RETHINKING LITIGATION GROUNDED ENFORCEMENT OF CONSTITUTIONAL RIGHTS IN ETHIOPIA

Mizanie Abate Tadesse[*]

Abstract

In its Preamble, the Constitution of the Federal Democratic Republic of Ethiopia states that full respect of human rights is key in achieving the Ethiopian national objective of building a political community founded on rule of law and democratic order. Cognizant of this, the Constitution guarantees a broad range of human rights in its Bill of Rights chapter. However, constitutional remedies for infringement of constitutional rights are rarely applied notwithstanding that the Constitution has been in force for close to twenty-six years. Most scholarly works on the matter conclude that entrusting the power of constitutional interpretation to the House of Federation in lieu of ordinary courts is the root cause for this problem. This article contends that lack of clear and comprehensive Bill of Rights litigation procedure as well as redress for violation of constitutional rights could also contribute to the current unacceptably low enforcement level of the Bill of Rights of the Constitution via constitutional litigation. To augment his position and show the legal gaps and challenges as well as put forward recommendations for constitutional and legal reform, the author has analyzed the Constitution and relevant laws and leading cases of the House of Federation and the Council of Constitutional Inquiry. The author has also consulted the laws and cases of other countries and

[*] Associate Professor of Law, School of Law, Addis Ababa University. The author could be reached at: mizanie.abate@aau.edu.et. This article is a slightly modified version of a paper the author presented at the Human Rights and Access to Justice in Ethiopia Symposium, co-organized by Northwestern Pritzker School of Law's Journal of Human Rights and Addis Ababa University School of Law's Journal of Ethiopian Law, on February 19, 2020 at Northwestern Pritzker School of Law, Center for International Human Rights, Chicago, Illinois, USA. The author is grateful to Professor Bridget Arimond of Northwestern Pritzker School of Law and two anonymous reviewers for their constructive comments.

relevant literature with a view to identifying normative standards and practices from which Ethiopia could learn.

Key-terms: Enforcement, constitutional rights, constitutional remedies, Ethiopia

Introduction

In its Preamble, the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) underscores the key role full respect of human rights could play in achieving the Ethiopian national objective of building a political community founded on rule of law and democratic order.[1] Accordingly, the Constitution guarantees a broad range of human rights in its chapter three. Chapter three of the Constitution guarantees not only the traditional civil and political rights but also socio-economic and collective rights. The Constitution incorporates a commendable interpretation clause which necessitates the interpretation of the fundamental rights and freedoms specified in chapter three in conformity with pertinent international human rights standards and jurisprudence.[2] By conferring international human rights treaties ratified by Ethiopia the status of the law of the country, the Constitution has also created an avenue through which the treaties could be invoked before domestic courts by individuals aggrieved of invasion of their rights with a view to get redress.[3] While it is not justiciable in in its own right, the National Policy Principles and Objectives chapter could also serve as a guidance in the interpretation of the constitutionally recognized socio-economic, cultural and environmental rights.[4]

[1] The Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), Preamble.

[2] *Id.*, art. 13(2).

[3] *Id.*, art. 9(4).

[4] *Id.*, arts. 89-92.

Academics who criticize the institutional arrangement for the enforcement of constitutional rights commence their analysis by appraising the Constitution as a 'progressive' and 'impressive' instrument protecting human rights 'in conformity with international human rights laws and principles'.[5] These kinds of affirmations are overstatements and arise from lack of a meticulous reading of the Constitution. Notwithstanding that it incorporates a long list of rights, the Constitution is fraught with a number of maladies the most notable ones being: lack of explicit recognition of certain human rights;[6] an uncommon classification of constitutional rights into human and democratic rights whose application has resulted in exclusion of non-Ethiopians from exercising a handful of human rights;[7] attachment of claw back clauses to a number of civil and political rights and ambiguous limitations to certain human rights;[8] making the right to life derogable;[9] and bad formulation of socio-economic rights.[10]

Although the Constitution has gaps in terms of articulation of constitutional rights, this could have been remedied had we have a strong judicial activism. As a matter of reality, litigation based on the Bill of Rights of the Constitution

---

[5] See, for example, Chi Mgbako *et al*, *Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights*, 32(1) FORDHAM INTERNATIONAL LAW JOURNAL 259 (2008).

[6] Examples of rights not recognized in the FDRE Constitution are the right to remedy for violations of constitutional rights and the right not to be arrested for failure to pay a civil debt.

[7] The Constitution unusually classifies rights as human rights (articles 14-28) and democratic rights (articles 29-44). For grounds of this calcification and the effect thereof, see Gedion Timothewos, *Freedom of Expression in Ethiopia: The Jurisprudential Dearth*, 4(2) MIZAN LAW REVIEW 208-213 (2010).

[8] See Adem Kssie, *Human Rights in the Ethiopian Constitution: A Descriptive Overview*, 5(1) MIZAN LAW REVIEW 58 (2011). A typical example of these kinds of limitations can be found under article 30(1) which subjects the exercise of the right to assembly and peaceful demonstration to public convenience.

[9] The right to life is not listed among the list of non-derogable rights during state of emergency under article 93(4)(C).

