All about Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation

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I. Introduction

Over the last 15 years or so, the discussion on constitutional interpretation in Ethiopia has obtained the greatest attention. It is not at all difficult to understand why this has been the case. This is essentially because of the unprecedented system of constitutional interpretation designed in the 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution or Constitution). The fact that the discourse on the area has flourished to such a promising extent is very positive. There are sources of concern, however, in relation to this flurry of literature on Ethiopian constitutional interpretation. An easy problem to pick up from the many writings seen so far is the disconnect that exists between most of what have been written. Every writer espouses his idea in isolation from others. Reference to other works by other authors on the same area is seldom the case and much less is the habit of taking issue with the positions of other authors. As a result, we see that divergent and isolated positions have been taken for example on the scope of the power of the House of the Federation (HoF) and the role of courts vis-à-vis constitutional interpretation. The immediate effect of this is that the users of our products, i.e. our writings, are confused with the islands of views on the same subject that are disconnected. They are confused and, in some cases, misled with the views we have inked. It is time that we take issue with each other so those who read what is penned by one scholar would not take his/her opinion for granted in the absence of critique on that work by other scholars that would help the reader view the various opinions in a better light. Truly, determining the unmistakable trajectory of constitutional interpretation in Ethiopia is very difficult primarily because the FDRE Constitution is very general on the matter. Its sensible elucidation cannot be done fully by one paper or writer. Clarification of such a vexing issue can be achieved through a concerted effort and a sustained engagement.

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This article is a modest attempt at reviewing and evaluating most (if not all) of the views aired by Ethiopian and foreign academics on Ethiopia's system of constitutional interpretation. It also in the same context looks at the positions taken on different issues of constitutional interpretation by the HoF, the Council of Constitutional Interpretation (CCI) and the judiciary so far as those positions are possible to ascertain. This author believes that some of the apparent positions taken by at least the CCI have been influenced or at least emboldened by the academic writings that came out earlier. A case in point is the position of the CCI on the question of its (as well as HoF's) interpretive jurisdiction on executive acts and decisions. The CCI maintains a position that the Ethiopian Federal Constitution does not empower it to interpret executive acts and decisions. This position aligns with the academic writings that came out in 2000 and 2002 reviewed in this article.

By adopting a critical and practice-oriented approach, this article hopes to encourage those who have an interest in the area to join the debate and contribute his/her fair share. I believe that the arguments and analysis put forward in this article will take the debate on constitutional interpretation a step forward.

The main objective of this article is not to delve into the theoretical and normative discourses of judicial or non-judicial review of constitutionality. Nor is it to investigate the theoretical underpinnings of originalism as an approach to constitutional interpretation. It is rather to set out as clearly as possible the meaning and scope of constitutional interpretation in Ethiopia as it is purported in the FDRE Constitution. This author believes that the most potent instrument for doing so at this point in time is the identification of the original understanding or intention of the makers of the FDRE Constitution which calls for a closer study of the history of its making.

The closer examination of the making history of the FDRE Constitution reveals that there was no distinction made among laws or decisions involving constitutional interpretation with a view to partitioning the jurisdiction among the HoF and the courts. The overwhelming consensus at the making time was that all kinds of 'constitutional dispute' or 'constitutional interpretation' will be within the powers of the HoF. In this regard, the article also argues that the key matter is the determination of the meaning of a 'constitutional dispute' or a 'matter of constitutional interpretation'. A constitutional dispute or a matter of constitutional interpretation is a constitutional issue—whether that relates to a constitutional provision, or a conflict between the Constitution and any other law or decision—to which there are two or more equally persuasive sides or viewpoints.

The above argument which is based not only on the study of the making history of the FDRE Constitution but also on the closer study of the pertinent provisions of the same Constitution establishes further that a mere expounding of a constitutional provision does not entail constitutional interpretation. An expounding of a constitutional provision becomes a matter of constitutional interpretation only if the provision in question involves a constitutional issue amenable to two or more equally persuasive viewpoints in a given case at a given time. It is thus argued in this context that it will be within the power of courts to determine the meaning and scope of a constitutional provision so long as a constitutional issue in the above sense has not arisen. By promoting the above standpoints, this author calls for an immaculate examination of the concepts of 'constitutional dispute' and 'constitutional interpretation'. It is believed that the academics as well as the CCI will be prompted to revisit their positions or embark upon a fresh look at the law book and its architectural history.

The article begins with a review of the major scholastic works in relation to the law of constitutional interpretation in Ethiopia. This section is intended only to put in perspective the views held by the authors on main and dividing issues of constitutional interpretation in Ethiopia. By so doing the intention is to allow the reader to compare the viewpoints forwarded by these scholars with one another, and with this author and then make an informed assessment and reflection on the subject matter. Section two presents a condensed snapshot of the opinions of the CCI regarding the scope and meaning of constitutional interpretation power of the HoF (and CCI). In the third part of the article, the making history of the FDRE Constitution is presented so that the reader will see what was originally intended by the makers regarding the meaning and scope of constitutional interpretation in Ethiopia. This will help the reader to understand and evaluate the opinions forwarded by the scholars. The fourth and last section of the article is devoted to analysis and conclusions. Here an attempt is made to evaluate and critique the views held by the scholars whose works are reviewed as well as those of the CCI. Moreover, the author offers his own perspective on what he believes is the correct approach to understanding the Ethiopian law of constitutional interpretation.

II. A Review of the Existing Academic Works on Constitutional Interpretation in Ethiopia

Assefa Fiseha is among the first and the most prolific of those who have written on Ethiopia's system of constitutional interpretation.[1] The main thrust of his

[1] The following are Assefa's major publications on constitutional interpretation in Ethiopia: 'Constitutional Interpretation: The Respective Role of Courts and the House of the

argument in all of his writings is that courts are empowered by the FDRE Constitution to interpret it.[2] His conclusions are derived from a cumulative reading of certain provisions of the Constitution. He primarily builds his argument around the provisions of Art. 84(2) and Art 13(1) of the FDRE Constitution. Asking the question whether the HoF is the sole and ultimate interpreter of the Constitution on every matter or whether the Constitution leaves room for other bodies, he goes on to answer the first part of the question in the negative and the second part in the positive. For this, the Amharic version of Art. 84(2) is his source of inspiration. He pays a particular attention to the phrase: '*በፌደራሉ መንግስትም ሆነ በክልል ሕግ አውጪ አካላት የሚወጡ ሕጎች...*' ('which most approximately means 'laws enacted by the federal as well as State law making bodies') and argues that this wording of the Constitution limits the power of the HoF (and of the CCI) to reviewing the constitutionality of only 'laws enacted by the Federal House of Peoples' Representatives (HoPR) and its state counterparts'.[3] Assefa argues derivatively that 'as far as the constitutional compatibility of the acts of the executive with the Constitution --- is concerned,

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Federation' in *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution* (Addis Ababa: May 19-20 2000; hereafter 'Symposium on the Role of Courts); 'New Perspectives on Constitutional Review in Ethiopia' in *Ethiopian Law Review* Vol.1 (2002); 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of the Federation' in *Mizan Law Review*, Vol.1, No.1 (2007)—hereafter 'Constitutional Adjudication in Ethiopia'; 'Federalism and Adjudication of Constitutional Issues: The Ethiopian Experience', in *Netherlands International Law Review*, Vol. LII, No. 1(2005); and 'Federation and Second Chambers' in *Indian Journal of Politics*, Vol. 39, No. 3 (2005).Assefa also discusses the Ethiopian system of constitutional interpretation in chapter 8 of his book: *Federalism and Accommodation of Diversity in Ethiopia: A Comparative Study* (Revised Edition; 2007)—hereafter *Federalism and Accommodation of Diversity*; reviewed by Getachew Assefa in *J. Eth. L.*, Vol., 22; No. 2 (2008).

[2] See for example Assefa Fiseha, *Symposium on the Role of Courts*, at 10.

