

Chapter

Constitutional Interpretation

Interpretation

- The act or process of **discovering the meaning of a law**.
- **Search for meaning of law**, constructs from the words of law.
- **Art of ascertaining the meaning of a certain statute.**

Constitutional interpretation :

- Constitutional adjudication or
- Constitutional review
 - Used interchangeably
- Reveals a meaning, ascertaining the message of the constitution.
- **Evaluating whether a given law is enacted in conformity with constitution or not** and
- Declaring the constitutionality of the decision of government officials and others.
- Here ascertaining the message of the legislature in the constitution helps to declare a certain official act or law is being unconstitutional and is no more applicable

Purpose of Constitutional Interpretation

1. Ensuring Constitutional Supremacy.

- Constitutional principles are sources of 'an objective normative value system, a set of values that must be respected.

2. To protects individual rights from being violated both by executive and legislative branches of government.

3. To implement uniform applicability of constitutional norms throughout the country

4. To protect and enforce the well established principle of separation of power

Theories of Constitutional Interpretation

1. The Diffuse System:

- **American system /decentralized system/.**
- **Accord every branch of the judiciary the right to constitutional interpretation.**
- **Any court has the power:**
 - **To interpret the Constitution and**
 - **Declare any law or decision of an executive body unconstitutional.**
- **Final appeal being reserved to the federal Supreme Court**
- Since the famous decision of chief justice ***John Marshal*** of the U.S. in **Marbury v. Madison**
 - **In 1803**

Requirements

- Presence of **real controversy and adverse parties**.
- The matter **must be justiciable** and **must not involve political question**.
- Control of constitutionality of legislative acts and executive conduct is **exercised by all regular courts**
- it is the duty of the judge to apply and interpret the law

Effect of Judicial Determination:

- **Inter partes**, and
- **Its application does not extend to non-parties**.
- **Becomes erga omnes**, binding upon all entities in the country's territory, if the case has been appealed to the Supreme Court and is given a final decision there

The Concentrated System

- Power is **vested exclusively in a separate body.**
 - Sole duty is to **act as a constitutional judge**
- **An organ could be:**
 - Constitutional Court
 - Supreme Court or
 - Separate special body such as the French Conseil Constitutionnel
- **Establish special institutions.**
- **Abstract review.**
 - **Does not involve itself in the ordinary settlement of disputes** unless the case relates to a constitutional question
 - Not to adjudicate controversies between individuals or between them and their government

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- **Initiation**

- Interested parties or
- Specified state bodies or
- Referral by the court

- Entirely separate institution from the traditional judicial branch.

- They are not part of the executive or legislative

- Its decision should be limited to the question of constitutionality of a law or decision, and excludes concrete constitutional adjudication

The Mixed System

- **Apportion constitutional adjudicating powers**
 - Between the regular judiciary and a separate constitutional-interpreting body.
 - ***Latin American countries*** such as Colombia, Venezuela, Peru and Brazil, and in a few European states, namely Portugal and in a limited form in Switzerland
- Any party to a civil or criminal proceedings or the court which is a forum thereof can raise the constitutional question
- **Courts of all levels are empowered** to rule on the constitutionality of the challenged law, decision or Act
- **Regular courts can rule:**
 - Meaning of the constitution and
 - (un)constitutionality of a law,
 - But with inter partes effects

- Party can **appeal to the constitutional court**
- Or a sitting judge can refer, ex officio, the constitutional issue to the constitutional court for the latter's interpretive guidance, pending which the proceeding before the court stays.
- **Decision of the constitutional court:**
 - Has **erga omnes** effects.
 - limited to **abstract review**
 - **Pending concrete dispute**

Pros and Cons of Vesting Constitutional Interpretation in Judiciary

Cons or Against

- **Courts must be avoided** from constitutional interpretation. b/c
 - Judicial interpretation is **undemocratic**.
 - Judges are not directly accountable to the public at large
 - It permits unelected judges, to nullify the acts of democratically elected legislatures who are accountable to the public.

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- When a supreme court or a constitutional court declares a statute unconstitutional, ***it is overturning what appears to be the popular will.***
- **When judges reject the products of majoritarian democracy:**
 - They engage in counter-majoritarian law making.

Counter-majoritarian Problem:

- Finds its roots in:
 - Popular sovereignty and
 - Majoritarian governance
- Consider as an anti-democratic force
- Scholars question the legitimacy of judicial review.
- These group has **Reductionist" view of democracy :**
 - **Only to majority rule**

Pro judicial review

- **For this group:**
 - Democracy is more than majority rule.
 - Judicial review **does not undermine democracy.**
 - it enhances democracy.
- **They See Democracy As:**
 - Regime characterized by certain ends and values towards whose realization a certain political group aim and works.
 - Fundamental values to the “democratic enterprise” which cannot be amended or destroyed by the majority government
- It is **more than a mere populism.**

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- Political majority has no “**exclusive claim**” on the meaning of democracy and the Constitution
- **Based on this understanding of democracy:**
 - They contend that an effective democratic society implies the existence of **institutional limitations on the power of the majority government**.
 - The desire to ensure that majoritarian branch adheres to limitations imposed by constitution calls for some form of institutional constraint.
 - This, can best be achieved by the judiciary - an institution that is free from majoritarian pressure.
 - According to them, the judiciary is best suited to interpret the constitution and to protect its principles.