[10] Articles 41, captioned as Economic, Social and Cultural Rights, neither explicitly guarantees all socio-economic rights nor specify the normative contents of the rights. See Sisay Alemahu Yeshanew, *The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia*, 8 (2) AFRICAN HUMAN RIGHTS LAW JOURNAL, 276 (2008).

is extremely rare compared to the magnitude of human rights violation in the country. Admittedly, constitutional rights litigation is not the only avenue for the enforcement of human rights. It is equally true that it is through litigation before judicial and quasi-judicial bodies that individuals aggrieved of violation of their constitutionally guaranteed rights could get appropriate remedies. As Sisay rightly argued, the argument that the constitution is symbolic and incorporates broad human rights standards that are not in themselves amenable to litigation and hence should be applied through other subordinate laws is flawed for two reasons. First, the 'Constitution enshrines provisions specific enough to be applied by courts' and, second, 'there are constitutional rights which do not have a perfect substitute in ordinary legislation'.[11] The centrality of domestic remedy for infringement of human rights in Ethiopia must also be viewed against the backdrop of individuals' limited access to international treaty bodies mandated to receive complaints of human rights violations. Apart from the fact that access to these bodies is contingent up on exhaustion of all available domestic remedies and remedies before international bodies are more expensive, infective and time taking, Ethiopia has not generally accepted the competence of treaty bodies to entertain individuals' claims of human rights infringement.[12]

It is interesting to note the paradox of widespread violation of human rights infringement in Ethiopia but limited invocation of the Bill of Rights of the Constitution to seek remedy. The Ethiopian People's Revolutionary Democratic Front (EPRDF) that stayed in government power for more than 27 years is infamous for lack of respect of fundamental rights and freedoms. Widespread and systematic violations perpetrated with impunity during its era include, but not limited to, arbitrary killings; disappearances; torture and other cruel, inhuman or degrading treatment or punishment; humiliating treatment of prisoners; arbitrary arrest, detention without charge, and lengthy pretrial detention; severe restrictions on civil and political rights; and

[11] *Id.*, at 283-84.

[12] The only exceptions to this are African Commission on Human and Peoples' Rights and African Committee of Experts on the Rights and Welfare of the Child.

interference in religious affairs.[13] Driven by a revolutionary democracy ideology that prioritizes economic development over protection of human rights, the government was persistently unwilling to respond to call by national and international actors to give up its policies and practices that perpetuate human rights violations.

It is the coming in to power of Abiy Ahmed as prime minister in April 2, 2018 that has resulted in change of human rights policy and practice of the government. The new leadership took a range of crucial measures which it believes would improve human rights protection.[14] To expedite legal reforms, the government has established a Legal and Justice Affairs Advisory Council composed of 13 prominent legal professionals.[15] The Council is mandated to advise the Office of the Attorney General in its effort to undertake a

[13] *Country Reports on Human Rights Practices for 2016 and 2017*, United States Department of State, Bureau of Democracy, Human Rights and Labor.

[14] For more on this, see Human Rights Watch, *Ethiopia Events of 2018*, https://www.hrw.org/world-report/2019/country-chapters/ethiopia (last accessed, 16 January 2020); Mahlet Fasil and Yared Tsegaye, *Analysis: Ethiopia Crackdown on Corruption, Human Right Abuses, Everything You Need to Know*, Addis Standard/ November 16, 2018, http://addisstandard.com/analysis-ethiopia-crackdown-corruption-human-right-abuses-everything-need-know/ (last accessed, 16 January 2020); Felix Horne, June 26, 2018 9:33AM EDT Torture and Ethiopia's Culture of Impunity, https://www.hrw.org/news/2018/06/26/torture-and-ethiopias-culture-impunity (last accessed, 16 January 2020); Freedom House, *Policy Brief Reform in Ethiopia: Turning Promise into Progress*, September 2018 By Yoseph Badwaza and Jon Temin, https://freedomhouse.org/report/special-reports/reform-ethiopia-turning-promise-progress (last accessed, 12 January 2020); Nega Gerbaba Tolesa, OP:ED: *Dealing With Past Human Rights Abuses In Ethiopia: Building the Bridge Between Justice and Peace*, Addis Standard / December 10, 2018, http://addisstandard.com/oped-dealing-with-past-human-rights-abuses-in-ethiopia-building-the-bridge-between-justice-and-peace/(last accessed, 16 January 2020); Wondwossen Demissie, *OP:ED: The Government's Approach to Past Human Rights Violations Needs to Be Transparent*, Addis Standard / January 25, 2019, https://addisstandard.com/oped-the-governments-approach-to-past-human-rights-violations-needs-to-be transparent/ (last accessed, 16 January 2020); and Kjetil Tronvoll, *Admitting guilt in Ethiopia: Towards a truth and reconciliation commission?* June 22, 2018, https://www.ethiopiaobserver.com/2018/06/22/admitting-guilt-in-ethiopia-towards-a-truth-and-reconciliation-commission/ (last accessed, 16 January 2020).

[15] Road Map of the Justice and Legal Affairs Advisory Council.

comprehensive reform of the legal and justice system.[16] So far, the Council has spearheaded the repeal and replacement of the two most human rights unfriendly laws; namely, the 2009 Charities and Societies Proclamation and the Anti-Terrorism Proclamation.