[3] See Id. at 12. I should like to mention here that Dolores A. Donovan has the same view of the jurisdiction of the HoF vis-à-vis constitutional interpretation. She states that Art. 84 of the Constitution makes it clear that the act of interpretation which the makers of the Constitution had in mind was the act of declaring a federal or state legislative provisions invalid as violative of the Ethiopian Constitution. See Dolores A. Donovan, 'Levelling the Playing Field: The Judicial Duty to Protect and Enforce the Constitutional Right of Accused Persons Unrepresented by Persons' in *Ethiopian Law Review*, Vol. 1, No. 1 (2002) at 31-32. Although was not well elaborated, this author also supported this position in a couple of early publications. See generally Getachew Assefa, 'Problems of Implementation of Human Rights Treaties in Ethiopian Courts,' in *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution* (Addis Ababa: May 19-20 2000); and Getachew Assefa, 'Protection of Fundamental Rights and Freedoms in the Ethiopian Federalism,' in *Proceedings of the Symposium on the First National Conference on Federalism, Conflicts and Peace Building* (Addis Ababa: 2004). The argument presented in this article is therefore a revision of the author's earlier position as well.

the Constitution is silent'.[4] According to him, since the Amharic version of Art. 84(2)—as opposed to the English version which could be controvertible—'makes it clear that the term law refers to laws enacted either by the HoPR or state legislative bodies [and therefore nothing more]', a citizen can challenge the constitutionality of all laws other than proclamations of HoPR and state councils before ordinary courts. More clearly, his argument is that the review of constitutionality of regulations, directives, decrees, orders, notices, will be the competence of the ordinary courts.[5]

The second ground for Assefa's argument finds salvo in Art. 13(1) of the FDRE Constitution. According to Assefa, Art. 13(1) which stipulates that '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 [chapter three]' makes it mandatory that the courts engage in the interpretation of the scope and limitation of the rights in the third chapter in order to live up to its duty to 'respect and enforce' the Constitution.[6] Assefa extensively discusses the activist roles the judiciary in the USA played in the 1950s and 60s and urges the Ethiopian judiciary to draw lesson form the US courts.[7] The core of his views remained unchanged as reflected in all of his subsequent publications. He rather used all later practices and legal developments in relation to constitutional interpretation to strengthen his positions. In for example the most recent of his publications in 2007, he discusses how the role of the judiciary has been affected by the legal and practical developments.[8] Assefa believes the two

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[4] Id.

[5] Id. Assefa tries to strengthen his position by stating that such a differential treatment of interpretation of the Constitution vis-à-vis parliamentary enactments is consistent with the parliamentary form of government in which the parliament is the supreme body subject to only the supremacy of the constitution, and ordinary courts are thus prohibited from nullifying parliamentary enactments. See Id.

[6] Id., at 14. Assefa quotes in support of his argument here the opinion of, Clyde Willis, an American law professor who was visiting the AAU Law School back in early 1990s. Willis argued that in order to settle ordinary criminal cases on freedom of religion, search and seizure, right to speedy trial, etc, the courts' involvement in constitutional interpretation is unavoidable. See Id. This author does not disagree with Assefa and Willis on the role of the courts to deal with the kinds of cases that arise in relation to criminal justice administration and ordinary civil litigation that may have to be resolved by citing the provisions of the Constitution. This in a way is a form of textual interpretation by which the courts engage in the reading and application of the text of the Constitution. However, as I will fully bring to light later in this article, as opposed to the systems in which courts are fully mandated to interpret the constitution such as in the USA, textual interpretation in Ethiopia should be understood in a stratified way, from mundane to more complex one.

[7] See Id., at 15-16.

[8] 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of the Federation' in *Mizan Law Review*, Vol.1, No.1. See also his book (note 2 above), at 388-394.

proclamations enacted in 2001 are incompatible with the Constitution.[9] Here again he reiterates his view discussed above that the HoF's role has to be restricted to 'reviewing the constitutionality of laws enacted by the legislature: federal and state'.[10] He takes issue with the two proclamations primarily because he believes they expand the reviewing jurisdiction of the HoF by broadly defining the term 'law' to embrace regulations and directives issued by the executive branch of government as well as international agreements ratified by Ethiopia.[11] In this connection Assefa has the following to say:

> ...by defining 'the law' too broadly to include all conceivable acts of the legislature and the executive, the drafters of the new laws that are supposed to define the role of the HoF and the CCI, have themselves apparently come up with an unconstitutional law. This is so because the Federal Constitution is at least clear on this point: it never intended to include regulations, directives and decisions of administrative bodies in the way the laws attempted to include. By so doing the drafters [of the two proclamations] have wiped out or at least attempted to wipe out the jurisdiction of the courts: federal and state.[12]

He accordingly reaffirms his contention that 'it was not the intention of the framers of the Constitution to rule out the jurisdiction of the judiciary from all constitutional matters'.[13]

Another publication to consider is Ibrahim Idris's article which was one of the early and influential works.[14] Ibrahim contends that under the FDRE Constitution the courts are denied both the power of interpreting the constitutional provisions and handling judicial review of legislative statutes.[15]

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[9] See Id., p.15. The two proclamations are: Proclamation No. 250/2001, *Council of Constitutional Inquiry Proclamation;* and Proclamation No. 251/2001, *Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation.* Assefa says that the two laws '--- indirectly strip the jurisdiction' of the regular judiciary---'. See Id.

[10] Id., at 15-17. Assefa uses the same argument based on the reading of the controlling Amharic version of Art. 84(2) which he believes to restrict the constitutional interpretation power of the HoF to only parliamentary enactments at both state and federal levels. He also turns here as well to the argument emanating from the notion of parliamentary supremacy as justifying deferential treatment of parliamentary enactments, and not other laws. See note 5 above.

[11] See Id., at 17.

[12] Id. Assefa asserts further that in the *CUD v. Prime Minister Meles Zenawi* (2005), the federal court 'wilfully relinquished its constitutional mandate' by its act of referring the case to the CCI. See my discussion on this under the next section of this article.

[13] Id. at 32.

[14] Ibrahim Idris, 'Constitutional Adjudication under the 1994 FDRE (Federal Democratic Republic of Ethiopia) Constitution' in *Ethiopian Law Review*, Vol. 1, No.1 (2002).

[15] Id., Art. at 67.

Having argued that the power to interpret the Constitution is entirely the power of the HoF, he specifically has the following to say:

> ... the scope of constitutional adjudication consists of two situations: interpretation of constitutional provisions and determination of constitutionality of legislative act. Accordingly all other legal issues, including those having constitutional significance such as an act or a decision of a state organ or a public official or a custom contravening the Constitution are not matters to be entertained by the Council of Constitutional Inquiry and the House of the Federation. Under Ethiopian law, any petition on the unconstitutionality of an administrative act or a decision or a custom is within the judicial jurisdiction of an ordinary court.

Besselink's article on the protection of human rights in Ethiopia is also worthy of consideration for it is an, if not the most, insightful textual readings of the FDRE Constitution's interpretative system.[16] He sharply analysed the respective role of the HoF/CCI, and the judiciary relative to the interpretation and enforcement of the fundamental rights and freedoms of the Constitution. He observes that the wording of the relevant provisions of the Constitution, i.e., Arts. 83(1), 84 (1 and 2) and 62(1) do not clearly provide 'the extent to which these bodies [HoF/CCI] have exclusive power to decide constitutional issues'.[17] He concludes at one point that Art. 62(1) must be understood 'to probably mean that the HoF has the power to interpret the Constitution *authoritatively*, that is to say: it is the ultimate interpreter and its interpretations will be decisive and binding'.[18] He further concludes that 'this does not out-rule every and any powers of interpretation of the constitution by others'.[19]

Although he rather promotes a very cautious and insightful reading of the text of the Constitution regarding the matter at hand, Besselink seems to endorse the view, at least partially, that Art. 84(2) 'suggests a much more limited exclusive jurisdiction of the Council and the House of the Federation: only the power to give an authoritative interpretation of the Constitution with a view to establishing the (in-) constitutionality of federal and state legislation is reserved to the Council and the House of the Federation.[20] He tries to justify his position

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[16] Leonard F.M. Besselink, 'The Protection of Human Rights in Federal Systems- the case of Ethiopia' in *Proceedings of the 14th International Conference of Ethiopian Studies* (Nov. 6-1, 2000, Addis Ababa), Vol., 3. See specifically his discussion at 1372-1379.

[17] Id., at 1373. See incidentally that Professor Besselink leaves out Art. 84(3) of the FDRE Constitution from the list of determinant provisions.

[18] Id.

[19] Id.

[20] Id.

by the provisions in Arts. 9(2), 79(1) and 13(1) of the Constitution which together vest judicial power in the courts, and impose on all organs of state, along with others, the duty to respect, to enforce, to ensure the observance of, and to obey the Constitution. As regards the power of the courts to interpret the text of the Constitution, he seems to conclude that in relation to non-rights parts of the Constitution the courts 'should be assumed to have the power to apply the Constitution whenever the meaning of the Constitution is beyond doubt and does not require 'interpretation'' or because of the obviousness of the case or because it was previously settled by the CCI/Hof.[21] Regarding the power of the courts to interpret the rights and freedoms in the third Chapter of the Constitution, he boldly states that such a power is not within the competence of only the Hof and the CCI.[22] But he does not go further to show as to how the competence between the Hof/CCI on the one hand, and the courts on the other can be shared.

When it comes to the power of HoF/CCI relative to other matters such as executive actions or rules alleged to have violated the Constitution, Besselink puts forward an interesting perspective, different from those of Assefa and Ibrahim discussed earlier.[23] He proposes the following way of approaching the matter under consideration:

> ...the broadly described power to 'interpret' the Constitution [Art.62(1)], respectively, to 'investigate issues of constitutional interpretation' [Art.84(3)] and investigate or decide 'constitutional disputes' [83(1), 84(1)] is vested in Council of Constitutional Inquiry and House of Federation in a non-exclusive manner, whereas the power respectively to investigate and decide on the disputes concerning the constitutionality of legislation has been vested exclusively in these institutions.[24]

Besselink concludes that whether the matters involving the executive action relates to human rights violations or other matters in which allegation is made that there is an issue of constitutionality of the executive action involved, the HoF/CCI has jurisdiction which is not exclusive but shared with the judiciary, most appropriately, I believe, the CCI/HoF being appellate loci for a case that has begun somewhere in a court of law.

