majority in the HPR will almost certainly have the majority in the HoF.

Hence, it is difficult, if not impossible, to expect the HoF to effectively hold the HPR accountable based on constitutional standards. The consequence is that the constitutional review system is controlled by and part of the political group that controls the legislative and executive organs of the government. As part of the political organs, the HoF cannot be expected to effectively protect constitutional rights,

[38] See also Minassie Haile 'Comparing human rights in two Ethiopian constitutions: The Emperor's and the "Republic's" – *cucullus non facit monachum*' (2005) 13 *Cardozo Journal of International and Comparative Law* 1, 55 concluding that 'regular courts have no power to decide constitutional issues'. Courts do not have the *discretion* to refer a constitutional issue, as Takele Bulto submitted – Takele Bulto 'Judicial referral of constitutional disputes in Ethiopia: From practice to theory' (2011) 19 *African Journal of International and Comparative Law* 99, 101. If courts are convinced that resolving a constitutional issue is necessary to resolve a non-constitutional case before them, they have no choice but to refer the constitutional issue to the Council. Courts have discretion only in determining whether (1) there is a constitutional issue and (2) whether resolving such issue is necessary to resolve the dispute before them. Even in cases where a court decides that there is no constitutional issue, the parties are allowed to refer the case to the Council within 90 days after the court has rendered the decision. Takele is right though in observing that 'there must be a strong justification for direct invocation of constitutional provisions' (at 112). Not every mundane and peripheral constitutional issue has to be resolved by the Council and the HoF. The power to decide whether or not there is a constitutional issue serves a filtering purpose to ensure that only unavoidable constitutional issues reach the Council.

[39] For a thorough analysis of all the major publications relating to constitutional adjudication in Ethiopia and a discussion of the debates surrounding constitutional adjudication see Getachew Assefa (note 36 above). For analysis of the intention of the drafters see 157-162.

[40] Getachew Assefa (note 36 above) 169.

especially in relation to individual civil and political rights which ignite a conflict between those in government and those outside government. The constitutional review system in Ethiopia cannot be expected to rule against the policy choices and interests of the ruling political group. As a result, constitutional review does not also provide an effective horizontal accountability mechanism. The constitutional review system in Ethiopia is a novel failure – but still a failure.

Theoretically, it is possible to imagine a scenario where different political groupings dominate the HPR and the HoF, such as if the opposition wins the Southern Nations, Nationalities and Peoples Region, and the Oromia or the Amhara legislative councils. Also if the regional councils organize elections to select the representatives to the HoF, it is theoretically possible that people might vote representatives of different parties to the HoF and the HPR. In such cases, the two Houses might be dominated by two different political groupings. This is practically very unlikely to happen, as people will likely vote for the same parties both to the state councils and the HPR. Nevertheless, even if it happens, the HoF will merely provide forum to represent the interests of the party that dominates it, rather than the principles entrenched in the Constitution. In fact, the dominance of the two Houses by different political parties will lead to paralyzing and unnecessary political deadlock. By whomsoever it is dominated, therefore, the HoF cannot serve as an independent 'forum of principle' to protect the Constitution.[41]On the one hand, if the HoF is dominated by the same party as the HPR, constitutional review will be a mere rubberstamping process. On the other hand, if the HoF is dominated by a political group different from the one that dominates the HPR, constitutional review will serve as a tool to frustrate and blindly reject the decisions of the party controlling the HPR. Both Houses are designed to give effect to the policy preferences and interests of the political party that dominates them.

Although the Council of Constitutional Inquiry can be expected to fill the independence gap in the constitutional review system, it merely has recommendatory powers. Moreover, there is nothing in the Constitution which requires that the members of the Council should be independent. In fact, so far the members of the Council have also been active members of the legislative organs or the ruling political party. Currently, for instance, the legal advisor to the Prime Minster and another active member of the HPR are also members of the Council. Three members of the Council are also members of the House of

[41] The phrase 'forum of principle' is borrowed from Dworkin - R Dworkin 'The forum of principle' (1981) 56 *New York University Law Review* 469.

Federation. As such, the views of the Council should reflect the views of the group that dominates the legislative and executive organs. It is naïve to expect the members of the Council to rule against the wishes of their superiors in the party or state hierarchy. The Council does not, therefore, alleviate the deficiency in independence that haunts the Ethiopian constitutional review system. The constitutional review system in Ethiopia is designed to be part of and work in harmony with whichever political group is governing.