Evidently, government sponsored atrocities of human rights violations have declined since Abiy Ahmed came to power. However, the human rights violation has changed its face after the political transition. Partly due to the inability of the government to enforce law and order and partly due to ethnic tensions fueled by abuse of the democratic and political space by intolerant and hate preaching activists and politicians coupled with high rate of youth unemployment and limited access to public funded services, human rights abuses by individuals and informally organized youth groups have become a matter of daily life in many parts of Ethiopia. Such state of affairs has resulted in massive internal displacements, brutal killings, beatings and destruction of properties and religious establishments, among others.

Understandably, we cannot abate the cycle of human rights abuses in Ethiopia unless we ensure legal accountability and remedy for infringement. For that to happen, the enforcement of the Bill of Rights of the Constitution is indispensable. The most shattering deficiency of the FDRE Constitution, however, is the institutional architecture for the enforcement of constitutional rights protection. Largely enthused about putting in place at most protection to the group interests and rights of nations, nationalities and peoples (NNP), arguably at the expense of individual rights, not only does it snatch the power of constitutional interpretation[17] from ordinary courts but also put it in wrong hands. The Constitution entrusts litigation-based enforcement of its Bill of Rights to the House of Federation (HF): a non-judicial second house of parliament.[18]

---

[16] Ibid.

[17] In the context of Bill of Rights litigation, constitutional review, (constitutional) judicial review or constitutional interpretation, interchangeably used in this work, refers to the power to ascertain the meaning of a provision in the Bill of Rights in order to establish whether law or conduct is inconsistent with that provision.

[18] See articles 62 and 83(1) of the FDRE Constitution.

Constitutional remedies for infringement of constitutional rights are rarely applied notwithstanding that the Constitution has been in enforce for close to twenty-six years. Most scholarly works on the subject matter concluded that entrusting the power of constitutional interpretation to the House of Federation in lieu of ordinary courts is the root cause for this problem.[19] Little attention has been paid by scholars to the impact of lack of clear and comprehensive Constitutional Bill of Rights litigation procedure as well as redress for violation of constitutional rights for the current unacceptably low level of enforcement of the Bill of Rights of the Constitution via constitutional litigation. This article is an attempt to address this gap by instigating debate and contributing to the discourse on human rights and access to constitutional remedies in Ethiopia. Thus, it seeks to canvass whether and the degree to which lack of detail rules and procedures on constitutional remedies could adversely affect litigation-based enforcement of the Bill of Rights of the Constitution even under the existing institutional arrangement. In doing so, the article does not attempt to cover all issue surrounding the substantive and procedural aspects of constitutional remedies. Instead, it focuses on areas where there is a dearth of scholarly analysis or the author would like to inject his perspectives.[20]

As the research objective necessitates analysis of the law and the prevailing practice, the author has employed a doctrinal research methodology that blended analysis of laws and cases. The author has analyzed the Constitution

---

[19] See, for example, Yonatan Tesfaye Fessha, *Whose Power Is It Anyway: The Courts and Constitutional Interpretation in Ethiopia*, 22 J. ETHIOPIAN L. 128, 141 (2008); Takele Soboka Bulto, *Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory*, 19(1) AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 115-16 (2011): Chi Mgbako, *supra* note 5, 278; Getachew Assefa, *All about Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation*, 24 J. ETHIOPIAN L. 139, 140 (2010); Assefa Fiseha, *Constitutional Adjudication in Ethiopia: Exploring the Experience of The House of Federation (Hof)*, 1(1) MIZAN LAW REVIEW10 (2007); and FASIL NAHUM, CONSTITUTION FOR A NATION OF NATIONS: THE ETHIOPIAN PROSPECT 59 (The Red Sea Press, Inc. 1997).

[20] Related procedural issues not covered in this work include the legal rules on *amici curiae*, oral hearing (procedural fairness), legal aid, court fees (costs), principles of constitutional interpretation and applications of limitations.

and relevant laws and leading cases of the HF and the Council of Constitutional Inquiry (CCI). The cases the author selected for analysis are the ones that involve violation of constitutional rights by the government through its official0s and institutions.

1. An Overview of the Right to Effective Remedy and Associated State Obligation

Be it in the context of a domestic legislation or international human rights treaties, the purpose of submission of complaints of human rights violations by individuals is to seek appropriate remedy. To emphasize on the significance of remedy for human rights infringements, national and international tribunals have referred to a maxim 'a right without a remedy is no right at all' in their dictum.[21] The right to an effective remedy for a human rights violation is also provided for in numerous global and regional human rights instruments including article 8 of the Universal Declaration of Human Rights (UDHR) and article 2(3)(a)-(c) of the International Covenant on Civil and Political Rights (ICCPR) to which Ethiopia is a party. Moreover, there is a wider recognition that the right to effective remedy is part of customary international law.[22]

Generally, the term 'remedy' can be understood to refer to 'the range of measures that may be taken in response to an actual or threatened violation of human rights'.[23] In *Jawara v The Gambia*, the African Commission on Human and Peoples' Rights set out the three important elements of a remedy;

---

[21] See, for example, what Lord Denning said in *Gouriet v Union of Post Office Workers* [1978] AC 435; and Chief Justice Marshall of the United States Supreme Court affirmed in *Marbury v. Madison. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). See also African Commission on Human and Peoples' Rights, *Free Legal Assistance Group and Others v Zaire*, (2000) AHRLR 74 (ACHPR 1995) Para. 37.

[22] See Cantoral Benavides Case [ACHtR Series C 88 (2001]: 11 IHRR 469 (2004).