Yonatan Tesfaye is another author who dwelt on the law of constitutional interpretation in Ethiopia.[25] Originally, his ideas on the role of the courts in the

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[21] Id., 1374.

[22] Id.,

[23] Id., at 1376-1377.

[24] Id., at 1376.

[25] The following two of his publications are considered most related for our purpose: 'Whose Power Is It Anyway: The Courts and Constitutional Interpretation in Ethiopia' in *J. Eth. L.*,

enterprise of constitutional interpretation lack clarity.[26] However, in his other article considered here, Yonatan comes out with a clearer view of the role he ascribes to the Ethiopian courts regarding the task of interpreting the FDRE Constitution in a way much related to, and perhaps inspired by that of Ibrahim's point of view discussed earlier. In an attempt to put the works of other scholars, primarily Assefa's, in perspective, Yonatan says the following:

> 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 [HoF]. 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.[27] (Emphasis added).

Yonatan goes on to state that a close reading of the FDRE Constitution does not warrant the conclusion that the constitution does equate constitutional interpretation with only the 'power to determine the constitutionality of legislation'.[28] He urges that in order to determine what 'constitutional interpretation' must mean according to the Constitution, one needs to define what a 'constitutional dispute' is since the Constitution also empowers the HoF to decide all constitutional disputes.[29] He goes on to argue on the basis of Art.

Vol.22, No.1.(2008)– hereafter 'The Courts and Constitutional Interpretation in Ethiopia'; 'Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review' in *African Journal of International and Comparative Law*, Vol. 14, No.1 (2006)– hereafter 'Ethiopian Approach to Constitutional Review'. In his first article mentioned above, Yonatan has embarked upon an exemplar scrutiny of other writers' works and he should be credited for that.

[26] See 'Ethiopian Approach to Constitutional Review', Id. at 79-81. One will find it difficult to understand whether the matter with the judiciary of Ethiopia regarding non-utilizing the constitution for settlement of cases has to do with the judges' own problems (what he calls 'hands-off' approach at one point) or whether it has to do with the constitutional arrangement that prohibited courts from interpreting the Constitution. But he seems to align more with the second reason from what he says in the conclusion: 'the Ethiopian approach to constitutional review--- totally excludes courts from the business of constitutional interpretation'. See Id., at 82. One will find it difficult also to learn whether he assigns same or different meanings to the terms 'constitutional review' and 'constitutional interpretation'. See generally Id.

[27] 'The Courts and Constitutional Interpretation in Ethiopia' (note 25 above) at 133. Yonatan does not make any reference to Professor Besselink's work referred to above.

[28] Id., at 133-134.

[29] Assefa and Yonatan maintain divergent views on what each of the terms – 'constitutional interpretation' and 'constitutional dispute – means. Assefa believes that constitutional dispute involves cases of real dispute between parties. He does not consider cases of review

84(1) and (2) of the Constitution that constitutional dispute would mean both 'the general task of interpreting the Constitution with a view to ascertaining the meaning, content and scope of a constitutional provision', and 'the more specific task of determining the constitutionality of federal or state law...'.[30] Yonatan boldly concludes that the courts do not have the power to interpret the Constitution in either of the senses he elaborated as discussed above.[31]

In taking issue with Assefa's position that enforcement of the Constitution (for example in relation to the third Chapter) presupposes interpretation of some sort, Yonatan somewhat ambivalently goes on to say 'yes' and 'no'. He says that although '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', there may however be at least few cases 'where the courts can enforce the provisions of the Constitution without interpretation.[32] He goes on to give examples of cases in which the provisions of the Constitution are stated in 'an explicit and clear manner' and hence do not require the courts to do any work of interpretation but application.[33] Yonatan sums up his main argument by stating the following:

> ... 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 constitutionality arise in the courts'--- in the process of enforcing the Constitution, the courts should refer the matter to the Council. They should refrain from giving meaning to the provisions of the Constitution and resolve the Constitutional

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of constitutionality as falling under the ambit of what we call constitutional dispute because review of constitutionality does not necessarily involve a dispute between parties. A good example is abstract review of legislation which is essentially initiated by political bodies and can be resolved by the HoF without the existence of any other party—'defendant' in the case. See Assefa 'Constitutional Adjudication in Ethiopia' (note 1 above), note 22 at 10. Yonatan on the other hand states that a clear example of a constitutional dispute is reviewing the constitutionality of legislation found to be in contravention of the Constitution. He cites Art. 84(2) of the Constitution which deals with rules and procedures of challenging constitutionality of federal and state law before the HoF and the CCI as a prime case of constitutional dispute. According to Yonatan, another aspect of constitutional dispute 'is the mere fact that a dispute involves constitutionally recognized rights' and he further holds 'the determining factor is that a claim is made based on the provisions of the Constitution or that the provisions of the Constitution are in one way or another implicated in a case brought before the court'. See The Courts and Constitutional Interpretation in Ethiopia (note 25 above) at 134.

[30] .See The Courts and Constitutional Interpretation in Ethiopia (note 25 above) at 134.

[31] Id., at 134-135.

[32] Id. at 139.

[33] Id., at 140-141. We shall return to this argument later in the article to show that it misses a critical point.

dispute. Under such circumstances, they are expected to defer to the interpretation of the House.[34]

The conclusion that one can draw from the above is that in all cases where a court has to interpret the Constitution in order to settle a dispute at hand, the court in question must do nothing but refer the case to the CCI.

Other scholars have also in various ways and degrees discussed constitutional interpretation in Ethiopia. Tsegaye Regassa for example argues that Ethiopian courts must be considered to assume to have inherent power to engage in review of constitutionality when there are clear cases in which the norms in a given law contradicts with those of the Constitution.[35] Girmachew Alemu has also touched upon constitutional interpretation in the context that courts are denied the power to interpret the Constitution, although, brief and incidental as it is, his discussion does not reflect on the issue under consideration.[36]

Sisay Alemahu, who also makes an incidental discussion on constitutional interpretation system of Ethiopia in a couple of his publications, argues that 'the mandate of the HoF --- to interpret the Constitution does not exclude the courts from applying constitutional provisions on fundamental rights and freedoms'.[37] The following is his main argument in this regard:

> ...Art. 84 of the Constitution--- shows that 'constitutional disputes' are those in which the constitutionality of laws or decisions is contested and/or those which make the interpretation of some constitutional provisions necessary. It may be that the precise meaning and scope of a constitutional provision is disputed or a legislation invoked by the parties or relied on by the court, or a decision given by the government organ or official is contested or considered to be inconsistent with the Constitution. Such instances may give rise to 'constitutional disputes' that make constitutional interpretation necessary.[38]

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[34] Id., at 141.

[35] Tsegaye Regassa, 'Courts and the Human Rights Norm in Ethiopia' in *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution* (Addis Ababa: May 19-20 2000) at 114-120.

[36] Girmachew Alemu, 'Beyond the Red Terror Trials' in *The Ethiopian Red Terror Trials*, K. Tronvoll, C. Schaefer & Girmachew Alemu (eds.) (James Curry, 2009) at 118-120.

[37] See for example Sisay Alemahu, 'The Constitutional Protection of Economic and Social Rights' in *J. Eth. L.*, vol.22, No. 2 (2008) at 144-145.

[38] Id., at 145. The points in the quoted paragraph are also based on the Provisions of Arts. 6, 17 and 21 of Proclamation 250/2001. See Id.

Sisay seems to conclude that 'when such disputes arise in a case already before a court of law, the court is not precluded from entertaining and ultimately deciding the case' as the court is only required to submit a legal issue of constitutional interpretation to the CCI only if it believes that there is a need for 'authoritative constitutional interpretation'.[39]

Takele Soboka's recent article comes up with what one may term as the most liberal ever understanding of the role of courts in the interpretation of the FDRE Constitution.[40] He boldly affirms that 'the Ethiopian Constitution has apportioned the duties of constitutional interpretation between two bodies: the judiciary and the CCI/HoF' wherein the judiciary is the principal body to adjudicate constitutional issues.[41] In what may be considered as a shared view with Tsegaye, Takele believes that 'this would mean that the judiciary is equally duty bound to deny applications to cases before them those laws which they deem are outright unconstitutional'[42]. According to him 'in case the court reaches the conclusion that the law under consideration is clearly unconstitutional, it refuses to apply it to the concrete case before it and renders a decision on the bases of other laws and precedents that are constitutional', and this may be, as done in systems like the UK and Australia, called *disaplication.*[43] He believes that the term 'constitutional dispute' in Art. 83 of the Constitution must be understood to mean interpretational dilemmas or disagreements rather than factual disputes and he concludes that the Constitution does not vest in the HoF the power of adjudication of constitutional disputes involving concrete factual situations beyond the requirements of abstract interpretation of the Constitutional provisions.[44]

In a related argument, Takele asserts:

> ...the Constitution itself has come close to defining the meaning of 'constitutional dispute.' Under Article 84(2), a dispute is used to refer to a situation '[w]here any Federal or State law is contested as being unconstitutional,' thereby necessitating the need to investigate the dispute and CCI's recommendation for or against interpretation of the contested law. It thus hints at the intended meaning of the word

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[39] Id. See also Art. 21 of Proc. No. 250/2001.

