WHOSE POWER IS IT ANYWAY: THE COURTS AND CONSTITUTIONAL INTERPRETATION IN ETHIOPIA

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Introduction

The 1995 Constitution of the Federal Democratic Republic of Ethiopia (hereinafter the 'FDRE Constitution' or 'the Constitution') provides the power to "interpret"[1] the Constitution to the House of Federation (hereinafter 'the House'), which is the second chamber of the parliament. The Constitution also establishes the Council of Constitutional Inquiry (hereinafter 'the Council'), a body composed of members of the judiciary, legal experts appointed by the House of Peoples' Representatives and three persons designated by the House from among its members, to examine constitutional issues and submit its recommendations to the House for a final decision. The formal way through which issues of constitutional interpretation pass is via the Council. Issues of constitutional interpretation are referred to the Council by a court or "the interested party"[2] to a dispute. This is, of course, very different from a number of other more well-known legal systems which vest the power of constitutional review either in ordinary courts or in constitutional courts set up exclusively for constitutional matters.

As indicated above, the House has the final and ultimate power to interpret the Constitution. However, the role of the courts in the interpretation of the Constitution is still far from settled. The function, relation and co-existence of the courts and other organs of state need to be spelled out clearly. The extent to which and the circumstances under which the judiciary should defer to other institutions, and especially to the House, need to be ascertained. The difficulty lies in determining where the role of the court ends and that of the other institutions (especially the Council and House) begins.

This contribution investigates the locus of constitutional interpretation and constitutional review in Ethiopia. As the title of the article and the discussion in the preceding paragraphs suggest, it asks who interprets the constitution. It specifically explores the role of the courts. It shall do this in four related parts. Section two provides us with a brief comparative account on the development of constitutional review in the different major constitutional systems of the world. This is followed by a concise historical review of

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[1] The Ethiopian Constitution uses the terms 'constitutional interpretation' and 'constitutional disputes' Nowhere in the Constitution does one finds the terms constitutional review or judicial review (i.e. the power to invalidate legislation for constitutionality). The concept of constitutional review is, however, recognized by the constitution, as it is obvious from the reading of article 84(2) of the Constitution.

[2] For a discussion on the term 'interested party' see Abebe Mulat, "Who is the Interested Party to Initiate a Challenge to the Constitutionality of Laws in Ethiopia" The Law Student Bulletin Vol. 1 (1999), p. 9-12.

constitutional review in Ethiopia. The article then proceeds to examine constitutional review under the present constitution. In this regard, it first examines the argument that puts constitutional review under the normal business of courts. Second, it examines the argument from the duty to enforce the constitution, which *albeit* on a different basis, arrives at the same conclusion – the courts cannot avoid interpreting the constitution as they have the constitutional duty to enforce the constitution. The discussion on constitutional review is made complete after discussing the developments that have unfolded in the areas of constitutional review after the adoption of the Constitution. The article then concludes with a few remarks.

I. A Brief Comparative Note On Constitutional Review[3]

Constitutional review, the power to determine the constitutionality and, therefore, the validity of the acts of the legislature, takes various forms. This depends on various factors. Irrespective of these differences, however, most countries in the world have been practising some form of constitutional review.[4]

The subject of constitutional review, however, gained considerable attention only after 1803 when the American Supreme Court in *Marbury v. Madison* asserted its power to review the conformity of legislation with the constitution and to disregard a law held to be unconstitutional.[5] Since then it is not uncommon to find ordinary courts empowered to control the compatibility of legislation and executive acts with the terms of constitutions. This is what is often referred to as decentralized or diffuse system of constitutional review. In such a system, of which America is a good example, constitutional review is a power exercised by all courts.

This system of constitutional review, which is also alternatively referred to as the "American" system of control, failed to strike root in Europe. This is attributable to various reasons, among which are the difference in legal traditions of Europe and America,[6] the inability of European judges to exercise constitutional review and the different level of status accorded to constitutions in Europe and the United States between the two world

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[3] This section is adopted from the work previously published by the same author. Yonatan Tesfaye Fessha, "Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review" 14 African Journal of International and Comparative Law Vol. 14(1), (2006), p. 53-83. The term constitutional review in this article is used interchangeably with judicial review. Judicial review, in this article, refers to the act of reviewing the constitutionality of statutes or legislation.

[4] Today close to 100 countries have some form of constitutional review. See MI. Aboul–Enein "The Emergence of Constitutional Courts and the Protection of Individual and Human Rights: A Comparative Study" in AO. Sherif and E. Cotran (eds.) The Role of the Judiciary in the Protection of Human Rights (1997), p. 284.

[5] Marbury v Madison (Supreme Court of U.S 1803 5U S. (1(Granch) 137, 2, L.Ed.60 quoted in D. Kommers and J. Finn American Constitutional law: Essays, cases and Commentary Notes (2000), p. 25.