[23] DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 17 (Third Edition, 2015). See also The United Nations Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, Principle V, Guideline 8.

namely, availability, effectiveness and sufficiency. [24] The Commission further clarified that a remedy is considered to be 'effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.'[25]

Remedy has substantive as well as procedural facets. While remedy connotes the outcome of proceedings, and the relief afforded to the claimant in its substantive sense, it, in its procedural dimension, refers to the processes by which arguable claims of human rights violations are heard and decided, whether by courts, administrative agencies, or other competent bodies.[26] The procedural aspect of the right to an effective remedy, the right of access to justice, demands that the remedy or remedies in question must be accessible by victims.[27] It, *inter alia,* requires an accessible, independent and competent tribunal; broader standing standards, legal aid services; and fair, timely and expeditious proceedings.[28]

2. Key Procedural Issues in Bill of Rights Litigation

2.1 Bill of Rights Litigation Procedural Gap

The fundamental human rights and freedoms recognized in the chapter three of the FRDE Constitution would be illusionary unless they are supported by enforcement procedural rules. It is extremely important to flash out at the outset that the Bill of Rights of the Constitution in Ethiopia is not accompanied by full-fledged enforcement rules dedicated to it. The procedure for litigation of the Bill of Rights can be found scattered in the

[24] (2000) AHRLR 107 (ACHPR 2000) para 32.

[25] *Ibid.* See also African Commission on Human and Peoples' Rights, General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), Adopted at the 21st Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, held from 23 February to 4 March 2017 in Banjul, The Gambia, Para.23.

[26] Dinah Shelton, *supra* note 23, 16 and the UN Basic Principles and Guidelines.

[27] UN *Basic Principles and Guidelines*, *supra* note 23, Principle 12.

[28] Dinah Shelton, *supra* note 23, 17 and UN Basic Principles and Guidelines, *supra* note 23, Principle 12.

Constitution, Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities Proclamation, Proclamation No. 251/2001 (HF Proclamation) and Council of Constitutional Inquiry Proclamation, Proclamation No. 798/2013 (CCI Proclamation). As explained below, these laws are far from being complete.

Generally, individuals' or groups' grievances of violations of any of their rights recognized in chapter three of Constitution may arise in or outside judicial proceedings. Where an issue of constitutional interpretation arises in a pending court case, the court or the litigant may refer the issue that needs constitutional interpretation to CCI.[29] Furthermore, any individual who allege that his/her fundamental right and freedom recognized in the Constitution have been violated may directly submit the case to the CCI after exhausting all available remedies.[30] In both cases, the CCI shall consider the matter and if it finds that the matter does not need constitutional interpretation, it shall reject the case or remand it to the court, and, if, on the other hand, it believes there is a need for constitutional interpretation, it shall submit its recommendations to the HF for a final decision.[31] A party dissatisfied with the decision of the CCI is entitled to lodge his/her appeal to the HF.[32] Apart from procedural rules regulating the manner of submission of complaints of constitutional human rights violations discussed above, other procedural rules set out in the aforementioned laws, albeit with enormous ambiguity, include: standing,[33] exhaustion of other remedies,[34] order of suspension of judicial proceeding until the CCI decides on the matter referred for constitutional interpretation,[35] gathering of professional opinions and

[29] Art. 84(2) of the Constitution and article 4 of the Council of Constitutional Inquiry Proclamation, Proclamation No. 798/2013 [CCI Proclamation].

[30] *Id.*, art. 5(1).

[31] FDRE Constitution, art. 84(3).

[32] *Ibid.*

[33] Art. 4 of CCI Proclamation.

[34] *Id.*, art. 3.

[35] *Id.*, art. 6.

production of evidence,[36] decision making procedure,[37] the precedent effect of the decision of the HF on constitutional interpretation,[38] the time span within which the HF should make a decision,[39] and service fee.[40] Other procedural matters that are not or barely regulated encompass: joinder of parties, admission of amicus curiae; oral hearing, period of limitation, withdrawal or discontinuance of applications, rules of constitutional interpretation and types of redress for infringement of constitutional rights except declaration of invalidity of law or conduct.

At this point, it is important to note that the Constitution entitles the CCI to 'draft its rules of procedure and submit them to the House of the Federation; and implement them upon approval.'[41] Moreover, the CCI Proclamation empowers the CCI to lay down specific rules regarding application procedure for constitutional interpretation,[42] the procedure of deliberation and making decision or submitting recommendation,[43] the time limit within which the Council notifies its decision to the applicant,[44] and manner and conditions of public hearing.[45] The HF Proclamation, on its part, gives the HF a specific mandate of identifying and implementing principles of constitutional interpretation[46] and a general mandate of enacting regulations for the implementation of the HF Proclamation.[47] In view of the fact that procedural rules, such as on remedies, period of limitation, fairness and timely disposition of proceedings and standing have a serious repercussion on

[36] Art. 9 of CCI Proclamation & arts. 8 and 10 of Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities Proclamation, Proclamation No. 251/2001 [HF Proclamation].

[37] Art. 11 of the CCI Proclamation and art. 14 of the HF Proclamation.

[38] Art. 11 of the HF Proclamation.

[39] Art. 1 of the HF Proclamation.

[40] Art. 14 of the CCI Proclamation and art. 17 of the HF Proclamation.