[40] Takele Soboka, 'Judicial Referral of Constitutional Disputes in Ethiopia' in Assefa Fiseha and Getachew Assefa (eds.) *Ethiopian Constitutional Law Series*, Vol. 3 (Addis Ababa: AAU Printing Press, 2010).

[41] Id., at 66.

[42] Id., at 67.

[43] Id.

[44] Id.

'dispute' as it refers to a situation where the constitutionality of a federal or state law is doubted or contested.[45]

In such a way, Takele argues that any further expansive ascription of the power of the HoF to extend to 'the resolution of each and all constitutional disputes is to usurp the power of the regular judiciary' in ways contrary to the design of the Constitution itself.[46] He concludes that 'the contextual reading of the Constitution means that the word 'dispute', that appears only once in Art 83(1) of the Constitution must be taken to mean constitutional interpretation.[47] Another point perhaps worth noting in his argument is the one that goes along the line of Tsegaye earlier discussed which says that if the judge has no doubts about constitutionality or unconstitutionality of a law, the need for interpretation is dispensed with and it remains for the judge to apply or disapply the law in question.[48] The purport of this argument is that the judge can set aside a law the unconstitutionality of which he is certain about.

Finally, it is worth mentioning the expressed opinions of the former President of the Federal Supreme Court (FSC)—also ex officio chair of the CCI, and the former Vice President of the same Court—also ex officio vice-chair of the CCI. The former President of the FSC, as we can tell from his keynote address made at one gathering back in 2000, seems to believe that the power to 'interpret the Constitution is equated with the power to declare federal or state laws as unconstitutional and therefore null and void'.[49] A key note address as it was, this will not give the full view of the opinion of the former president and it should be taken at that. However, more elaborate views of the former vice-president Menbertsehai could be gathered from his publications and speeches.[50] One can conclude from these that, his theory is inclined more towards the position espoused by such scholars like Assefa discussed above. Menbertsehai seems to assert that other than non-justiciable matters such as the right to self-determination and vertical division of power between the Federal and state governments, cases of constitutional interpretation arise in the context of the claim of unconstitutionality of federal or state law.[51] But he also believes that

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[45] Id.

[46] Id.

[47] Id., at 68.

[48] Id., at 77.

[49] Ato Kemal Bedri, 'Keynote Address' in *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution* (note 1 above) at 4. See also a related discussion in Yonatan Tesfaye, 'The Courts and Constitutional Interpretation in Ethiopia' (note 25 above).

[50] An important publication, used in this review, is his book in Amharic □□□□□□ □□□ □□□ □□□□□ (roughly translated as 'the Situations/Features of Law and Justice in Ethiopia') published in December 2006.

[51] See Id., at 144.

courts have a role to play in the interpretation of the Constitution, and in this regard ascribes to courts a wider jurisdiction. As Assefa, Menbertsehai also holds that if a given case involves the challenge of constitutionality of a decision or a directive of a government organ, there is nothing that prohibits the entertainment (and decision) of such a case by an ordinary court.[52] Menbertsehai makes two additional points worth noting. The first one is that when a question of constitutionality is raised in relation to a law material for the case before it, the court must scrutinize whether the question of constitutionality is reasonably persuasive or not, and he calls this 'preliminary constitutional interpretation'.[53] The second point relates to interpreting the provisions of the constitution itself, and he says that based on Art. 3 of Proclamation No. 25/1996 (the Federal Courts Proclamation) courts have jurisdiction over cases arising under the Constitution. Therefore, he concludes, this indicates that courts can 'to some extent' interpret the Constitution.[54]

III. A Review of the Jurisprudence of the CCI and the HoF

According to the HoF's *Journal of Constitutional Decisions* published in 2008, there have been more than 80 applications, mostly by private parties, made to the CCI for constitutional interpretation. The CCI made recommendations to the HoF for constitutional interpretation in only three of the above applications.[55] While a few are still pending in the docket of the CCI, most of the rest have been rejected as not entailing constitutional interpretation.

The author's intention here is not to review the whole jurisprudence of the CCI and HoF that has emerged out of all the cases they have considered. Rather the author will canvass a few cases in order to assess particularly the position of the CCI relative to the scope and meaning of constitutional interpretation in Ethiopia. This exercise is hoped to show the interpretive stance the CCI and HOF have taken as regards their own powers as well as those of the courts.

When we study the cases referred to the CCI right from the early days of its establishment, we see all sorts of cases from those alleging religious discrimination, to claims against municipality decisions, to those raising fundamental group rights issues such as the *Silte* case[56] and the *Beneshangul/Gumuz* case[57]. A good number of these cases has been referred to

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[52] Id., at 145-146.

[53] Id., at 146.

[54] Id.

[55] These are the *Silte* case, *Beneshangul-Gumuz* Language case, and the *Kedija Beshir* case.

[56] See *Journal of Constitutional Decisions*, Vol. 1, No. 1(in Amharic, 2008) (published by the HoF) at 40-100. The English rendition of the parts of the cases reproduced or otherwise mentioned in this article (including those in the Journal) is made by the author from the Amharic original.

[57] Id., at 14-33.

the CCI by affected individuals either after a court decision or in the middle of the court process. However, most seem to come directly to the CCI, hence making it an avenue of first instance. The opinions of the CCI so far also show that it has rejected most of these cases as not entailing constitutional interpretation. This pattern of opinion is hoped to make those who will intend to bring cases to the CCI to think twice as it shows that the latter is seriously filtering cases when it comes to constitutional interpretation. This at the same time will encourage such potential applicants who want to make the CCI a first instance interlocutor to in stead resort to the judiciary with their claims.

Turning to the examination of the CCI's jurisprudence, the following paragraphs will explore the issue under two categories: textual interpretation of the Constitution, and review of constitutionality of laws and decisions. Following a conventional understanding in constitutional law, the terms 'textual interpretation of the Constitution', are ,meant to refer to cases in which interpreting the provisions of the Constitution becomes necessary for giving resolution to a certain dispute. Likewise, the terms 'review of constitutionality' on the other hand refer to cases in which the constitutionality of a law enacted at Federal or state level, or decisions of Federal or state organ or official are challenged.

To get directly to the heart of the matter, as far as the interpretation of the text of the Constitution is concerned, the opinions given so far by the CCI do not give rise to any doubt that such is within its jurisdiction. The CCI has taken upon itself to look into cases that are principally based on the interpretation of the text of the Constitution for resolution of the submitted disputes. The opinions it gave in relation to the *Silte* case, *CUD v. Prime Minster Meles Zenawi*, and the *Corruption case* (involving 41 persons) are good testimonies to the above assertion. The first two cases will be discussed here, and the reader is referred to a recent article published in J. Eth. L. for the third case.[58]

As this is almost a commonplace by now, in the *Silte case*, the central issue was the determination of the identity of a group, the Silte, which has claimed for a distinct identity as opposed to the assumption that it was part of the Gurage people. The CCI stated that there were two major questions to be answered for the resolution of the case:

1) On which organ or body does the Constitution bestow the power to determine the identity of a group?
2) What procedures should be utilized in order to decide on an identity claim by a group?

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[58] Wondwossen Demissie, 'The Right to Bail in Ethiopia: Respective Roles of the Court and the Legislature' in *J. Eth. L.* Vol, 23, No.2 (2010).

In its attempt to resolve these questions and with a view to resolving the question of identity pressed by the Silte people, the CCI stated from the outset that there is a need to interpret the text of the Constitution.[59] In regard to the first question, the CCI arrived at a conclusion that there is no provision in the Ethiopian Constitution that 'directly and clearly' provides as to who has the power to determine the identity claim of a group.[60] Having made the above-stated conclusion regarding the apparent gap in the Constitution, it went on to make a textual interpretation of the latter. It stated that a close reading of Article 52(2, a) of the Constitution would give a direction to the resolution of the case.[61] The CCI went on to hold that when the states establish their respective state administrations that best advance self-government, they need to first decide on the question of identity.[62] It also unambiguously stated that 'since the federal state structure put in place by the FDRE Constitution gives states the power to decide on their internal matters and that identity questions arise within states, such questions must obtain the decision of the state in question'.[63] The CCI also opined that by virtue of article 62(3) of the Constitution, the HoF will remain to be the ultimate settler of questions of self-determination. But it also said that the HoF shall be the appellate body in relation to questions of identity determination while the concerned state council remains to be the body to serve as a first instance venue with original jurisdiction.[64] As regards the second question (the question of procedure), the CCI recommended that referendum be used in the same way as in the claim for statehood (Art. 47) and secession (Art. 39).[65] This opinion of the CCI was endorsed by the HoF. This beyond any doubt shows that such a textual interpretation of the Constitution is well within the jurisdiction of both the CCI and the HoF, and that both bodies have accepted and exercised this constitutional competence. As will be later shown, the fact that textual interpretation of the Constitution was understood by its framers is vindicated by this jurisprudence.