[6] In Europe, the law is identified with legislation, whereas in the United States there is still a substantial common law. European courts cannot engage in the interpretation of constitutions while quite a contrasting attitude is established in the United States where ordinary courts are entitled to interpret the constitution.

wars.[7] A number of European countries, in which constitutional review of legislation was virtually an unknown phenomenon till the end of World War II, have, by and large, adopted a different model of constitutional review. In most of the European countries the power of constitutional review is assigned to a single organ of state. This may be either a supreme court or a special court created for that particular purpose. This system is called a concentrated system of constitutional review.[8]

In France, where it is considered that "constitutional review through an action in the courts would conflict too much with the traditions of French public life" [9], constitutional review, is exercised by a body other than a court. It is the *Conseil Constitutionnel*, a political body, which exercises constitutional review. The *Conseil Constitutionnel* challenges the constitutionality of a law only before it is promulgated by parliament. Hence, some authors refer to the system as a preventive system of constitutional review.[10]

The institution of constitutional review in France is often wrongly described as another "European Model" This is partly because of the fact that the *Conseil Constitutionnel* deals only with constitutional questions. However, the *Conseil Constitutionnel* is a political body composed of members appointed by a person holding political office and political institutions: The President of the Republic, the National Assembly and the Senate. Its whole structure is essentially political. Moreover, in contrast to the other systems of constitutional review, the *Conseil Constitutionnel* does not deal with constitutionality of law as a result of "a challenge in the ordinary courts by way of defence" Examination of Bills before promulgation is typically the only way envisaged for dealing with questions of constitutionality.

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[7] See generally L. Favoreu, "Constitutional review in Europe" in L. Henkin and A.J. Rosenthal (eds.), Constitutionalism and Rights: The Influence of the United States Constitution Abroad (1990). Until the post world war II period only a few European constitutions, most notably the 1920 Austrian constitution, recognized constitutional review. It was introduced in France until the introduction of the institution of the *Conseil Constitutionnel* in the 1958 Constitution. For further discussions see C. Sampford and K. Preston, Introducing the Constitution: Theories and Principles and Institution (1996), p. 22 –25.

[8] M. Cappilleti Judicial review in Comparative Perspective (1989), p. 136-146. In Great Britain and some other countries, where the doctrine of parliamentary sovereignty has long been regarded as the most fundamental element of the constitution, no organ has legal authority to invalidate statutes on the ground that they are not in conformity with the constitution (the unwritten constitution) or some fundamental moral or legal principles. In Britain, the legislative authority of parliament is supreme, and the function of the court, in this system, is merely to give effect to these laws. In the words of Dicey, the legislature "has the right to make or unmake any law whatever" and no person, body or court outside Parliament "is recognized by the law of England as having a right to override or set aside the legislation of parliament" In the most quoted statement of Walter Bagehot, "[t]here is nothing the British Parliament can not do except transform a man into a woman and a woman into a man" Quoted in Y. Meny and A. Knap Government and Politics in Western Europe (1998), p. 317. See also generally J. Goldsworthy The Sovereignty of Parliament: History and Philosophy (1999). With the introduction of the Human Rights Act 1998 in Britain, the courts, if satisfied that primary legislation is incompatible with a right recognized by the European Convention of Human Rights, can make a declaration of incompatibility. The declaration of incompatibility, however, does not, in itself, affect the validity of the challenged legislation. For further discussion see PP. Craig Administrative Law (2003), p. 570-571.

[9] See generally J Bell French Constitutional Law (2001), p. 1-27.

[10] Ibid.

II. Constitutional Review In Ethiopia: Historical Overview

A brief examination of the legal history of Ethiopia reveals that constitutional review, as one writer commented, "does not have a gratifying history" [11] To begin with, the 1931 Constitution, the first written constitution, did not include a specific provision on constitutional adjudication. One may even argue that such conception of constitutionalism was not possible during that period. This mainly has to do with the fact that the 1931 Constitution, in the first place, was designed to enhance both change and stability in favour of the monarchy rather than impose a limit on government.[12] It especially achieved this by "effectively removing the church from the forefront of Constitutional power play" [13] As a result, the powers of the Emperor were not subject to any strict kind of review and his authority could not be contested.[14]

Neither was there a practice of constitutional review after the introduction of the 1955 Revised Constitution. This is despite the fact that the 1955 Constitution contains a supremacy clause under Article 122. According to this provision, the Constitution, together with those international treaties conventions and obligations to which Ethiopia [is] a party, shall be the supreme law of the Empire, and all future legislation, decrees, orders, judgments, decisions and acts inconsistent therewith shall be null and void.

No specific organ, however, was empowered to exercise the power of constitutional review and thus declare legislations, decrees, orders, judgments, decisions and acts, which are unconstitutional, null and void. Based on this provision, one may advance an argument, as some do,[15] that constitutional review was possible under the 1955 Revised Constitution. Theoretically, this is not completely implausible. The fact that the 1955 Constitution did not explicitly empower a specific organ to exercise the power of constitutional review does not exclude such a possibility. As the history of constitutional review in America demonstrates, a court may exercise constitutional review without explicit authorization of the Constitution. This may also be the reason why some even hold that the 1955 Revised Constitution followed the American system of judicial review. The above construction, however, does not take account of the power structure envisaged by the Constitution. Under a Constitution that recognizes the "indisputability" of the power of the Emperor and grants him a legislative power (in addition to the fact that he appoints all members of the Senate in the two chamber parliament), it is almost impossible to talk of constitutional review. As George Krzeczunowicz has rightly pointed out, the power of the Emperor to quash any decision rendered by the courts would make the exercise of constitutional review

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[11] Assefa Fiseha, "Constitutional interpretation: the respective role of courts and the House of Federation" in Faculty of Law/Civil Service College (ed.) Proceedings of the Symposium on the Role of the Courts in the Enforcement of the Constitution (2000), p. 18.

[12] Fasil Nahum Constitution for a Nation of Nations: The Ethiopian Prospect (1997) 21. Tradition and religion were the only limits on the power of the monarch, Emperor HaileSelassie. The introduction of the constitution, by centralizing government power in the hands of the Emperor, limited the influence of both religion and tradition.