[41] Art. 84(3) of the FDRE Constitution.

[42] Art. 7(1) of the CCI Proclamation.

[43] *Id.*, art. 10.

[44] *Id.*, art. 12(2).

[45] *Id.*, art. 10 (4).

[46] Art. 7(1) of the HF Proclamation.

[47] Art. 58 of the HF Proclamation. So far, neither the HF nor the CCI have adopted a rule of procedure or directive.

substantive human rights, it is submitted that these matters should be regulated by a law to be passed by the federal parliament as opposed to the CCI or HF. The power of this organ to issue a comprehensive Constitutional Bill of Rights enforcement law springs from articles 13(1), 9(2), 51(1) and 55(1) of the Constitution.

As discussed in the next sub-section, the author of this article is of the opinion that ordinary courts do not have the power to interpret the Constitution in general and the Bill of Rights chapter in particular. Thus, when a dispute arises in respect of whether a statute, customary practice and conduct of a government are in violation of constitutional rights, the matter needs to be adjudicated by the HF. However, the fact that the HF has the power to adjudicate constitutional dispute does not necessarily mean that it will fully resolve a case in which constitutional interpretation arises. In particular, where an issue that needs constitutional interpretation arises in a case pending before court, the CCI Proclamation enjoins the court and litigant to submit only a matter that needs constitutional interpretation.[48] After the issue of constitutional interpretation is resolved, the concerned court will then decide on the entire case and order remedy if infringement of constitutional rights is found. Courts have also a role to apply the Constitution in concrete cases even if a constitutional issue arises if this is a matter on which the HF has already handed down interpretation. This is so because the final decision of the HF creates a binding precedent which courts should follow.[49] In these circumstances, courts have an opportunity to resolve cases where the violations of constitutional rights are alleged. However, they cannot effectively play their role due to the absence of Constitutional Bill of Rights enforcement rules. Distinct rules of procedure that are different from criminal and civil procedural rules are needed that take in to account the nature of constitutional litigation in terms of standing, litigation proceeding and remedies.

In this regard, the experience of Nigeria and Uganda could be instructive for Ethiopia. Similar to the FDRE Constitution, the 1999 Constitution of the Federal Republic of Nigeria contains a list of fundamental rights in Chapter

[48] Art. 4(4) and (6) of the CCI Proclamation.

[49] Art. 11(1) of the HF Proclamation.

IV without laying down the specific rules of enforcement. The detailed enforcement matters were laid down later in the 2009 Fundamental Rights (Enforcement Procedure) Rules made by the Chief Justice of Nigeria pursuant to the authority conferred on him by section 46(3) of this Constitution. The 2009 Rules, which replaced the 1979 and 2008 rules, have overriding objectives of ensuring 'expansive and purposeful interpretation, access to justice; public interest litigation, abolition of objections on ground of *locus standi*; and expeditious trial of human rights suits among others.'[50]

Similarly, the 1995 Constitution of the Republic of Uganda, in article 50 provides for the enforcement of rights and freedoms recognized under its chapter four by courts of law. In its sub-article 1, it provides that: '[a]ny person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.' Sub-article 4 of the same article enjoins Parliament to make laws for the enforcement of rights and freedoms under Chapter Four of the Constitution. By virtue of this authority, the parliament adopted the 2019 Ugandan Human Rights (Enforcement) Act. After laying down the principal procedural rules, such as standing, prohibition of rejection by the competent court merely for failure to comply with any procedure, form or any technicality, redress for violation of human rights including compensation and rehabilitation, personal liability of government officials and period of limitation,[51] the Act leaves other detailed procedural rules for other subsidiary laws.[52]

---

[50] Onakoya Olusegun, *Fundamental Rights (Enforcement Procedure) Rules 2009: A Paradigm Shift in Human Rights Protection in Nigeria*, 10 US-CHINA L. REV. 494 (2013). See also Jacob Abiodun Ada, *Judicial Remedies for Human Rights Violations in Nigeria: A Critical Appraisal*, 10 J.L. POL'Y & GLOBALIZATION 1, 7 (2013).

[51] Carmel Rickard, Uganda's Human Rights Law Takes Enforcement to New Level, Jul 11, 2019.

[52] The 2019 Ugandan Human Rights (Enforcement) Act, article 18.

2.2 Independence and Competence of the Tribunal

The bulk of legal scholarly works on the FDRE Constitution revolve around the institutional arrangement for constitutional interpretation. The main controversy among scholars is on the propriety of vesting this power to the HF and whether regular courts have some roles. This work is not meant to comprehensively review these diverse views. Instead, it seeks to focus on the independence and competence of the body entrusted with the power of constitutional interpretation and its impact on individuals' ability to get remedy for infringement of their fundamental rights guaranteed in chapter thee of the Constitution. To address the issue thoroughly, a brief background about jurisdiction as it relates to constitutional interpretation will be provided below.

2.2.1 The Institutional Arrangement on Constitutional Interpretation

The Constitution, under article 62(1) and 83(1), entrusts the power of constitutional interpretation to the HF. Despite what these provisions say, some argue that regular courts have some role to play in regard to constitutional interpretation. Generally, arguments in favor of residual judicial power of constitutional interpretation are based on article 79(1) of the Constitution which vests judicial power in courts; article 13(1) of the Constitution which imposed responsibility and duty on courts to respect and enforce the Constitutional Bill of Rights; article 3(1) of the Federal Courts Proclamation,[53] and the Amharic version of article 84(2) of the Constitution which is understood to limit the power of the HF to interpret the constitution only where laws enacted by the federal parliament or regional state councils are contested as being unconstitutional.[54] The position that courts have a power to interpret the constitution where the constitutionality of laws other

[53] Federal Courts Proclamation, Proclamation, No. 25/1996.