The second showcase is the *CUD* case of 2005. A good number of academics has taken interest in this case for obvious reasons. Some have made this case part of their academic writings primarily holding the view that the Federal First Instance Court (FFIC) made a mistake by referring the case to the CCI for

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[59] *Journal of Constitutional Decisions* (note 56 above) at 41.

[60] See Id. at 41-42.

[61] Art. 52(2)(a)—which deals with the powers and functions of states—provides one such powers to be 'to establish a State administration that best advances self-government, a democratic order based on the rule of law; to protect and defend the Federal Constitution'.

[62] *Journal of Constitutional Decisions* (note 56 above) at 43.

[63] Id.

[64] Id., at 44.

[65] Id., at 45-46.

constitutional interpretation.[66] As it is not necessary for the purpose of this article to comprehensively review the opinions of the scholars that have commented on the *CUD* case, the author would just like to briefly inject a view in relation to the agenda of this section, i.e. textual interpretation of the Constitution, that the position of the FFIC was at least partially defensible. Most of the commentators referred to above[67] rejected particularly the issue framed by the Court as inappropriate. This in the opinion of this author arises from the failure to look at the case in the prevailing circumstances as opposed to a normal time enforcement of the law. This can help see what the court was made to deal with was not a type of case that could be decided in the same way as other everyday cases. No one would argue that the Prime Minister's ban of outdoor meetings and demonstrations on any one fine morning would be defensible, nor would it be a matter for constitutional interpretation because it would clearly fly in the face of Art. 30(1) of the Constitution which guarantees to everyone 'the right to assemble and to demonstrate together with others peaceably and unarmed, and to petition.' In other words, a court of law in Ethiopia could declare that such a ban by the chief executive violates the Constitution; that is precisely what it is supposed to do under Art. 13(1) of the Constitution. But in the *CUD* case, the court was confronted not with a clear situation of enforcement of the Constitution in normal times but with a high-stakes situation in which, depending on its rulings—whether its ruling is correct or not—a situation that would be capable of being highly politicized would arise. This would directly place the court in confrontation with the executive, not to mention the risk that its decision would be dishonoured by the latter. In the opinion of this author, it was acceptably prudent for the court to make this case a case for constitutional interpretation and get out of the flames, at least momentarily. However, this author agrees with the view that the court failed to interact with the case (as it was legally bound to) and frame the legal issue(s) it believed would involve the interpretation of the Constitution.[68] That way, it would have made use of the opportunity to engraft its judicial and rightful views on the dispute. That was not to be, and it is regrettable.

On a non-prudential consideration ground, and this is more important, this author also believes that there was an issue of constitutionality involved in that case. As stated above, the question was whether the Prime Minister was

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[66] See Assefa, 'Constitutional Adjudication in Ethiopia' (note 1 above); Sisay, 'The Constitutional Protection of Economic and Social Rights'(note 38 above); also in Sisay Alemahu, 'The Justiciability of Human Rights in Ethiopia' in *African Human Rights Law Journal*, Vol. 8 (2008), at 279-281; Takele, 'Judicial Referral of Constitutional Disputes in Ethiopia' (note 40 above).

[67] See for example Takele and Sisay, Id.

[68] See Art. 21, Proclamation No. 250/2001.

empowered by the Constitution to take measures (such as the one he took) in circumstances in which he deemed the nation's peace and order would otherwise be in grave danger. Such a constitutional interpretation question—textual interpretation—is warranted in the absence of a clear constitutional provision answering such a question. That was what that Court did, and that was in a way what the CCI investigated in its opinion by looking at the overall executive powers in the Constitution.[69]

In conclusion of the above points, this author would like to underscore first that the CCI has no doubts or confusion regarding its powers of investigation into constitutional disputes to ultimately recommend the textual interpretation of the Constitution by the HoF. Secondly, it is important to note from the forgoing that a jurisprudential stance to the effect that ordinary constitutional enforcement issues will not be passed upon by the CCI/HoF is being developed as the numerous cases rejected by the CCI has effectively demonstrated.[70] This is in line with the Constitution's provisions particularly those under Arts. 83 and 84(1). These provisions make reference to constitutional disputes, not to everyday constitutional application or enforcement.

Takele rightly observes that constitutional dispute is said to have arisen if there is a real and important disagreement between two or more constructions of a constitutional rule or principle each of which is forcefully persuasive.[71] If owing to the equally persuasive nature of the arguments of both sides, a judge believes that the dispute cannot be resolved without interpreting the constitutional rule or principle in question, there arises the need to interpret the Constitution. Constitutional disputes do not involve factual disputes.[72] Constitutional disputes rather involve in terms of the text of the Constitution issues like resolution of gaps in the Constitution (such as the one determined in relation to the *Silte* case), conflict of norms in the Constitution and problems arising from the *sue genres* nature of the Constitution.

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[69] See the Opinion of the CCI reported in *J.Eth. L.*, Vol. 23, No.2 at 146.

[70] In this connection, the observation by Sisay that the submission of a claim on the basis of a constitutional provision startles our courts to think to consider referring the case to CCI may be a little exaggerated but has some grain of truth in it. See Sisay (note 66 above) at 278. We have on the other hand cases in which courts have taken upon themselves settling a dispute on the basis of constitutional provisions in a situation that borders deciding a constitutional dispute in the sense of Article 83 of the Constitution. See, for example, the Federal Supreme Court's cassation decision in the case *W/t Tsedale Demissie v. Ato Kifle Demissie* (Federal Cassation File No. 23632). See also the comment on the same by Getachew Assefa in *J. Eth. L.* Vol. 23 (No.2) at 162.

[71] See Takele (note 40 above).

[72] Id.

We shall now turn to the second category of the CCI's jurisprudence, review of constitutionality of laws and decisions. The CCI defines its jurisdiction regarding review of constitutionality of laws and decisions very narrowly. It appears that the CCI has come to believe that the Ethiopian Constitution limits its (and the HoF's) power of reviewing constitutionality only to cases of contestation that a Federal HoPR's or a state council's proclamation is unconstitutional. It suffices to see a recent case considered and decided by the CCI to show its position in this regard. In the case *Ethiopian Blind Persons Association v. Oromia Education Bureau and Jimma College of Teacher Education*, the CCI stated that if at issue is the constitutionality of other matters than state or federal proclamations, it will not be for the CCI to decide but for the courts.[73] It reasoned on the basis of Art. 84(2) that its mandate is limited to review of constitutionality of proclamations of both levels of government. Interestingly, it also admonished courts in its opinions that they should send only those cases in which constitutionality of proclamations are challenged, not when regulations or decisions are challenged. The reading of the relevant provisions of the Constitution as well as the documents recording its making process demonstrate that the interpretive jurisdiction of the HoF (and CCI) is meant to be all-encompassing. In other words, whether at issue is the constitutionality of a proclamation or a regulation of the executive or a decision of an official or organ of state, the ultimate settler is the HoF. The intention of the framers of the Constitution will be shown in the following section.

IV. Understanding the Makers of the Constitution

This section presents the controlling views around which consensus was reached regarding the scope and meaning of constitutional interpretation during the making of the FDRE Constitution. The views presented here are those of the members of the Constituent Assembly that discussed and ratified the Constitution. Although the debates held in other bodies involved in the making process such as the drafting commission and the Transitional Council of Representatives are worth looking into, unfortunately, the minutes of these bodies do not shed any light on this particular case. As a result, we will look only at the Minutes of the Assembly that embody the discussion in relation to Arts. 62(1), 83, and 84 of the Constitution.

Before taking up the 'genetic' history of the FDRE Constitution with the intention of locating the original understanding of the makers as regards the scope and meaning of constitutional interpretation, a few words on the theoretical squabbles around the use of original understanding or intention of makers of a given constitution for interpreting its text will be in order. The

[73] Decided in December 2003 with all the 10 members concurring.

interpretive approach that advocates for ascertaining the original meaning attributed to a word or a clause or a phrase by the framers and to use that same meaning to solve a case is commonly known in the American constitutional jurisprudence as 'originalism' or the 'jurisprudence of original intention'[74]. Although the approach has its genesis in the works of the US Supreme Court, it has been employed in other systems such as the German and south African constitutional courts. This approach stands for the view that where the meaning of a constitutional provision is unclear, judges should be guided by the original intent of the framers (or original authors) of the constitution.[75]

Originalism is one of the most controversial approaches of constitutional interpretation in constitutional theory.[76] It has both supporters as well as detractors in the academic and practicing lawyers and judges in the United States and elsewhere. Those who object to the originalist positions point primarily at the extreme difficulty of precisely ascertaining the so called original intent or understanding of the framers of the constitution. This difficulty relates both to the problem of deciding whose 'intention' or 'understanding' should count (is it the drafters'? the ratifiers'? or of the people who elected them?), and the evidence for vindicating the intention to be used.[77] Each participant or delegate in a constitution making process may have his or her own understanding of the given term or clause put in the constitution and therefore it may not be warranted to conclude that there was a shared intention. These problems would be further complicated by layers and layers of compromise that go into the text of the constitution among the delegates and the interests they

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[74] For a useful summary of methods of constitutional interpretation developed by the American Supreme Court, see Walter F. Murphy, et al., *American Constitutional Interpretation*, 2nd ed. (Westbury, N.Y.: Foundation Press, 1995).