[13] Ibid.

[14] CN, Paul and C. Clapham Ethiopian Constitutional Development (1967), p. 287.

[15] Meaza Ashenafi "Ethiopia: Process of Democratization and Development" in A An-narim(ed.) Human Rights under African Constitutions (2003), p. 30.

pointless.[16] The fact that some argue that the 1955 Revised Constitution had envisaged an American system of constitutional review can possibly be explained by the fact that the Constitution was drafted by three American legal scholars. The belief, therefore, is that the Constitution reflects the American experience.[17]

The advent of the 1987 Constitution, on the other hand, has brought with it the designation of an institution that exercises the power of constitutional review. The Constitution contained express clauses on the interpretation of the Constitution and determination of the constitutionality of legislative acts. It was the State Council, a political body, which was entrusted with the control of constitutionality. It is reported that no significant case was brought before it.[18]

The present Constitution, however, provides detailed provisions on constitutional interpretation. It has also established the institutional framework necessary to discharge this function. With this as a background, we now proceed to discuss constitutional review and constitutional interpretation under the present Constitution. The aim of this discussion is to explain the institutional structure adopted by the Constitution for constitutional interpretation and specifically for constitutional review. Establishing the role of the House and the courts is a specific objective of this section.

III. Constitutional Review Under the 1995 Constitution

The FDRE Constitution deals with the issue of constitutional review under Article 83.[19]

> *Article 83 Interpretation of the Constitution*
> *1. All Constitutional disputes shall be decided by the House of Federation.*
> *2. The House of Federation shall, within thirty days of receipt, decide a constitutional dispute submitted to it by the Council of Constitutional inquiry.*

As the reading of this article indicates, it does not tell us much about constitutional review. It only declares that the House decides on all constitutional disputes. But what is a constitutional dispute? Is it the same as a ruling on the constitutionality of laws or does it only refer to the expounding of the provisions of the constitution or to both? A reading of some other provisions of the constitution may shed light on the meaning of this term.

Article 62 of the Constitution which provides for the powers and functions of the House states, under sub article one, that the "[House] has the power to interpret the constitution"

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[16] G. Krzeczunowicz, "Hierarchy of Laws" Journal of Ethiopian Law Vol. 1(1), (1984), p. 111-117.
[17] Ibrahim Idris, "Constitutional Adjudication under the 1994 FDRE Constitution" Ethiopian Law Review Vol. 1(1) (2002), p.63.
[18] Assefa, cited above at note 11, p. 19.
[19] It is important to note right from the beginning that the title of this article is interpretation of the Constitution and not constitutional review or judicial review.

This is what article 84, the other relevant article that deals with the power of the Council has to offer:[20]

1. *The Council of Constitutional Inquiry shall have the power to investigate constitutional disputes. Should the Council, upon consideration of the matter, find it necessary to interpret the Constitution, it shall submit its recommendations thereon to the House of Federation.*
2. *Where any Federal law is contested as being unconstitutional and such a dispute is submitted to it by any court or interested party, the Council shall consider the matter and submit it to the House of Federation for a final decision.*
3. *When an issue of constitutional interpretation arises in the courts, the Council shall:*
   A) Remand the case to the concerned court if it finds that there is no need for constitutional interpretation; the interested party, if dissatisfied with the decisions of the Council, may appeal to the House of Federation
   B) submit its recommendations to the House of Federation for a final decision if it believes that there is a need for constitutional interpretation

The meaning and implications of these articles has been the subject of controversy and debate. The Chief Justice of the Federal Supreme Court (FSC), on one occasion, stated that "the power to interpret the Constitution is equated with the power to declare federal or state law as unconstitutional and therefore null and void" [21] Thus, according to him, the act of invalidating legislation for unconstitutionality is what the phrase 'Constitutional interpretation' is meant to signify in the Ethiopian Constitution.[22] The import of this argument is that it is only the power to enquire into the constitutionality of legislation that the Constitution has entrusted to the House. The Constitution, as a result, does not identify a single organ that is responsible for constitutional interpretation. In the absence of any law or provision that excludes the courts from the business of constitutional interpretation, they conclude, the courts still have the power to expound the provisions of the Constitution through interpretation, short of invalidating legislation for unconstitutionality.

A careful reading of the provisions of the Constitution, however, does not warrant the conclusion that the Constitution, in referring to constitutional interpretation, only refers to the power to determine the constitutionality of legislation. The Constitution does not equate constitutional interpretation with the act of invalidating legislations. In order to demonstrate this one needs to determine what a "constitutional dispute" is since article 83 of the Constitution and, by implication, article 84(1) of the Constitution[23] state that the House shall

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[20] A discussion of the power of the Council indirectly indicates the power of the House as the Council serves as an advisory organ of the House.

[21] Kemal Bedri Key note address in Faculty of Law/Civil Service College (cited above at note 11).

[22] Donovan, an American scholar, has also argued that the act of interpretation, which the drafters had in mind when they assigned the power of constitutional interpretation to the House was the act of declaring a federal or state legislative provision invalid as violative of the Ethiopian Constitution. See DA. Donovan, "Levelling the Playing Field: the Judicial Duty to Protect and Enforce the Constitutional Rights of Accused Persons Unrepresented by Counsel" Ethiopian Law Review Vol. 1(1) (2002), p.31.