[54] See Assefa Fiseha, *supra* note 19, at 16. It is argued that since there is a discrepancy between the Amharic and English version of article 84(2), the former should prevail based on article 106 of the Constitution.

than primary legislation, customary practices and administrative decisions is challenged is also buttressed by the nature of parliamentary systems where, due to the supremacy of the parliament, courts are disallowed to invalidate its laws.[55]

Those who argue that regular courts do not have the power to interpret the constitution admit the responsibility of courts to enforce the Constitution; but contend that this responsibility does not involve constitutional interpretation for articles 62(1) and 83(1) of the Constitution made this the exclusive mandate of the HF.[56] To reinforce their argument, they referred to its drafting history which testified that the framers consciously excluded courts from the task of constitutional interpretation for two reasons; viz,, the desire to entrust the HF to exercise this power and fear of the undemocratic nature of the judiciary.[57]

The HF was made the favorite candidate owing to the fact that it is a body composed of representatives of NNP and the Constitution is taken to be a political pact among NNP.[58] Thus, it is important to note that the motivation for selection of the institution for constitutional interpretation is not protection of constitutional rights. Instead, the decision was driven by the aspiration to give utmost protection to the interests and rights of NNP. The Constitution's preoccupation for the rights of NNP could also be detected

---

55 *Ibid.*

56 Yonatan Tesfaye Fessha, *supra* note 19, at 141; Adem Kssie, *supra* note 8, at 67; Sisay Alemahu Yeshanew, *supra* note at 10; Minasse Haile, *The New Ethiopian Constitution: Its Impact Upon Unity, Human Rights and Development*, 20 SUFFOLK TRANSNATIONAL LAW REVIEW 45-46; K. I. Vibhute, *Right to Access to Justice In Ethiopia: An Illusory Fundamental Right?*, 54(1) JOURNAL OF THE INDIAN LAW INSTITUTE 82 (2012); Takele Soboka Bulto, *supra* note 19, at 115-16; Chi Mgbako, *supra* note 5, at 278; Fasil Nahum, *supra* note 19; and Getachew Assefa, *supra* note 19, at 140.

57 Assefa Fiseha, *supra* note 19, at 10; Fasil Nahum, *supra* note 19; and Getachew Assefa, *supra* note 19.

58 See the preamble and arts. 8 and 61 of the FDRE Constitution.

from the constitutional recognition of their unconditional and non-derogable right to self-determination including secession.[59]

The second motive for denial of the judiciary from interpreting the constitution in general is the belief that doing so would undermine democracy. This ground, also called counter-majoritarian argument in the literature, posits that unelected and unaccountable few judges should not be given the chance to annul a law passed by democratically elected legislatures. The counter-majoritarian argument or parliamentary supremacy has been used by a number of countries including France and UK to oust the judiciary from constitutional interpretation. In its 1958 Constitution, France adopted an extreme version of European concentrated system form of judicial review as opposed to the US diffused system of review where all courts have the power to interpret the constitution and mixed system of judicial review adopted by some Latin American and European countries.[60] In the French system, only the Constitutional Council (*Conseil Constitutionn*el) is mandated to 'conduct an objective examination of statutes newly passed by the legislature during a brief window before they enter into force to determine whether the statute is consistent with the Constitution.' [61] Under this *a priori* abstract review arrangement, a statute cannot be challenged after it entered into force.[62] In the UK, there was no practice of constitutional judicial review for Britain does not have a written constitution.[63] The role of the UK Supreme

[59] Article 39 of Constitution does not attach any substantive condition for the enjoyment of the right to self-determination of nations, nationalities and peoples. This is more progressive position compared to international law. Article 93 of Constitution made the right to self-determination among a handful of non-derogable rights. It is interesting to note that, contrary to the position of the ICCPR, the right to life is among the dregoable rights during state of emergency.

[60] ALLEN BREWER- CARIAS, JUDICIAL REVIEW IN COMPARATIVE LAW 263 (Cambridge University Press, 1989).

[61] Gerald L. Neuman, *Anti-Ashwander: Constitutional Litigation as a First Resort in France*, 43 (15) INTERNATIONAL LAW AND POLITICS 16 (2010).

[62] *Ibid*.

[63] Albert H.Y. Chen, *The Global Expansion of Constitutional Judicial Review: Some historical and comparative perspectives*, 2, file:///Users/mizanie/Downloads/SSRN-id2210340.pdf (last accessed 23 September 2021).