[75] Aileen Kavanagh, 'Original Intention, Enacted text, and Constitutional Interpretation,' in *Am. J. Juris.*, Vol., 47 (2002) at 255; William J. Brennan, Jr., 'The constitution of the United States: Contemporary Ratification,' in *S. Tex. L. Rev.*, Vol. 27 (1985-1986) at 435.

[76] This can be seen from the existence of a veritable mass of literature written in support or explanation or critique of this approach. See for example: Mark Greenberg and Harry Litman, 'The Meaning of Original Meaning,' in *Georgetown Law Review, Vol., 86 (1998)*; W. Rehnquist, 'The Notion of a Living Constitution,' in *Texas Law Review*, Vol., 54 (1976); Earl Maltz, 'The Appeal of Originalism," in *Utah Law Review*, Vol. 4 (1987); David Strauss, 'Common Law Constitutional Interpretation,' in *The University of Chicago Law Review*, Vol. 63 (1996); James Fleming, 'Fidelity to our Imperfect Constitution,' in *Fordham Law Review*, Vol., 65 (1997); James Boyd White, 'Constraining a Constitution: "Original Intention" in the Slave Cases,' in Md. L. Rev., Vol., 47 (1987-88); Aileen Kavanagh, 'Original Intention, Enacted text, and Constitutional Interpretation,' in *Am. J. Juris.*, Vol., 47 (2002); William J. Brennan, Jr., 'The constitution of the United States: Contemporary Ratification,' in *S. Tex. L. Rev.*, Vol. 27 (1985-1986); and Edwin Meese III, 'The Supreme Court of the United States: Bulwark of a Limited Constitution,' in *S. Tex. L. Rev.*, Vol. 27 (1985-1986).

[77] Aileen Kavanagh (n 76 above) at 255-56.

represent.[78] The problem of obtaining a full record of the making process is also not to be underestimated. Beyond the above important technical objections to this interpretive approach, more fundamental objections are also raised by its opponents. One such objection states that originalism stagnates the constitution thereby making it irrelevant to the present society. A good argument is made by White in relation to the US Supreme Court's decision on slave cases of mid 19th century.[79] In *Dred scott* (1857), for example, the Court held that according to the intention of the framers of the Constitution, negroes cannot become citizens of the US.[80] So the argument against original intent approach is that adherence to it could be as ridiculous as the *Dred Scott* decision.

Supporters of the jurisprudence of original intention on the other hand claim that it should be the controlling approach for it seeks to discern the meaning of the text of the constitution by understanding the intentions of those who framed, proposed and ratified it.[81] They believe that originalism is the best way to explicate the original and the true meaning of a constitutional text thereby keeping the meaning of the text within safe framework of fundamental principles that are permanent.[82] They also point at the danger of the interpreters' substitution of their own values and worldview for the true meaning of the text if they are allowed to attribute meaning to a constitutional provision at will without searching for the intention of the framers. One of the hazards of such judicial liberty was pointed out to result in judicial activism through which under the guise of interpretation, the interpreters impose their own ideology on the society.

As one can see from the above, both sides have plausible points to make. Therefore a total rejection of one side in favour of the other may not be advantageous. Even those who have rejected originalism as an implausible theory on a normative level have accepted the significance of the framers' intent to understand what the constitution means today.[83] This author's position as it relates to the use of the intention of the framers to interpret the FDRE Constitution is not doctrinal or normative but conceptual. Rather the author argues that interpreters of the Ethiopian Constitution must rely on the

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[78] Lourens M. du Plessis, 'The Evolution of Constitutionalism and the Emergence of a Constitutional Jurisprudence in South Africa: An Evaluation of the South African Constitutional Court's Approach to Constitutional Interpretation,' in *Sask. L. Rev.*, vol. 62 (1999) at 311-12.

[79] See James Boyd White (n 76 above).

[80] See Id.

[81] Edwin Meese III, (n 76 above) at 466.

[82] Id.

[83] Aileen Kavanagh (n 76 above) at 256-57; Lourens M. du Plessis (n 78 above).

intentions of the framers which are manifest, or at least implicit (where not so manifest) in the text of the Constitution to shed light on constitutional issues in dispute. The argument of the author is not for this approach to be used as a stand-alone means of interpretation but in combination with other approaches. In the case of the FDRE Constitution, there are more reasons that enhance the relevance of this approach. The first important reason is the fact that the Constitution was ratified not so long ago which makes the facts and circumstances of its making directly relevant to the present time. The second reason is that since the issue of constitutional interpretation power was hotly debated, there can be a lot to be learned, at least in relative terms, from the records of the debates and the fundamentals that swayed the decisions that went into the Constitution. Third, we can say that the making history of the constitution is well documented and kept and can be accessed by the interpreters and researchers. Because of these and perhaps other reasons, ascertaining the intention of the framers in our case would not be as difficult as it would be in the US where for example there were no official minutes of the Philadelphia Convention of 1787.[84]

As we turn to the point under consideration, it is imperative to mention at the outset that most of those who have written on the Ethiopian system of constitutional interpretation and who have discussed the determinants of the decision made in favour of making the HoF the interpreter of the Constitution, and not the courts, have a clear understanding of those determinants and have articulated them well.[85] The arguments and sort of policy debates on who should interpret the FDRE Constitution were made by the Constituent Assembly mainly in relation to Art. 62, which provides for the powers and functions of the HoF. One of the swaying arguments that were overwhelmingly reflected in the Constituent Assembly was the position that the Constitution is a political (as much as it is legal) covenant among the nations, nationalities and peoples of Ethiopia. Covenant as it is, the argument goes, it must be interpreted directly by those who represent, and are elected by, the parties to it.[86] The majority of the members of the Constituent Assembly were persuaded by the

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[84] See Walter F. Murphy, et al. (n 74 above).

[85] See for example Assefa Fiseha , 'Constitutional Adjudication in Ethiopia' (note 1 above) at 10-14, and *Federalism and Accommodation of Diversity* (note 2 above) at 388-391; Yonatan Tesfaye, 'Ethiopian Approach to Constitutional Review' (note 25 above) at 69-70.

[86] See the discussion of the Constituent Assembly on Art. 62 in Vol. 5 of the *Minutes of the Constituent Assembly* (November 1994, Addis Ababa). Embedded in this argument was also the old question in relation to judicial review of constitutionality that a few judges should not be allowed to control the decisions of the majority. This was clear from the repeated references made to the 'hazards' of the US system of judicial review and the fact that the Ethiopian arrangement would be a solution to the sorts of problems the US system grapples with.

argument that courts may not neutrally interpret or even may misinterpret the Constitution thereby encroaching on the rights of nations, nationalities and peoples.[87] Forceful arguments were made along the line that the Constitution must be interpreted by those who are holders of the rights the Constitution protects.

It is worth noting that ideas along the line of dividing up the interpretation of the Constitution between the courts and the HoF were aired at the Assembly.[88] This was to the effect of giving the power of interpreting the Constitution dealing with the rights of nations, nationalities and peoples to the HoF while other parts dealing with rights of individuals should be left to the courts. This approach did not muster the required support because of the same reason for which the power was given to the HoF, i.e. the fear that such power of ultimate say on constitutional interpretation by the courts may work against the rights of nations, nationalities and peoples.[89] It has been also persuasively argued by vocal members of the Assembly (and that appears to have swayed the decision finally made) that if courts (ordinary or constitutional) are made to interpret the Constitution, they may through interpretation fundamentally change the Constitution just like the American Supreme Court has been doing. According to them, such 'rewriting' of the Constitution by courts may result in dire consequences for Ethiopia if group rights fall prey to such a judicial activism by our courts.[90]

The forgoing shows that members of the Constituent Assembly have squarely dealt with textual interpretation of the Constitution. There cannot be any doubt that the framers have intended that the HoF's (and the CCI's) competence covers fully textual interpretation of the Constitution. As regards the determination of the overall scope and meaning of constitutional interpretation, a better picture emerges from looking at the Assembly's discussion on Arts. 83 and 84 of the Constitution. Regarding the key terms – 'constitutional dispute' and 'constitutional interpretation' – that have proved to be matters for debate among scholars, the debates were not clearly forthcoming on whether they are identical or distinct. Perhaps it would be wrong to expect such a technical detail from an assembly made of ordinary representatives of the people. But we at the

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[87] Id.