Constitutional Interpretation Under FDRE Constitution

- **Every law must be compatible with the FDRE Constitution:** most of the time on important points like:
 - Ensuring rule of law.
 - Separation of powers.
 - Check and balances among the three branch of governments.
- **Conflicts or disputes are inevitable**
- **Constitution has provided mechanisms of resolving constitutional disputes and other conflicts.**

FDRE Constitution

- **Apportioned the duties of constitutional interpretation** between two bodies:
 - Judiciary and
 - CCI/HoF.
- *Boundary between the powers* of the Regular Judiciary and those of the HoF, has been a subject of **rumbling debates**.
- More of a **mixed system** rather than the concentrated or diffuse system

The Scope of Constitutional Interpretation

- **From the close reading:**

- Article 84 of the Constitution and
- Article 3 of the Proclamation No. 798/2005
 - to re-enact for the strengthening and specifying the powers and duties of the Council of Constitutional Inquiry

1. The Determination of the Constitutionality of Legislative Acts

- **Art. 84(2)** of FDRE constitution states that: “*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.
- **Art.3** of the proclamation of the Council of Constitutional Inquiry strengthens the point by stating that: “**when the unconstitutionality of any law....** is submitted in writing to the Council,

2. Any Customs, Decision of Any Organ or Official of the Government

- **Art. 5(1).** Proclamation No. 798/2013
 - *An act or decision of a government organ or a public official or any customs* which is contrary to the constitution are all legal issues that demands constitutional interpretation through the appropriately mandated organ under the law

3. Interpretation of Constitutional Provisions

- Interpretation of the Constitution is authorized to entertain the provisions of the Constitution whenever there is disagreement on the message of the constitutional provisions is created
- **Art. 4 and 5** of the Proclamation of CCI

The Power of Regular Courts in Constitutional Interpretation under FDRE Constitution

- Most contested area in constitutional law scholarships.
- Constitution has apportioned the duties of constitutional interpretation between two bodies:
 - The judiciary and
 - the CCI/HoF even though the scope of their respective power is still a contested area
- **There are Two main issues:**
 - 1. Whether or not **constitutional dispute** and **constitutional interpretation** as employed by the Constitution meant one and the same and
 - 2. what is **the scope of the power** of the HoF vis-à-vis the judiciary in constitutional interpretation.

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1. Whether or not **constitutional dispute** and **constitutional interpretation** as employed by the Constitution meant one and the same.

- **Employed Differently:**

- **Constitutional interpretation:**

- Refers the **review of constitutionality of laws made by state and federal legislators**

- **Constitutional Disputes:**

- Involves cases of concrete/real dispute between parties involving constitutional issue.
 - Assefa Fiseha, „Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation

Two terms meant one and the same

Others still argue:

- Constitutional interpretation is more than reviewing of the constitutionality of laws and
- Includes the **determination of the scope, meaning and content of a constitutional provision in question.**
- Constitutional interpretation requires the determination of the meaning of constitutional dispute;
- Constitutional dispute is both the task of determining the scope of specific constitutional provision and ascertainment of the constitutionality of laws made by state and federal law makers
- **Takele** argued that the two terms should not be seen differently instead constitutional dispute should be construed to mean constitutional interpretation; and in this way, constitutional dispute refers to interpretational dilemma or disagreements, not the disposition of interpretive function by the HoF involving factual disputes

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- Constitutional dispute cannot be meant the determination of factual or concrete cases between parties because the HoF is not vested to interpret or resolve factual disputes rather disputes in their abstract form.
- A concurring argument is reflected by Getachew that constitutional dispute is said to be arisen when there is a “disagreement between two or more constructions of constitutional principle or rule each of which is forcefully persuasive
- The phrase ‘**constitutional dispute**’ that **appears only once in article 83(1) of the Constitution** must be taken to mean ‘constitutional interpretation’

- More convincing is that, as Getachew revealed, what one can find from digging in to the Minute of the Constitutional Assembly is that there is no distinction made between the terms by the Assembly while dealing with the pertinent provisions of constitutional interpretation and it does not seem that the makers of the constitution has intended to make distinction between the terms

2. The other issue is that *whether courts are completely deprived of the power* of constitutional interpretation Or not.