Court was confined 'to give effect to, and not to challenge, the will of Parliament.'[64]

While Ethiopia is stuck with its parliamentary sovereignty stance, countries from which it has transplanted this notion have made tremendous reforms in favor of constitutional judicial review. In 2008, France has introduced amendments to the 1958 Constitution. The new article 61-1 of the Constitution provides that '[i]f, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms, guaranteed by the Constitution, the matter may be referred by the *Conseil d'Etat '* or by the *Cour de Cassation* to the Constitutional Council.'[65] The United Kingdom (UK) has also injected judicial review as a consequence of the influence of the European Union (EU) and the European Convention on Human Rights (ECHR) and the commitment to strengthening the enforcement of human rights.[66] The legal obligation to provide domestic remedy for and the possibility of adjudication of human rights violations by the supranational European Court of Human Rights has prompted member states to provide judicial redress at domestic level at least in the first instance. It is partly this fact that led to the enactment of both the 1998 UK's Human Rights Act and the French constitutional amendments in 2008.[67]

Even if the debate among academicians and practitioners is far from over, recent developments exposed in no uncertain terms that ordinary courts are entirely sidelined from constitutional interpretation in Ethiopia. Contrary to how article 84(2) is understood, the 2013 CCI Proclamation clarified that constitutional interpretation by the HF is necessitated not only where the constitutionality of a statute is challenged but also where the constitutionality of 'customary practice or decision of government organ or decision of

---

[64] Murkens, Jo Eric Khushal, *Judicious Review: The Constitutional Practice of the UK Supreme Court*, 77 (2) CAMBRIDGE LAW JOURNAL (2018).

[65] For more detailed discussions on this, Gerald L. Neuman, *supra* note 61, at 19-20.

[66] Stephen Gardbaum, *Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?)*, 62(3) THE AMERICAN JOURNAL OF COMPARATIVE LAW 624 (2014).

[67] *Ibid*. See also Albert H.Y. Chen, *supra* note 63, at 12-13.

government official' is an issue.[68] In the *Wessen et al* Case,[69] the HF assumed jurisdiction over a case in which a decision of a government institution is challenged as an unconstitutional and which ultimately decided that the decision is unconstitutional.

Entrusting the power of constitutional judicial review to the HF in the Ethiopian Constitution is proven to have a debilitating negative impact on enforcement of constitutional rights of individuals by shielding the legislature and the executive from any meaningful scrutiny. In the case of *Ashenafi Amare et al v the Ethiopian Revenues and Customs Authority (Ashenafi and Others Case),*[70] the CCI was called for to make a recommendation to the HF on the complaint that a regulation issued by the Council of Ministers (Regulation No. 155/2007) that give the head of governmental authority to dismiss its employees without any possibility for judicial scrutiny is a violation of the right of access to justice provided under article 37 (2) of the Constitution. In its analysis, the CCI held that as parliament that operates in parliamentary system, it has the power to decide which cases are justiciable before courts. The CCI went on to contend that it does have the power to challenge law passed by the parliament as long as the power is exercised within its constitutional limits. It finally decided that this matter does not merit constitutional interpretation. Although the CCI has acknowledged constitutional limits to the parliament, its final decision and reasoning in general tend to show its implicit recognition of the inviolability of what the parliament says regardless of its effect on constitutional rights. Lack of judicial control has encouraged the parliament to enact laws that hampered the enjoyment constitutional rights and takeaway judicial power from courts. The latter, in turn, has resulted in further degrading judicial power over control of executive delegated laws and conduct.

---

[68] Art. 3(1) of CCI Proclamation.

[69] *Wessen Alemu and Dawit Oticho vs. the Amhara National Regional State Justice Professional Training and Legal Studies Institute and Judicial Administration Council* (Decision of HOF file no. 019/08, decided on Tikimit 2, 2009 Ethiopian Calendar (E.C.) (September 2016)).

[70] Decided on 6/1/2002 E.C (December 2009).

2.2.2 Independence and Competence of the HF and CCI

Although horizontally applicable, the Bill of Rights of the Constitution is primarily designed to protect fundamental rights and freedoms of individuals and groups from arbitrary conduct of government. As raised above, the constitutional protection of human rights could be meaningful where the rights listed could be vindicated by an independent and competent organ in the event of violation. The term independence is used in this article to mean that the constitutional adjudication body and its members should be free from improper influences and biases.

The HF is one of the two houses of the Federal parliament without legislative mandate.[71] The Constitution under article 62 lists the powers and responsibilities of this House one of which is interpretation of the constitution. It is composed of representatives of all NNP elected by state councils for a term of five years.[72] The HF is authorized to organize the CCI[73] which could provide support in constitutional interpretation. Where an interested party or a court is of a belief that an issue requires constitutional interpretation, the matter should first be submitted to the CCI for its investigation.[74] If the CCI finds that the matter needs constitutional interpretation, it shall submit its recommendations to the HF for final decision and if, on the other hand, it reached at a different conclusion, it will reject the request.[75] A party dissatisfied with the decision of the CCI is entitled to appeal to the HF.[76] Organizationally, the CCI is composed of eleven members drawn from the legal community, Federal Supreme Court and HF.[77]

In relation to the HF and CCI, a question raised by many scholars is to what extent these institutions can discharge their responsibilities independently and impartially, in particular, when an issue submitted to them aims at

[71] Arts. 53 of the FDRE Constitution.
[72] *Id.*, arts. 61 & 67(2).
[73] *Id.*, art. 62(2).
[74] *Id.*, art. 84(1).
[75] *Id.*, art. 84.
[76] *Ibid.*
[77] *Id.*, art. 82.

challenging the inconsistency of a law or a decision of the executive with constitutional rights. This question is answered in the negative principally for two reasons.