3.2. Claw-back clauses

Constitutional rights provide the principal limits on government power. Constitutional rights impose limitations on the exercise of legislative, executive, judicial and other forms of state power (vertical applicability of rights).[42] Chapter three of the Ethiopian Constitution recognizes a reasonably robust panoply of rights ranging from civil and political to socio-economic to group rights. Unfortunately, the human rights provisions are formulated in such a way as to enable the political organs to limits the rights simply by enacting a law. The Ethiopian Constitution does not contain a general limitation clause that regulates the limitation of human rights enshrined therein. The rights to life, liberty, freedom of association, and bail may be limited based on any 'law'. There is no requirement in the Constitution which subjects laws that limit rights to internationally accepted standards for limiting rights.[43]

Unfortunately, the Council of Constitutional Inquiry has failed to assess the justifiability of laws that have imposed limitations on different rights. In a case that dealt with limitations on the right to bail, for instance, the Council did not assess whether the complete preclusion of the right to bail in relation to all corruption offences was necessary and reasonable under the Constitution.[44] The Council simply held that Parliament had the power to limit the right to bail through enacting laws, regardless of the substantive quality, reasonableness or justifiability of the laws. Similarly, in a case that dealt with the constitutionality of judicial ouster clauses,[45] the Council ruled that the power of courts to review decisions of administrative agencies depends on whether there is a law that allows or precludes judicial review. It essentially ruled that whether or not a matter is justiciable before courts in terms of article 37

[42] In some states, constitutional rights are made applicable even to private individuals and actors. This is referred to as the horizontal application of human rights. See for instance article 8 of the South African Constitution.

[43] For a detailed discussion of the problems associated with the limitation of constitutional rights in Ethiopia, see Adem Abebe 'Limiting limitations of human rights under the Ethiopian Constitution' (2011) 4 *Ethiopian Constitutional Law Series*, Addis Ababa University, Ethiopia.

[44] The case concerning the constitutionality of the law that excluded bail in corruption offences, Council of Constitutional Inquiry (2004) (on file with author).

[45] Constitutional case on the validity of ouster clauses, Council of Constitutional Inquiry (10 February 2009) (on file with author).

of the Constitution is determined by parliament. The Council has, therefore, applied the claw-back clauses literally to enable the political organs to limit constitutional rights by simply enacting a law or regulation to that effect. As a result, the constitutional limits on the law-making powers of the parliament have been undermined. The implication of the literal application of the claw-back clauses is that the parliament, not the Constitution, is supreme.

3.3. Federalism

Perhaps the only horizontal accountability mechanism within the Ethiopian Constitution is provided by the federal structure of the state. Federalism ensures the division of powers vertically between the federal and regional governments. The Ethiopian Constitution establishes a federal state on ethnic lines. The competition for power between the federal and the regional states should ideally provide an important tool to check and balance the activities of the governments at both levels.[46] However, federalism can be an effective accountability mechanism only in relation to the vertical division of powers between the federal and regional governments. It cannot, for instance, be expected to ensure effective compliance with constitutional human rights guarantees by those exercising political power. It is only when any one of the governments has an interest that it will want to control the other level of government. In relation to matters that do not directly affect their interests, the different levels of government will likely avoid confronting each other. Moreover, in practice, due to the absolute domination of both levels of government, since the Constitution was adopted, by a single political party, the EPRDF, the federal structure has not been able to provide the necessary check on government power.[47] Indeed, it has been shown that, despite the fact that the federal and regional governments should generally be co-equal, in practice the relationship between the two levels of government is hierarchical, with the federal government on top.[48] In fact, in most federal systems, there is an express or explicit understanding that, in the case of conflict, federal laws prevail over state laws.

4. The National Human Rights Commission and the Ombudsman

Perhaps two other potentially relevant entities in terms of ensuring compliance with constitutional requirements are the Ethiopian National Human Rights Commission and the Ombudsman. With a view

[46] For a discussion of the reciprocal relationship between the federal and regional governments and how federalism can serve as a check and balance see, R Wagner *Parchment, guns, and constitutional order* (1993).

[47] See generally L Aalen 'Ethnic federalism in a dominant party system: The Ethiopian experience 1991-2000' (2002) (Chr. Michelsen Institute, Development Studies and Human Rights; and L Aalen 'Ethiopia's paradox: Constitutional devolution and centralized party rule' (2000), a paper presented at the 14th International Conference of Ethiopian Studies.