- **Three views** as to the power of the **HoF and of courts.**

1. Courts are wiped out from the power to :

- Review the constitutionality of laws made by state and federal legislature and
- Determination of the scope, meaning and content of provisions of the Constitution.
(Yonatan Tesfaye)
 - There are some provisions of the Constitution which are explicit and clear which do not require interpretation (art. 62,83)
 - It is in such cases that **courts are required to apply the provisions of the Constitution**

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- His argument based on “**Received Law Theory**”.
- **Based on this theory:**
 - Law is held as fundamental, absolute and unchallengeable.
 - It contained, the answer to every constitutional question which might be arised in relation to any state or federal statutes
- This is **open to challenge** at least for two reasons.
- First, based on the **Indeterminacy Theory:**
 - **Constitutional texts are general, vague, and abstract** that may require interpretation and construction of a given provision based on some values that are not explicitly provide in the text of the Constitution
 - So, **to apply the Constitution without interpreting it is more of “a myth than a reality”**

Second: from nature of judicial power

- Direct application of constitutional provisions by courts may be challenged based on the nature of judicial power.
- **Judicial power in strict sense is:**
 - Determining **what the law says, not application of the law** without looking at what the law is.
- *If judges are considered as **persons through which the law is to be applied**, their function is **an administrative proper, not judicial.***

The second view

- **Getachew's finding**: by relying mainly on the intention of the makers of the Constitution as reflected in the *Minute of the Constitutional Assembly*:
 1. It is ***up to the power of courts to determine the meaning, scope and content of a constitutional provision in resolving factual disputes*** before them so long as they are not faced with 'constitutional dispute'.
 2. ***Courts cannot pass a decision up on issues of constitutionality or settling constitutional disputes*** irrespective of the type of cases and regardless of the fact that the legislations are apparently unconstitutional
 - Different from Takele and Assefa, all constitutional disputes-whether involving federal or state ***proclamation, regulation, directive, or decision of federal or state organ or official-*** are precluded from the jurisdiction of courts rather within the interpretation power of the HoF/CCI

The Third Category Of Understanding

- Advocated by Assefa and Takele:
- Art.84(2)
 - ***Courts in Ethiopia are excluded from constitutional interpretation*** only when the un/constitutionality of **laws by state and federal legislative bodies** is questioned; and
- **In all other cases:**
 - It is not the intention of the Constitution to preclude courts from constitutional interpretation
- **Takele emphasis on:**
 - **Art.79(1)** and **Art.78** and
 - He explained that courts are constitutionally provided with ***the power to see any case of justiciable matter other than those the constitutionality of laws enacted by federal and state legislatures*** is in question.

Justifications

1. Minutes of the Assembly:

- it is asserted by the Assembly that “**in cases individual rights are at issue the case is to be brought to the CCI after passing the remedies in the hierarchy of courts up to the Cassation level**, and in general there is no provision in the Constitution which prohibits individuals who allege their rights are affected contrary to the Constitution to pass through the various levels of courts

2. Art.13(1) of the FDRE Constitution.

- **Makes it mandatory that the courts engage in the interpretation of the scope and limitation of the rights** in the third chapter.
- Close reading of the provisions in **Arts. 9(2), 79ft) and 13(1)**
 - Vest judicial power in the courts, and
 - ***Impose all organs of state, the duty to respect, to enforce,***

3. Constitutional interpretation by courts of law is taken as constitutional right:

- Even exists in the absence of recognition by a particular statute.
- Art. 79(1) stipulates *that judicial powers are vested in courts*.
- In addition, **Art. 37(1)** adds that everyone has the right to bring justiciable matter and to obtain a decision or judgment by a court of law
- As far as human rights is justiciable matter, decision on any of these rights including the *decision of interpretation rests on the regular courts* in Ethiopia.

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4. '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.**

- 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
- Other subordinate laws issued by the executive and decisions of governmental bodies were left to the courts

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- 5. The practice of the CCI** as well hinted at this position, at least until the enactment of the laws (Procls. No. 251/2001 and 250/2001).
- **Addis Ababa Taxi Drivers Union v. Addis Ababa City Administration**
 - **Biyadigligh Meles et al v. Amhara National Regional State,**
 - The CCI seemed to rule that remedies concerning the constitutionality of Regulations, as well as violations of rights by the executive have to be sought from the regular courts.
 - Decision of the CCI on Tirr 17/1992 E.C. (25 January 2000, unpublished).
 - Decision of the CCI on an application made on Miazia 30 1989 E.C. (8 May 1997, unpublished).
 - **Constitutionality of a directive for recruitment of students for being accepted in Jimma Teachers' College made by Oromia Education Biro.**
 - Council rejected the case as being outside of its jurisdiction by mentioning the Amharic version of Art. 84(2)

Wiping Power of Regular Courts

- The problem in this regard comes together with the enactment of Proclamation No. 798/2013, 250/2001 and 251/2001.
- **In these Proclamations:**
 - The CCI and HoF is given the power to entertain the constitutionality of Federal and State laws.
 - “law” includes Regulation and Directives.
- **Courts power are snatched and given to the HoF by the above cited laws.**

Here comes the big question.

- ***Could the scope of Art 84(2) of the Constitution be broaden or narrowed by the legislator?***
- laws narrow the courts’ role which wasn’t intended by the constitution, it is logical to conclude that they are unconstitutional, and at the end they also contradicts courts’ independence as recognized by the Constitution.

- 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.
- In this case **Coalition for Unity and Democracy (CUD)** make a request to Lideta first instance court to declare the **directive issued by the Prime Minister** following May 2005 election crisis and it's after math banning demonstrations in the capital for a month. ***The court referred the case brought before it to the CCI.*** The CCI considered the matter and declare as directive is constitutional.
- This is a very interesting case because the **Federal First Instance Court to whose bench the case first appeared willfully 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.