[23] Any power entrusted to the Council is a power given to the House as the former is merely an advisor of the latter on matters of constitutional interpretation and constitutional review.

decide all constitutional disputes. Once we determine what a constitutional dispute is, we can, then, easily identify the role of each organ in constitutional interpretation and constitutional review.

An apparent feature of a constitutional dispute, that one identifies easily, is the determination of constitutionality or what we call constitutional review. This is the power of invalidating a legislative act, which is considered to be in contradiction with the Constitution. This is also what the Constitution in article 84 (2) refers to when it makes mention of the "unconstitutionality of a federal or state law" This is the first aspect of a constitutional dispute. A constitutional dispute, however, should not necessarily involve the issue of unconstitutionality of legislation. What makes a dispute a constitutional dispute is the mere fact that the dispute involves constitutionally recognized rights. The determining factor is that a claim is made based on the provisions of the Constitution or that provisions of the Constitution are in one way or another implicated in a case brought before the court. Resolving such a dispute may not require more than expounding the provisions of the Constitution. At the most, what would be required of the responsible organ under such circumstances is to determine the scope and application of the constitutional rights to the operative facts of the case. It would not require of them to declare a legislative act unconstitutional.

The Ethiopian Constitution, in agreement with the above explanation of constitutional dispute, recognizes that not all cases of constitutional dispute entail the need to determine the constitutionality of legislation. This is clear from article 84(1), which empowers the House to receive matters that give rise to issues that involve constitutional interpretation. Here the Constitution, by simply referring to the interpretation of the constitution (without mentioning anything about issues of constitutionality), has made it clear that it acknowledges that constitutional interpretation may not always be about determining the constitutionality of legislations. That is also why it specifically deals with the issue of constitutional review under another specific provision, article 84(2), and does not lump it together with article 84(1), which generally discusses constitutional interpretation. Had the Constitution, like the Chief Justice argued, equated constitutional interpretation with the act of determining the constitutionality of legislations, it would not have been necessary to deal with the latter under a separate provision (i.e. article 84(2)).

Thus, a constitutional dispute, in the context of the Ethiopian Constitution, has two aspects: the general task of interpreting the Constitution with a view to ascertaining the meaning, content and scope of a constitutional provision (article 84(1)) and the more specific task of determining the constitutionality of "federal or state law" (article 84(2)). Thus, in contrast to the conclusions of the Chief Justice, the Constitution does not equate constitutional interpretation with the act of determining the constitutionality of legislation. In fact, it recognizes that not all cases of constitutional dispute involve issues of constitutionality. It acknowledges that the process of interpreting the Constitution does not always lead to what the Chief Justice referred to as the end product (a declaration of unconstitutionality).

Once this is made clear, the argument that courts have the power to interpret the Constitution falls away. It becomes obvious that the House has both the general power of interpreting the Constitution and the specific function of invalidating legislation that is unconstitutional. This

is so because the Constitution, under article 84(1) and (2), provides to the House both the power to decide on matters where it is necessary to interpret the Constitution and cases where the constitutionality of any federal or state law is contested.

The House, in discharging its duty of constitutional adjudication, is assisted by the Council, an advisory body, whose main function is to examine constitutional issues and submit its findings to the House. This is a body composed of mostly legal experts of high standing, headed by the Chief Justice of the FSC.[24] The list of its members include the Vice President of the FSC, six legal experts appointed by the President of the Republic on recommendation by the House of Peoples' Representatives and three other persons designated by the House from among its members.

Where issues of constitutional interpretation arise, the matter is first referred to the Council by a court or 'the interested party' The Council, upon receiving the matter, should deliberate upon it and submit its recommendations to the House if it believes that the issues raised involve constitutional interpretation. If the Council, on the other hand, believes that there is no need for constitutional interpretation, it can remand the case to the concerned court. In this regard, it should be noted that the findings of the Council are mere recommendations and the House is at liberty to adopt or reject the recommendations of the Council. The Council, as indicated earlier, is thus an institution with an advisory capacity. The House, on the other hand, is the body that is entrusted with the function of providing the ultimate and final decision both on constitutional interpretation and more specifically on the constitutionality of legislations.

This concentration of power in the House has provoked debates regarding the role of courts in constitutional interpretation. Does it mean that there is no role left for the courts as far as constitutional interpretation is concerned other than referring to the Council matters that require the interpretation of the Constitution? The article now turns to deal with this issue.

IV. THE ROLE OF THE COURTS

Notwithstanding the consensus on the ultimate power of the House to interpret the Constitution and rule on the constitutionality of legislations, there is an argument that has been going on for a while now to the effect that the courts still have the power to interpret the Constitution and refuse to apply a legislation on the ground that it is not in conformity with the Constitution. Some of them rely on what they call "the normal (sometimes they call it "inherent") judicial business of courts" and argue that the power of the courts includes refusing to apply an Act of parliament on the ground that it is not compatible with the Constitution.[25] Others advance their argument based on the premise that the courts have the duty to enforce the Constitution.[26] However, those who argue along these lines do not accept

[24] See article 83-84 of the Constitution.

[25] Tsegaye Regassa, " Courts and the Human Rights Norms in Ethiopia" in Faculty of Law/Civil Service College, cited above at note 11, p.116.

[26] See Assefa, cited above at note 11, p. 13.

the conclusion that the courts can invalidate an Act of parliament. They rather limit the power of courts to espousing the provisions of the Constitution.