[88] Id.

[89] Id.

[90] Id. The jurisprudence of the US Court was mentioned by many members during the discussions at the Assembly. The argument was that the dire consequence would result here, and not in the US constitutional system, because the foundation of the Ethiopian political-constitutional system is laid on the respect for the rights of nations, nationalities and peoples who are made the holders of the sovereign power.

same time can see that the two terms were used or uttered together by the discussants, which shows that in their minds they were intended to embrace all matters of dispute and interpretation involving the Constitution and that such matters are to be resolved ultimately by the HoF.[91] One clear instance was to be found in the report of the Judicial Affairs Committee of the Constituent Assembly. It stated in relation to Art. 83 of the Constitution that 'whether it is a decision on constitutional disputes or a constitutional interpretation, it shall be ultimately decided by the HoF'.[92] This Committee also presented the two terms to be inseparable by stating that 'under Art. 83 interpreting the constitution means that the HoF has the power to settle all disputes that arise under the Constitution.' This view was endorsed almost unanimously by the Assembly.
A conclusion that the author believes could be drawn from the above is that there was no indication that a distinction was made among matters or laws or decisions involving constitutional interpretation that can or cannot go to the HoF. The overwhelming consensus was that anything and everything so long as it involves 'constitutional dispute' or 'constitutional interpretation' will be within the powers of the HoF. And what is important in this regard is the process of identifying whether a given dispute involves a constitutional dispute or constitutional interpretation. That is precisely what the CCI is there for as mandated by Art.84 which makes both procedural and substantive determination regarding the powers of the CCI. The identification of whether there is a constitutional dispute or not, as shall be argued later, will be made first by courts in the case of disputes coming from cases before courts, and by the CCI itself in cases that are lodged with it in first instance.

V. What is the Scope and Meaning of Constitutional Interpretation in Ethiopia? Analysis and Conclusions

This section will present my analysis and observations on the materials canvassed as well as the constitutional provisions being considered. The author will provide a quick analysis of the scholastic debates and of the positions of the CCI/HoF where applicable, and then present his own critical views in relation to the matters under consideration.

As shown earlier in the article, some of the scholars have argued for all-pervasive constitutional interpretation power of the CCI/HoF although there are some differences in the views of such scholars. Yonatan and Ibrahim are good examples. Yonatan has argued that anything that involves constitutional interpretation, including any construction (or in his words 'expounding') of a constitutional provision as well as review of constitutionality of any law (proclamation, regulation, directive) and decision of organ or official of state

[91] See in Id., the discussions on Arts. 83 and 84 of the FDRE Constitution.
[92] Id.

shall be decided by the HoF.[93] In this regard, he asserts that constitutional dispute means both the general task of interpreting the Constitution for the purpose of ascertaining the meaning, content and scope of a given constitutional provision, and the determination of the constitutionality of federal and state law.

In relation to the power of courts, Yonatan argues that courts are given only the power to directly (and what can also be called mechanically) apply the provisions of the Constitution which are 'clear and explicit'. In an attempt to demonstrate such clear and explicit provisions of the Constitution, he takes as an example Art. 21(2) of the Constitution which states that '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'. He says that this is a perfect example of a provision that need not involve the court in any interpretation but only mechanical application when a claim is made by a detainee or a prisoner. In such a way, he divides the constitutional provisions into two: clear and explicit (and therefore mechanically enforceable by courts), and those not clear and explicit which require some interpretation or expounding which will be untouchable by courts. In an attempt to give meaning to the concept of 'constitutional interpretation', Yonatan goes on to mistakenly assume that, from the courts' point of view, categorization of constitutional provisions in to those 'clear and explicit' and not so clear and explicit readily emerges from the face of the provisions. But an attempt to do this in abstraction without there being the underlying factual dispute to solve is highly misleading. One can assume complicated claims based on the constitutional provision that he presented as clear and explicit. Assume a person serving a prison term claims that the right to visitation by a spouse includes an extended, privately arranged stay with a spouse. A resolution to such a claim can not be made from the mechanical application of the provision in question.[94] The phrase 'to be visited by their spouses' in Art. 21 of the Constitution can prove to be as intricate as any complex constitutional dispute given the underlying facts the court is required to deal with. We can agree with the attempt to cut a slice for the courts in the enforcement of the Constitution;

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[93] See Yonatan 'The Courts and Constitutional Interpretation in Ethiopia' (note 25 above).

[94] Yonatan's other example on Art. 19 is not less controversial. He himself has admitted that the 'reasonable time' for journey to a court of law may require interpretation, but again says that it will not be a problem in most of the towns where courts and police stations are found proximate to each other. But Ethiopia is not only towns, and as we speak people have to travel hours and hours to get to courts and towns. Therefore, even if 'this does not apply in most of the towns', it applies in most of Ethiopia thereby making determination of 'reasonable time' all the more an issue for interpretation and fixation. See Yonatan, Id. at 141, note 52.

but to try to do that in the way Yonatan attempts to do, i.e. courts for only mechanically applying the Constitution, would be unrealistic and was not at all intended by the makers of the Constitution. This author believes that this position is engendered by a wrong approach to determining the meaning of 'constitutional interpretation' and 'constitutional dispute' which shall be explained in a moment.

As mentioned above, Ibrahim also seems to espouse the view that all or any kind of interpretation of the provisions of the Constitution is the power of the HoF, and courts are denied the power to engage in that. As he does not dwell reasonably well on this issue, I may have as well misread his view on this point. But as summarized earlier, he holds a view that courts have the power to review the constitutionality of executive acts (regulations, directives) and decisions as well as customary practices. He understands, in this case as Assefa and Takele do, that the power of the HoF is limited to review of constitutionality of 'legislative acts'—parliamentary acts alone. On the other hand Takele and Tsegaye go to the extent of arguing that a court of law can, in a dispute setting, set aside a law that is clearly unconstitutional without the need to refer such a law to the CCI/HoF. Takele, although in this case he eventually aligns with Assefa[95], has directly attempted to clarify the meaning of constitutional dispute vis-à-vis constitutional interpretation. He asserts that the concept of constitutional dispute carries pretty much the meaning ascribed to it by Art. 84(2) of the Constitution—'a situation where any federal or state law is contested as being unconstitutional.[96] Sisay on the other hand seems to believe the two concepts are the same basically in the sense that a constitutional dispute engenders constitutional interpretation.[97]

We have seen earlier Besselink applies three different approaches to the power of determination of constitutional issues: in non-rights parts of the Constitution, the courts can apply it but can not interpret it; in rights provisions of the Constitution as well as in cases where constitutionality of executive actions and rules are challenged, they share competence with the Hof/CCI. Sisay's position was shown to be a somewhat centralist position. His argument, as shown earlier is to the effect that constitutional dispute/interpretation is said to arise when constitutionality of any law or decision is at issue and when 'the interpretation

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[95] He on some occasions has stated that constitutional dispute might be narrower than constitutional interpretation since the latter embraces at least cases of abstract review which can not be covered by the former.

[96] See the text accompanying note 46 above.

[97] See text accompanying note 38 above.

of some constitutional provisions' becomes necessary.[98]
On the whole, it should be clear by now that different threads of thoughts and approaches have been espoused by the reviewed authors. As can be seen from the above summary, a closer look at these opinions shows that the positions taken by the writers (and the CCI) have been influenced by their understanding of the concepts of 'constitutional dispute' and 'constitutional interpretation'. Agreeably, any serious attempt to clarify the meaning and scope of constitutional interpretation in Ethiopia must address itself to the understanding of these concepts. This article argues for a fresher look at these concepts.

Earlier we have noted that during the discussion of the Constituent Assembly these conceptual expressions were used consistently to denote that all matters of dispute and interpretation involving the Constitution must be resolved ultimately by the HoF.[99] It needs to be re-emphasized that the Minutes of the Constituent Assembly do not give any indication that a distinction needs to be made among matters or laws or decisions involving constitutional interpretation that may or may not go to the HoF. This makes it clear that the HoF is the body with whom the ultimate power to decide all constitutional disputes and all questions of constitutionality reside. This is also manifest from the provisions of the Constitution. This must lead us to a conclusion therefore 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. To state this in other words, it will be unconstitutional for the courts to pass upon an issue of constitutionality or a settlement of constitutional dispute whether they are faced with simple or complex issues in the matter. So the argument by those who say that courts can set aside a clearly unconstitutional law relied upon by the parties in a dispute is untenable when seen both from the vantage point of the intention of the makers and the black letter law of the Constitution.

It has been noted that for the CCI/HoF to be involved we must first be sure (and therefore clear) that what is before it is either a constitutional dispute or a constitutional interpretation question. We see that the Constitution uses the two expressions almost equal times and almost identically again when it comes to

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[98] See Id., again. Sisay however goes on to say that generally a constitutional dispute arises (thereby making constitutional interpretation necessary) in cases where 'the precise meaning and scope of a constitutional provision is disputed'. See Id. However, this assertion of his makes constitutional interpretation very fluid and also the respective role of courts and the HoF impossible to determine.