[48] S Voigt 'Positive constitutional economics: a survey' (1997) 90 *Public Choice* 11, 43.

to ensure the realisation of human rights enshrined in the Constitution and international agreements ratified by Ethiopia, the Ethiopian Constitution requires the HPR to establish a National Human Rights Commission (EHRC).[49] The Constitution also requires the HPR to establish the Institution of the Ombudsman to ensure that administrative entities comply with laws and the Constitution.[50]

The objectives of the Commission are to create awareness through public education, to ensure that human rights are protected, respected and fully enforced, and that appropriate measures are taken where rights are found to have been violated.[51] The Commission has jurisdiction to entertain human rights issues that occur in any region and to ensure that human rights and fundamental freedoms are respected by all citizens, organs of state, political organisations and other associations as well as by their respective officials.[52] More specifically, the Commission is designed to ensure that laws, regulations, directives and other government decisions do not contravene constitutional rights.[53] The Commission is authorised to make recommendations toward the revision of existing laws, the enactment of new laws and the formulation of policies. It also has the power to give consultancy service on matters of human rights. The Commission is authorised to forward its opinion on human rights reports to be submitted to international organs and to translate into local vernaculars international human rights instruments adopted by Ethiopia and disseminate such instruments.

Clearly, the Commission has extensive powers to significantly contribute toward the realisation of rights.[54] Although its powers are merely recommendatory and the Commission mainly serves as an advisory organ, it has extensive mandates which enable it to contribute to the advancement of constitutionalism in Ethiopia. However, in practice the Commission is involved in mundane day to day individual activities rather than controversial legal, constitutional and policy issues. So far the

[49] FDRE Constitution, article 55(14).
[50] FDRE Constitution, article 55(15).
[51] National Human Rights Commission Establishment Proclamation no 210/2000, article 5.
[52] Proclamation no 210/2000, article 6 outlines the powers and duties of the Commission.
[53] Proclamation no 210/2000, article 6(2). Note that this provision only refers to the rights of citizens. It is not clear whether the Commission has jurisdiction to entertain allegations of violations of the rights of non-citizens.
[54] In terms of its competence and responsibilities, the establishment proclamation of the Commission is in line with the UN Paris Principles Relating to the Status of National Institutions (The Paris Principles) (1993). When it comes to composition and guarantees of independence and pluralism, it does not seem so. The Establishment Proclamation does not create procedures whereby CSOs and other actors may be actively involved in the nomination of the Chief Commissioner or any other member of the Commission. It is only members of legislative bodies, the President of the Federal Supreme Court and religious representatives that are represented in the nomination committee that recruits potential appointees for final approval by the HPR. There is no place for participation of university experts or other professional as required by the Paris Principles. The Commission's geographical presence is also very limited. In practice, as well, the Commission has yet to firmly establish its role as an independent and credible human rights institution. So far, it has generally avoided engaging in politically sensitive cases at the highest level.

Commission's role in curbing and criticising arguably repressive government laws, policies, ideologies and practices has been insignificant.[55] The Commission has not, for instance, expressed its views on controversial laws such as the CSO and the Anti-Terrorism Proclamations. The silence reflected in routinely avoiding engagement in politically controversial legal and policy issues can be seen as complacency on the part of the Commission. Some of its activities in fact pose doubts about its independence and may imply that it is being used as political camouflage to legitimise and justify unacceptable government behaviour and deflect criticisms of international and domestic human rights groups. The Commission, for instance, criticised Human Rights Watch (HRW) for accusing the Ethiopian government of using donor funds to suppress political dissent and requested HRW to reconsider the 'relentless campaign, direct or indirect, to obstruct the flow of development aid to Ethiopia by development partners'.[56]

In line with the Constitution, the HPR established the Ombudsman in 2000 with a view to 'rectify or prevent the unjust decisions and orders of executive organs and officials' and to ensure that individuals that have suffered from maladministration are provided easy access to remedies.[57] The objective of the Ombudsman is to bring about good governance that is of high quality, efficient and transparent, reinforce the rule of law, and ensure that citizens' rights and benefits provided for by law are respected by organs of the executive.[58] The Ombudsman is established as an autonomous federal government organ accountable to the HPR.[59] Despite its extensive powers, the role of the Ombudsman in curving executive lawlessness has been insignificant. Just like the Commission, the Ombudsman has yet to challenge any sensitive government decision or policy. Both the Commission and the Ombudsman are invisible if the issue affects the interests of the ruling party.

The Human Rights Commission and the Ombudsman are potentially crucial for the realisation of constitutional rights as they provide forum to challenge human rights violations committed particularly

[55] Most of its work has focused on receiving and investigating complaints mainly asserting violations of labour laws in Addis Ababa. The Commission is currently expanding its geographical presence by establishing branch offices in Mekelle, Bahir Dar, Gambella, Jimma, Hawassa and Jigiga.