In the following paragraphs, the article examines these positions. The purpose of this exercise is to identify the role of the courts, if there is any, in constitutional interpretation and constitutional review in Ethiopia. The article shall commence the discussion by elucidating the argument from "the inherent judicial task", which according to this writer, is not defensible under the Ethiopian legal system.

1. CONSTITUTIONAL REVIEW: 'THE NORMAL BUSINESS OF COURTS'?

According to some Ethiopian academics, declaring a law invalid is the "inherent" judicial task of the courts. These academics start from the premise that it is the usual/ normal business of courts to find and declare the law. When a court nullifies legislation on the ground that it is unconstitutional, it is applying the existing law as opposed to a non-existing or repealed law.[27] The court, in other words, is declaring what the law is. The "normal business of courts" thus includes the act of invalidating legislation for unconstitutionality. Based on this, they argue that the courts should proceed to resolve constitutional disputes without referring them to the Council. To substantiate their argument, they forward two reasons. First, all judicial power (including finding, interpreting, and declaring the law) belongs to courts. In relation to this, a reference is made to article 79(1) of the Constitution, which vests all judicial powers, both at Federal and State level, in the courts. Second, all laws, practices and decisions in contradiction with the Constitution, which are nullified *ab initio* by the Constitution, need no interpretation. What they need is mere application, which in this case is a mere declaration of repeal.[28]

The first line of argument which relies on the so called "inherent judicial task" bears a resemblance to the arguments advanced by Chief Justice Marshall in the most celebrated case of *Marbury v Madison*. In that case the court, despite the absence of explicit constitutional authorization to do so, refused to apply an Act of a coordinate branch of government. By doing so, it assumed for itself the power of judicial review. In Marshall's opinion, a written Constitution is a law and it is "the province and duty of the judicial department to say what the law is" [29] Thus, judicial power, according to him, includes reviewing Acts of the legislature.

The problem with this line of argument is its reliance on the so-called "inherent judicial task", a concept that does not necessarily apply in Ethiopia. It assumes that finding, interpreting and declaring a law is an "inherent judicial power", which in the Ethiopian case is vested in the courts. It, however, is not clear if judicial power necessarily includes reviewing Acts of the legislature. A brief survey of the different legal systems would show that this is not always the case. France, for instance, could be a good example. In France, Constitutional control of legislation has always been entrusted specifically to political non-

[27] Tsegaye, cited above at note 25, p.116.
[28] Ibid.
[29] Marbury v Madison, cited above at note 5.

judicial bodies. There is a long-standing distrust of the judges, who were perceived as being the 'bitterest enemies of even the slightest liberal reform" [30] Giving the judiciary a controlling power has always been considered as something that 'conflicts too much with the traditions of French public life' [31]This, in fact, was the main reason for denying courts the power of constitutional review and establishing the *Conseil Constitutionnel* in 1958.

As it is also stated in the beginning of this chapter, in the United Kingdom, where parliamentary sovereignty is "the dominant characteristic of [the] political institutions", judging statutes to be invalid for violating either moral or legal principles of any kind is not the "normal business of courts" Courts have no legal authority to invalidate statutes on the ground that they are contrary to fundamental moral or legal principles.[32] Understanding judicial power as including the exercise of the power of constitutional review has always been considered dangerous, as it would amount to "a massive transfer of political power from parliament to judges".[33] The same is also true for New Zealand.[34]

One may not even be sure whether this (i.e. the inherent judicial task and considering the Constitution as any other ordinary but supreme law) is not Marshall's invention. During the early days of America, the Constitution was understood to be a political instrument different in kind from ordinary laws.[35] Enforcing the Constitution was accordingly understood to be an extraordinary political act. In refusing to execute particular laws, judges [back then] relied on a variety of justifications, all of which were closer to outdated English precedents than subsequent American doctrine, which extended judicial power to include the power of constitutional review.[36] It was only after Chief Justice Marshall that the written Constitution started to be considered as any other law that falls within the ambit of judicial authority.[37]

As indicated earlier, this development is, however, not matched by corresponding developments in other legal systems. The situation, for example, is quite different in Ethiopia. As the brief review of the history of constitutional review earlier in this chapter indicated, declaring a law void for its repugnancy to the constitution has never been considered as the normal business of the courts. Either it had never been recognized as such or, when it was, it was explicitly given not to the courts but to another political body. It is, therefore, difficult to accept in the Ethiopian context the argument that judicial power includes the power of refusing to apply legislation on the ground that it is incompatible with the Constitution.

The academics, in making a case for the role of the courts in constitutional review, also relied on the argument that the courts, in refusing to give effect to legislation on ground of

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[30] Bell, cited above at note 9, p.2o.
[31] "It is neither in the spirit of a parliamentary regime nor in the French tradition to give the Courts…the right to examine the validity of a *loi*." See Id, p. 27.
[32] Goldsworthy, cited above at note 8, p.1-3.
[33] Craig, cited above at note 8.
[34] Ibid.
[35] S. Snowsis, Judicial Review and the Law of the Constitution (1990) p. 1.
[36] Ibid.
[37] Id, 2-4.

incompatibility, need not engage in interpretation. This is so because legislation, which is in conflict with the Constitution, is nullified *ab initio* by the Constitution. What is required from the courts is mere application, which in this case is mere declaration of repeal. It is true that provisions of laws, which contradict the Constitution, are of no effect right from the beginning and not when the court declares them so.[38] "The declaration is merely descriptive of a pre-existing state of affairs."[39] In an interesting remark by Ackermann J:

> *The court's order does not invalidate the law; it merely declares it to be invalid. A pre-existing law which [for instance] was inconsistent with the provisions of the constitution become invalid the moment the relevant provisions of the constitution came into effect...the test for invalidity is an objective one.*[40]

However, making such a distinction in the present context would only be simplifying the matter as interpretation and declaration cannot be divorced from one another. It is, of course, the Constitution that nullifies them *ab initio*. This, however, does not mean that interpretation is not needed. Any institution that is competent to make this decisive declaration needs to necessarily engage itself in constitutional interpretation. A declaration of unconstitutionality requires of a court to examine the impugned provisions of law against the rights recognized by the Constitution. The court needs to determine whether the impugned provision infringes the rights and whether such infringement is justified by the limitations recognized by the Constitution. In fact, it is when the court exercises its power of constitutional review that it needs to undertake a vigorous and careful interpretation of the Constitution. Enquiring into the constitutionality of legislation is always 'a question of much delicacy' [41]

As the foregoing discussion suggests, any argument to empower the courts with a constitutional review power cannot base itself on a claim that engaging in such exercise is the normal judicial business of courts. This would be an erroneous application of an American principle in a country that has a different legal tradition. It would also amount to utter disregard of the existence of various legal systems that construe judicial power quite differently and stand quite in contrast to the American judicial system.

2. THE DUTY TO ENFORCE THE CONSTITUTION AND CONSTITUTIONAL INTERPRETATION

A number of Ethiopian academics and officials of the judiciary, though on a different basis, still maintain the argument that Ethiopian courts have the power to interpret the Constitution. The argument is that this power stems from the constitutional commitment to respect and enforce the fundamental rights and freedoms set forth in chapters two and three of the Constitution.[42]

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[38] Article 9 of the Constitution states that any law which contravenes the Constitution shall be of no effect.

[39] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 94.

[40] *Ferreira v Levin No* 1996 (1) SA 984 (CC) para 27.

[41] Snowsis, cited above at note 35, p. 131.

[42] See Assefa, cited above at note 11, p. 13; Tsegaye, cited above at note 25, p.111. Article

The basic premise of this argument is that 'enforcement presupposes interpretation' In the words of Assefa Fiseha:

> *The judiciary's role in 'respecting and enforcing' fundamental rights and freedoms is clearly enshrined in Article 13 and this role of 'respecting and enforcing' fundamental rights and freedoms is illusionary unless the judiciary is, in one way or another, involved in interpreting the scope and limitation of those rights and freedoms for [sic] which it is duty bound to 'respect and enforce'* [43]

The court, it is argued, is faced with this "unavoidable duty" of interpreting the Constitution both in civil and criminal cases.[44] The following issues are often raised to illustrate that constitutional interpretation is a necessary corollary to adjudication of criminal cases:

> *Was the respondent granted a sufficient hearing before his driver's license was revoked? Did the entry into the burglar's house require a search warrant? Does hearsay violate the right of confrontation? ...Has the defendant's detention for seventeen consecutive days violated the right of speedy hearing? Was the zoning ordinance that shut down the loud speakers at the local cathedral a violation of free speech,[religion] and separation of church and state?*45

Therefore, to the extent that the courts enforce the rights and freedoms enshrined in the Constitution, they exercise the power of interpreting the Constitution. To this extent, they conclude, the courts have the power to state what the constitutional law is.[46]

It is, however, not clear whether all enforcements of rights under chapter three of the Constitution presuppose interpretation. Of course, most often courts are required to interpret the law in order to determine the meaning of the applicable law and apply it to the operative facts of the case brought before them. It is seldom that courts mechanically apply a pre-existing rule. This, however, does not mean that there are no cases where the courts cannot enforce a provision of the Constitution by simply applying it, without going into the business of interpretation. However few they might be, it is submitted, there are still cases where the courts can enforce the provisions of the Constitution without interpretation.

It is also because not every single enforcement of a provision of a constitution, or any law for that matter, requires interpretation that it is sometimes said that one should simply apply the law when its meaning is clear. When the language of a constitution provides a plain, clear meaning, the plain meaning of the language is to be applied and there is no

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13(1) of the Constitution reads: "All Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this chapter"

[43] Assefa, cited above at note 11, p. 14.

[44] M Wills "Draft Materials on the Ethiopian Constitution" (1999) 29 as cited in Assefa, cited above at note 11, p. 15.

[45] Ibid.

[46] Assefa, cited above at note 11, p. 14.

room for judicial construction.[47] In such cases, it is submitted, the judiciary is left with little to do other than strictly and literally to applying and enforcing the provisions of the Constitution.[48]

Of course, there is a view that says a court cannot give meaning to a provision of a constitution, 'however plain', without engaging in the work of interpretation. According to this view, all legal meaning is fundamentally a matter of context and interpretation.[49] The proponents of this view also believe that words only take on their real meaning when placed in context. In the words of De Ville, interpretation is a "mode of existence rather than a methodology" [50] According to him, we are always interpreting.

This theory of interpretation, which denies the existence of a 'non-positional' interpreter under all circumstances, entails the view that all texts are indeterminate. This, however, is difficult to accept in a country like Ethiopia, which follows the civil law tradition where detailed rules are enacted and judges are expected to strictly apply them without engaging in interpretation. In Ethiopia, as may also be the case in many other civil law countries, the legislature enacts laws which are detailed, explicit and clear. Under such circumstances, however unreasonable the law may sound, the judges are expected to apply it consistently.