[99] See again discussion of the Constituent Assembly on Art. 83 and 84 in Vol. 5 of the *Minutes of the Constituent Assembly* (November 1994, Addis Ababa).

the power of the HoF. These are evident from Arts. 62, 83 and 84. Art. 62(1) says 'the House [HoF] has the power to interpret the Constitution', while Art. 83(1) says 'all constitutional disputes shall be decided by the House of the Federation'. The fact that the two terminologies are meant to convey a determination of a constitutional issue can be clearly gathered from Art. 84(1) of the Constitution. It reads:

> The Council of Constitutional Inquiry shall have powers 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 the Federation.

One can easily see from the above provision the fact that it is the existence of a constitutional dispute that leads to the interpretation of the Constitution.[100] The two are part of a continuum of what is called determination of a constitutional issue. Contrary to what some of the authors whose works I have reviewed in this article believe, Art. 84(2) is not meant to determine the jurisdiction of the HoF. It is rather principally meant to set down procedures for the CCI to go about determining a dispute involving a federal or state law submitted to it by a court or an interested party.[101] It needs to be further noted that Art. 84 is not meant to regulate the powers and functions of the HoF regarding settlement of

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[100] As my summary above of professor Besselink's article indicates, he failed to pinpoint where exactly at the power of the courts and HoF can be shared regarding for example the interpretation the provisions of Chapter Three of the Constitution as well as in cases involving constitutionality of executive actions. The point of exist of the courts and entry of the HoF/CCI needs to be pointed out with some certainty, and I believe that is possible only with an ascription of a correct meaning to the term 'constitutional dispute'.

[101] Incidentally, some authors have chosen to give the phrase 'interested party' very broad meaning which does not seem to me to be warranted by the Constitution. See Yonatan 'Ethiopian Approach to Constitutional Review''(note 25 above), note 2 at 53; and also in 'The Courts and Constitutional Interpretation in Ethiopia', Id., at note 3 and 135. See also Ibrahim (note 14 above) at 82-84. Both of these authors relied on Abebe Mulatu's piece entitled 'who is the Interested Party to Initiate a Challenge to Constitutionality of Laws in Ethiopia', published in *The Law Student Bulletin*, Vol.1 (1999). The idea is that the phrase can be taken to mean among others an NGO, an association or any organized interest group who may be affected by the law being challenged. I believe on the contrary that in the two places where Art. 84 uses the phrase 'interested party', it is meant to specifically refer to a disputant party to a case in court now being challenged. The Amharic version of Art. 84(2) states that more clearly: '--- ጉዳዩም በሚመለከተው ፍርድ ቤት ወይም በባለጉዳዩ ሲቀርብለት ---'. This unmistakably refers to the person who is a party to a given case in a court and wants a constitutional interpretation to be made for a just disposition of his case. Similarly, the phrase 'the interested party' in Art. 83(3) refers to a disputant in a case. This is more clearly so because under this Sub-Article, the case comes from the court in the first place and such an interested party can only be someone who is a defendant or a plaintiff in that case because of the procedural requirements in our laws that are in place.

constitutional disputes or constitutional interpretation; it rather is meant to provide for the powers and functions of the CCI. This must also hint at the fact that it would be misleading to try to determine the power of the HoF by using a provision which was not meant for that purpose.

Even for those who believe that Art. 84(2) is important for determining the powers of the HoF, this author believes that Art. 84(1) and 84(3) are equally important in that regard and that Art. 84(2) should not be viewed in isolation. In this connection it has already been shown that Art. 84(1) states clearly that constitutional disputes lead to constitutional interpretation and therefore the two cannot be separated.[102] A closer study of the provisions of Art. 84(1) also depict that constitutional disputes cannot be limited to what Art. 84(2) is believed by some to mean, i.e. federal or state parliamentary acts, because it speaks about [any kind] of constitutional disputes that may lead to constitutional interpretation. Furthermore, Art. 84(3) refers to '*issues* of constitutional interpretation' (Emphasis added). An issue of constitutional interpretation would arise when there is a constitutional dispute. A constitutional dispute can arise in such situations as the familiar *Silte* case where the Constitution does not readily deal with an important matter of determination of an identity of a group. Therefore Art. 84(1-3) gives us primarily the overall powers and functions of the CCI and plays a great role in elucidating the two terminologies ascribed in Arts. 62(1) and 83(1) to the HoF as its powers.

Having concluded that the phrases 'constitutional dispute' and 'constitutional interpretation' are part of the same power of determining a constitutional issue and also that all constitutional disputes – whether involving federal or state proclamation, regulation, directive or decision of federal or state organ or official – are made within the constitutional interpretation powers of the HoF/CCI, it is appropriate to say a little more on when the application of the text of the Constitution by the courts may give rise to a constitutional dispute that makes the interpretation of the Constitution necessary.

We have earlier seen the views of Yonatan which says that anything that goes beyond mechanical application of the clear and explicit provisions of the Constitution are not for the courts to do; they rather have to defer that to the CCI/HoF. Again, such an attempt to categorize provisions of the Constitution

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[102] This is even self-evident from Art. 84(2) itself which says that: 'where any Federal or state law is contested as unconstitutional and such a dispute is submitted by any court or interested party---'. (Emphasis added). As can be seen, Art. 84(2) calls a contestation of unconstitutionality of a law a dispute once more underscoring the fact that the two expressions are part of the same process.

into 'clear and explicit' and 'not clear and explicit' without the underlying factual disputes would be severely misleading. First, such an approach cannot be anchored to any part of the Constitutional text; nor can it be shown to have been insinuated by its framers. Second, it is hugely problematic as a matter of legal interpretation to think that the role of the courts in relation to the application of the textual constitutional law would be limited as such by clarity or explicitness of constitutional provisions. What emerges from the making history as well as the wording of the Constitution is that what makes a given matter an issue of constitutional interpretation is whether a constitutional dispute is involved or not in the application of that particular constitutional provision. This author concurs with Takele on the point that it is absolutely the province of the courts to determine the content and meaning of a constitutional provision so far as its application for the resolution of a factual dispute is concerned. But while in the process of the court's doing so, if a constitutional dispute arises that convincingly calls for the authoritative interpretation of the Constitution, the court in question or the litigant would call the CCI/HoF into action as per Arts. 62(1), 83(1) and 84 of the Constitution.[103] Therefore, all determinations of the content and meaning of a provision of the Constitution in relation to a factual dispute submitted to it in a case lie within the powers of the courts unless and until a constitutional dispute arises. It was earlier pointed out that a constitutional dispute is said to have arisen if a court is confronted with two or more equally persuasive viewpoints regarding the constitutional issue in question. It has been reiterated in Proclamation No. 250/2001 that the court of law is the first important determiner of whether an issue before it requires constitutional interpretation or not. According to this law, a court handling a dispute shall submit constitutional interpretation issues to the CCI only if it believes that there is a need for constitutional interpretation in deciding that case.[104] It further states that the court must forward in this case 'only the legal issue necessary for constitutional interpretation.' This law also obliges a disputant before a court of law who wishes to submit a constitutional interpretation issue to the CCI to first submit the question of constitutionality to the court handling the case.[105] This must inform us that an issue of constitutional interpretation cannot readily emerge from the face of a constitutional provision or a case until after a vigorous investigative engagement in the fact and the law by a court or the CCI, as the case may be. Informed must we be as well that the courts of law play a determinative role in formulating constitutional interpretation issues. But beyond determining or formulating issues of

[103] See also Arts. 21 and 22 of Proclamation No. 250/2001 for further clarification of what the court should do in relation to issues of constitutionality arising in relation to a case it is handling.

[104] Id., Art. 21.

[105] Id., Art.22.

constitutional interpretation or constitutional dispute, the courts do not have the power of resolving them. This is in line with both the spirit of the Constitution and its framers' intentions.

In summing up, it is worth restating that the view that we can create a catalogue of constitutional provisions to automatically determine whether they fall under the application-jurisdiction of the courts or not is not a correct understanding of the constitutional interpretation regime under the FDRE Constitution. The correct understanding rather is that the courts can determine the content and meaning of a constitutional provision so far as a constitutional dispute requiring constitutional interpretation (by the HoF) is not involved. In the case of disputes before a court of law, the court in question determines whether a constitutional dispute requiring constitutional interpretation has arisen or not while the CCI determines whether or not a constitutional dispute exists in relation to matters coming to it out of court. As regards the proper expanse of the jurisdiction of the HoF as well, this article has argued that the makers did intend that the HoF commands all the powers to interpret the Constitution or decide on all constitutional disputes, and the CCI to investigate in relation to all matters involving constitutional dispute requiring constitutional interpretation without any exception or limitation. There was no design to share these powers among the courts and the HoF. It is therefore a high time that the course of the debate by the academics and the position of the CCI be reconsidered. There is no other correct way of understanding the understanding of the makers of the FDRE Constitution on this matter.