[56] Ethiopian Human Rights Commission, Press Release 'The Ethiopian Human Rights Commission requests HRW to reassess its communications, calls on stakeholders to critically look into it' http://ehrc.org.et/NewsEvents/tabid/59/Default.aspx (accessed 10 May 2011); 'The Chief Commissioner of the Ethiopian Human Rights Commission defended its views on Human Rights Watch reports in a recent interview with the Voice of America' http://ehrc.org.et/LinkClick.aspx?fileticket=qSKu2jdlko0%3d&tabid=36 (accessed 10 May 2011). The full letter of the Commission to Human Rights Watch is available at http://ehrc.org.et/LinkClick.aspx?fileticket=Ji%2fBbt57Hzo%3d&tabid=36 (accessed 10 May 2011).

[57] Institution of the Ombudsman Establishment Proclamation no 211/2000, preamble paras 3 & 4.

[58] Proclamation no 211/2000, article 5.

[59] Proclamation no 211/2000, article 13(1).

by the executive. Resort to these two organs can also reduce the burden on courts. By recommending the repeal or amendment of laws that potentially contradict constitutional rights in line with their legal reform mandate, the Commission and the Ombudsman can complement the unsatisfactory constitutional adjudication process in challenging the constitutionality of laws. The Commission and the Ombudsman should also encourage the government to adopt laws to give effect to constitutionally enshrined rights thereby facilitating their judicial enforcement. They have, however, yet to decisively prove their independence and actively engage politically sensitive human rights issue.

5. Conclusion

Constitutions are designed to establish the rules of a fair political game and entrench constitutional ordinances in the form of fundamental restrictions and obligations on those exercising government powers.[60] It is commonsense that men and women holding political power might desire to manipulate or abridge the rules to win advantages or constrain competitors. As the adage goes, 'power corrupts, and absolute power corrupts absolutely'. With a view to curve the abusive temptations of power, constitutions generally divide government power and establish permanent institutional overlaps that serve as safeguards against measures that might undermine constitutional restraints. In addition to vertical control mechanism provided by elections, the most common way through which constitutions do this is by establishing checks and balances, veto points to slow down, or prevent if necessary, the adoption of or invalidate measures that contradict constitutional restraints. The legislature should be empowered to control the executive and vice-versa. The judiciary should be empowered to control all the political organs based on constitutional templates. A constitution that does not at least have one veto point cannot make credible claims to supremacy. This is of course in addition to the potential influence of democratic elections. Despite all the challenges and skepticism on the accountability functions of elections, elections constitute a major institutional mechanism to constrain government power. It should be noted that vertical and horizontal accountability mechanism are complementary and even interdependent. The strength of one enhances the effectiveness of the other. In particular, the effectiveness of horizontal accountability mechanism depends to a large extent on vertical and social accountability mechanism and the existence of capable and well-organized opposition political parties.[61]

[60] Issachnaroff identifies two major justifications for the idea of constitutionalism and constitutional review: to protect individual and minority rights including against majoritarian will, and also to ensure that 'majorities can change, that the rules of the [democratic] game remain fair, and that those elected remain accountable to the electorate' − S Issachnaroff 'Constitutionalizing democracy in fractured societies' (2003/2004) 82 *Texas Law Review* 1861, 1862 − 1863.

[61] O'Donnell (note 17 above) 123.

In the Ethiopian context, however, the Constitution establishes a parliamentary form of government with a result that the legislature and executive cannot be reasonably expected to control each other.[62] In a parliamentary form of government, an independent constitutional review system is necessary to maintain and reinforce the constitutional status-quo. Unfortunately, the Ethiopian constitutional review system itself is designed to be part of and work in harmony with the principal political organs. The Constitution does not establish any forum beyond the control of the wining political group where individuals and groups outside government can challenge the state. Despite the fact that the Constitution appears to have divided powers between the three arms of government, it has not established checks and balances.[63] The absence of checks and balances and a network of horizontal accountability agencies constitute a significant institutional deficit in the Ethiopian constitutional architecture.