Many of the provisions of the Ethiopian Constitution, especially those that the courts are expected to invoke in their daily functioning, are stated in an explicit and clear manner.[51] This becomes clear when one looks closely at some of the provisions of chapter three of the Constitution. Article 21 for instance, provides for the rights of persons held in custody and convicted prisoners. Under sub article 2, it states, "all persons shall have the opportunity to communicate with and to be visited by their spouses or partners, close relatives, friends, religious councillors, medical doctors and their legal counsel" If a detainee or a prisoner presents a claim before the court alleging that he was denied contact with any of these individuals, the court need only to invoke the provisions of this article and order the defendant to comply with the constitutional provision. To do so, the court need not engage itself in interpreting the Constitution. It only needs to mechanically apply this specific provision of the Constitution to the facts of the case.

Article 19, which provides for the rights of persons arrested, is another good example. One of the important stipulations of this article is that persons arrested have the right to be brought before a court within 48 hours of their arrest. This is a very important principle of any criminal justice system that courts need to enforce vigorously. It lies at the heart of the duty of a state to protect citizens from any arbitrary and unlawful pre-trial arrest or detention. However, the application of this article needs no interpretation. It only requires a judge to ascertain the time of arrest and thus compute the time that went on before the

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[47] C. Antieau, Constitutional Construction (1982), p.3.

[48] Ibid.

[49] S. Sugunasiri, "Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability, Dalhousie Law Journal Vol. 22 (1999) p.126.

[50] JR de Ville Constitutional and Statutory Interpretation (2000), p. 3.

[51] Donovan stated that the language used in the sections of the Constitution detailing the rights of Ethiopian citizens caught up in the criminal justice system are written in the familiar language of the everyday functioning of the courts. See Donovan, cited above at note 22, p. 31-34.

arrested person is presented before the court.[52] The same also goes for article 23, which provides for the prohibition of double jeopardy and article 32, which decrees freedom of movement.

The implication of this argument is that the courts are expected to enforce the provisions of chapter three of the Constitution only to the extent that it does not engage them in interpretation. However, "if issues of Constitutional interpretation arise in the courts"[the words of the Constitution itself] in the process of enforcing the Constitution, the courts should refer the matter to the Council.[53]They should refrain from giving meaning to the provisions of the Constitution and resolve the constitutional dispute. Under such circumstances, they are expected to defer to the interpretation of the House.

Such understanding of the position of the Constitution in regard to constitutional review is also important if the provisions of the Constitution itself are to be considered as consistent and not contradicting each other. To the extent possible, provisions of the Constitution must be read in conformity. This is often referred as the 'unity of the constitution' or "harmonious interpretation of the constitution" [54] Reading the Constitution as allowing courts to interpret the Constitution in the course of enforcement gives the impression that the provisions of the Constitution are inconsistent with each other. This is because, as already mentioned, the Constitution, under article 84, provides the House with the power to interpret the Constitution, in addition to the specific task of determining the constitutionality of legislative acts. On the other hand, if the argument that the courts are only allowed to enforce the Constitution to the extent that it does not require interpretation is valid, then the provisions of the Constitution will be rendered consistent. The Constitution will then be read as having categorically assigned a role for each organ (i.e. the House, the Council and the courts).

The controversy surrounding constitutional review was only confined to the text of the Constitution. After the year 2001, however, that is almost six years after the adoption of the Constitution, another element that gave momentum to the controversy came into picture. The following section shall discuss this specific and important post-Constitution development.

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[52] Of course, there is another element of this same stipulation that may require the courts to engage in interpretation. The Constitution states that the court, when calculating the 48 hours, should not include the time reasonably required for the journey from the place of arrest to the court. On a case-by-case basis the court may decide, "the time reasonably required for the journey" This obviously may require the court to interpret what the constitution meant when it refers to the "reasonableness" of the time. This, however, is only in cases where people may have to travel a long distance before they reach a nearby court. For obvious reasons, this does not apply in most of the towns where there is always a court, which is not too far from the police station.

[53] Article 84(3) proceeds with the assumption that the courts refer a case to the Council when issues of Constitutional interpretation arise in the former. This obviously suggests that courts are expected to refer the matter to the council in the event deciding the matter at hand requires interpretation of the Constitution.

[54] N. Steytler, Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, *1996* (1998), p.17.

V. POST-CONSTITUTIONAL DEVELOPMENT

In the middle of 2001, the House of Peoples Representatives issued two proclamations consecutively. Proclamation NO 250/2001, which deals with the powers and responsibilities of the Council of Constitutional Inquiry, was issued first. Proclamation No 251/2001 that was issued to consolidate the House of the Federation and define its powers and responsibilities followed this.

Prior to the enactment of these two legal instruments, there was a general belief, among those who believe that the courts are mandated to interpret the Constitution (either by way of enforcement or as part of their "normal judicial task"), that the courts hold the power to review the constitutionality of executive acts. According to the proponents of this argument, the courts can examine the constitutionality of executive acts and, if they found them to be incompatible with the Constitution, consider them null and void.

To substantiate their argument, proponents of this viewpoint capitalize on the reading of the Amharic and English versions of Article 84(2) of the Constitution, which have different meaning and implication. According to the English version, "where any federal or state law is contested as being unconstitutional...." the House of Federation provides the final decision. "The import of this provision is that the constitutionality of laws enacted by the House of Peoples' Representatives or state legislatures can only be challenged before the CCI and final decision is rendered by the House of Federation."[55]

A rough translation of the Amharic version of Article 84(2), on the other hand, suggests that it is only where "laws enacted by the federal or state legislative bodies [i.e. the House of Peoples Representatives or state legislature] are contested" that their constitutionality can be challenged before the Council and final decision is rendered by the House of Federation. Thus, according to the Amharic version, 'law' in article 84(2) only refers to formal enactments of either the House of Peoples' Representatives or state legislative bodies. The offshoot of this argument is that the ordinary courts can challenge the compatibility of the acts of the executive with the Constitution. In other words, the courts, for instance, have the power to consider whether so-called *regulations*, which are issued by the Council of Ministers, contravene the Constitution. The same applies for enactments passed by the Federal government or its agencies or by regional agencies or governments.[56]

Advocates of this position maintain that this is consistent with the parliamentary system adopted by the Constitution.

> *In parliamentary system, at least theoretically speaking, the existence and effectiveness of the executive depends upon the securing of continuous support from the members of parliament. Consequently it is often said that, parliament is supreme, subject, of course, to the supremacy of the constitution. All other branches of government are accordingly bound to assume that legislation enacted by parliament is constitutional and that is why ordinary courts are*

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[55] Assefa, cited above at note 11, p.12.

[56] H. Scholler, Notes on Constitutional interpretation in Ethiopia (2003) p. 7.

prohibited from nullifying such legislation...[Thus] when the constitutionality of executive acts is at issue, the judiciary is bound to review for their constitutionality.[57]

Henrich Scholler who, almost in the same words, argues that the reason for this limitation is that the Constitution does not want to exclude the executive power from control by the courts also shares this. "Only the parliament itself is excluded, because in parliament the popular will is expressed and should [not] be subject to control by a court."[58]

Much need not be said on the fact that it is difficult to sustain this position in the face of the conclusion we reached at the end of the previous section of this article. This is for all the same reason that invalidating executive acts for constitutional incompatibility requires interpreting the Constitution, which according to the Constitution, is a task left for the House of Federation.

The implausibility of this position is, however, made more apparent by the two proclamations. According to the Council of Constitutional Inquiry Proclamation, the House of Federation has the power to decide on the constitutionality of any law or decision by any government organ or official, which is alleged to be contradictory to the Constitution.[59] Law, according to this Proclamation, is meant to include "the proclamations and regulations issued by the federal government or the state as well as international agreements which Ethiopia has endorsed and accepted" Thus, the review power of the House of Federation is not limited only to laws issued by the Federal and state legislative bodies but also extends to executive acts, which includes directives and by-laws.

Some have considered these proclamations as having further elaborated the provisions of the Constitution with regard to constitutional interpretation and cleared the confusion that attended the role of the different organs in constitutional interpretation and in the more specific task of constitutional review. Others have taken these developments to be unconstitutional. According to them, these proclamations have unconstitutionally consolidated the power of the House of Federation and further marginalized the courts from the important task of constitutional interpretation. Some even speculate that these proclamations were issued as a response to the growing consensus, especially among academicians and some members of the judiciary, regarding the "unavoidable" role of courts in interpreting the Constitution and more specifically in invalidating executive acts.[60]

It is submitted that these post-constitution developments go along with the general trend of the Constitution in excluding the courts from any exercise that involves expositing the

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[57] Assefa, cited above at note 11, p. 12.

[58] Scholler, cited above at note 56, p.7.

[59] Article 17(2) of the Proclamation reads: where any law or decision given by any government organ or official which is alleged to be contradictory to the Constitution is submitted to it, the council shall investigate the matter and submit its recommendation thereon to the House of federation for a final decision.

[60] Personal observations of the different views advanced by participants of the conference on "Constitutional interpretation in Ethiopia", organised by the Federal Supreme Court and Friedrich Ebert Stiftung, 2002 Addis Ababa, Ethiopia.

provisions of the Constitution. The Constituent Assembly, that adopted the Constitution, believed that constitutional issues are more than judicial matters. "It was, therefore convinced that such a task was so essential to the basic interests of the nations, nationalities and peoples of Ethiopia that it could not be entrusted to an organ other than the House of Federation."[61] It is this conviction that is now affirmed by the enactment of the two proclamations.

CONCLUSION

As the foregoing discussion suggests, the ultimate authority to interpret the constitution is vested in the House. This includes the power to declare legislative acts and executive acts invalid when it finds them to be repugnant to the Constitution. The House fulfils this task with the expert help of the Council, which provides the House with recommendations. The discussion has also demonstrated that the courts have neither the power to give an exposition of the provisions of the Constitution nor the power to exercise constitutional review. The line among academics that attempt to endow courts with the power to interpret the Constitution can only be a pious wish.

As this same author has argued elsewhere, this particular Ethiopian approach to constitutional interpretation and constitutional review does not escape from the same criticism that is levelled against constitutional system that relied on courts for constitutional review. Its attempt to eschew the counter-majoritarian problem by creating a novel system of constitutional review that excluded the judiciary has not succeeded. Its decision to entrust the function of constitutional interpretation and constitutional review to the House which is not institutionally and functionally suited to discharge the task is also problematic. In as much as the Ethiopian approach can be commended for the novelty of the system, it is not a commendable system of constitutional review as it does not have characteristics that make it a good part of a well-designed constitutional system. [62]

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[61] Discussions at the Constitutional Assembly, December 1994 as cited in Ibrahim, cited above at note 17, p.69.

[62] For a detailed critical examination of the current system of constitutional review see Yonatan, cited above at note 3.