Since there are no institutional structures that can ensure that the constitutional rules of the game actually limit the exercise of power, the declaration of supremacy by the Ethiopian Constitution is an empty promise.[64] The Ethiopian Constitution leaves the discretion to comply with the limits to whichever political group wins the elections. As a result, the political group that is in power, not the Constitution, is supreme. In the absence of institutional veto points or players, politicians could easily violate or manipulate constitutional limits. In the absence of any institutional blockade against the adoption of measures that contravene the Constitution, compliance with constitutional limits on government power entirely depends on the generous will of the governing political group. Given the absence of institutional veto points to ensure the supremacy of the Constitution, the Ethiopian Constitution is a constitution without a guardian.

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[62] It should be noted that this article is not recommending the rejection of the parliamentary form of government. The issue of which form of government Ethiopia ought to adopt should be addressed in a separate article. This article merely observes that parliamentary forms of government entail the fusion of the legislature and executive and, therefore, breed the lack of checks and balances between the two government departments. For a succinct discussion of the differences between presidential and parliamentary forms of government, see Gonzalo Villalta Puig 'Parliamentary versus presidential government' (2002) 74 *Australian Quarterly* 9.

[63] Separation of powers, and checks and balances have different objectives. As the Constitutional Court of South African observed, '[t]he principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation' - Certification of the Amended Text of the Constitution of the Republic of South Africa 1996 CCT 37/96 Constitutional Court 4 December 1996, para 109.

[64] Perhaps the fact that the Constitution was drafted and adopted by a single political party can explain the lack of any institutional veto points. An absolutely dominant political group in charge of adopting a constitutional does not have the necessary incentive to establish procedures and institutions to constrain the exercise of political power. Without an incentive, it is counter-intuitive to expect politicians to willfully establish institutions that will constrain their power.

Nevertheless, the article does not conclude that the Constitution is 'unworthy of the paper and ink used to write it'. The Constitution matters. Its relevance is reflected in the fact that the government almost always attempts to justify its decisions under the Constitution and actively repulses allegations of violations of the Constitution. The Constitution also provides the critical standards for opposition groups, CSOs, the media, academics, individuals and even international actors based on which to evaluate the actions and inactions of the government. These control or evaluation mechanisms are, however, soft and toothless. They are not sufficient to claim that the Constitution is as supreme as it declares itself to be. The declaration of supremacy has not been accompanied by the institutional structures that can ensure its supremacy in reality.

It must, however, be noted that the mere fact that a constitution establishes strong horizontal accountability mechanisms does not necessarily guarantee that the constitution will be supreme in everyday practice. A perfectly designed constitution may fail to constrain government power for different reasons. Checks and balances are an imperfect solution and can only do so much. Even when power is divided, one of the organs may overwhelm the others. In many cases, the different organs find it in their best interest to cooperate than control each other.[65] As Madison warned, 'parchment barriers' are not sufficient guarantees against the 'encroaching spirit of power'.[66] For instance, even if the Ethiopian Constitution had established a constitutional review system outside and independent of the political organs, the system might fail to constrain government power for reasons beyond the scope of this article. As aptly observed by Jesse Choper, 'the game of constitutional checks and balances, no matter how bold the lettering and durable the paper, works only if the players respect the rules. For clear constitutional violations, it is only the societal checks of popular conscience and responsibility that can finally preserve American federalism by demanding that the political branches return to course'.[67] Nevertheless, the establishment of formally effective horizontal accountability mechanisms institutionalizes and encourages control mechanisms thereby reinforcing claims of constitutional supremacy and constitutionalism. However imperfect, a constitution that embodies checks and balances is certainly better in enhancing the possibility of compliance with constitutional limitations on political

[65] Long observes in the U.S. context that '[d]espite the best intentions of those who framed the U.S. Constitution's checks and-balances system, there has been sufficient convergence of interests among the three branches that, occasional squabbles over details notwithstanding, each branch has been complicit with the others in expanding the power of the central government' – R Long 'Market Anarchism as Constitutionalism' in R Long & T Machan (eds) *Anarchism/Minarchism: Is a government part of a free country?* (2008) 41. See also R Barnett *The structure of liberty: Justice and the rule of law* (2000) 254.

[66] James Madison, The Federalist No 48 available at http://constitution.org/fed/federa48.htm (accessed 10 May 2012).

[67] Jesse H Choper 'The scope of judicial power vis-à-vis the states: The dispensability of judicial review' (1977) 86 *Yale Law Journal* 1553, 1606-1607.

power than those that do not. Constitutional design deficit therefore partly accounts to the dismal constitutional performance since the establishment of a multi-party democracy in Ethiopia. But constitutional design is certainly not the only, even the main, factor. The success of the constitutional project ultimately hinges on politics and political culture than on subtle and innovative constitutional designing.

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