First, as members of the HF represent their respective ethnic groups and are members of political parties, it is logical to expect their allegiance to the ethnic group they represent and the political party that they belong to in making decisions.[78] The reality that most members of the House have positions in their regional executive and legislative branches of governments coupled with the fact that members of the HF are elected by regional councils themselves is indicia of the possible lack of impartiality and independence of this organ to discharge a constitutional interpretation mandate.[79] Second, the way the CCI is organized and the criteria for appointment of its members also evoke the question of impartiality and independence. Out of its eleven members, six of them are expected to be 'legal experts, appointed by the President of the Republic on recommendation by the House of Peoples' Representatives, who shall have proven professional competence and high moral standing.'[80] Neither the Constitution nor the CCI Proclamation does require these members to be impartial and independent. In practice, it is not uncommon to see ruling party affiliated individuals serving as a member of this body. Moreover, three members of the CCI which are elected by the HF from its members have similar problems mentioned above.[81] Two of members of the CCI who serve as its president and vice-resident are the president and vice president of the Federal Supreme Court (FSC).[82] 'This has made both members to see cases in the CCI which they have already decided as either FSC or FSC Cassation Bench judge capacity. A study[83] conducted in this area

[78] Adem Kassie Abebe, *The Potential Role of Constitutional Review in the Realization of Human Rights in Ethiopia, LL.D Dissertation*, University of Pretoria, 2012, 81.

[79] Yonatan Tesfaye Fessha, *Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review*, 14 AFR. J. INT'L & COMP. L. 53, 74, 75, 77-78 (2006).

[80] FDRE Constitution, art. 82(2) (C).

[81] *Ibid.*

[82] *Ibid.*

[83] Mustefa Nasser Hassen, *Methods of Constitutional Interpretation in Constitutional Dispute Settlement in Ethiopia*, LL.M Thesis, Addis Ababa University School of Law, 2018,

disclosed that parties aggrieved by the decision of the Cassation Bench of the Federal Supreme Court often file a complaint against the president or vice president not to sit over their case in the CCI. However, the CCI often rejects such complain for the sole reason that members of the CCI assume responsibility in a different capacity. It is important to note that the relevant laws do not have a provision on recusal of CCI or HF members due to possible bias or personal interest. One can also see similar problem with three members of the HF who are selected to serve as member of the CCI and at the same time take part in the decision of the House.

So far, the trend shows that applications to the CCI challenging the laws and decisions of the government as a violation of constitutional rights are exceptions to the general trend of litigation between and among private parties. In the overwhelming majority of cases, the applications are submitted to the CCI against final decisions of federal and regional judicial organs. An important explanation for the unacceptably few number of cases on constitutional violation by the Government could presumably be lack of trust in these institutions due to their perceived lack of freedom from political influence and their biased decisions in previous cases. The CCI is blamed for inappropriately rejecting politically sensitive but legitimate questions of constitutional interpretation. And as a result of this disposition, the CCI and HF are forced to devote a great deal of time adjudicating cases involving property, land and marital rights among and between private parties.[84] The following cases are cited by a number of writers to show how the CCI is biased when it comes to politically delicate issues.

48, http://213.55.95.56/bitstream/handle/123456789/12652/Mustefa%20Nasser.pdf?sequence=1&isAllowed=y (last accessed 23 September 2021).

[84] Merhatsidk Mekonnen Abayneh, *Who should best be preferred for the business of constitutional interpretation?,* Reporter, 5 January 2019, https://www.thereporterethiopia.com/article/who-should-best-be-preferred-business-constitutional-interpretation?__cf_chl_managed_tk__=pmd_4Wd2vRLG4ggwYyYlduwPjrE.lt2FKW.Ig00yFEB_nEo-1632433310-0-gqNtZGzNAxCjcnBszRPR (accessed 23 September 2021) .

In *Seeye Case*,[85] Seeye Abraha, along with other persons accused of corruption, challenged the constitutionality of the Anti-corruption Special Procedure and Rules of Evidence (Amendment) Proclamation No. 239/2001. The applicants contended that retrospective application of this Proclamation which denies the right to bail of individuals accused of corruption is inconsistent with article 22 of the FDRE Constitution that prohibits retroactive application of criminal law. The CCI recommended to the HF to reject the application as the Proclamation in question is not inconsistent with article 22 of the Constitution.

In the 2005 *CUD* Case,[86] Coalition for Unity and Democracy (CUD), the then leading opposition party, challenged the order of the then Prime Minister, Meles Zenawi, banning public demonstrations in Addis Ababa and its neighborhood. The ban was intended to curb massive demonstrations in protest of the ruling party's (EPRDF) alleged manipulation of the election results in the aftermath of the controversial May 2005 parliamentary election. The CUD, among others, argued that the order of the Prime Minister is a violation of the right to peaceful demonstration recognized under article 30 of the FDRE Constitution. The CCI to which the matter was referred to it by a Court decided the case by concluding that the directive issued by the Prime Minister was not unconstitutional. In the *Ashenafi and Others Case,* discussed above, the CCI again made a controversial decision that a regulation issued by the Council of Ministers that gives the head of governmental authority to dismiss its employees without any possibility for judicial scrutiny is not a violation of the right of access to justice provided under article 37 (2) of the Constitution.

However, in its recent decisions, the HF, recommended by the CCI, has made important and bold decisions which involve claims against unconstitutionality of laws and practices of government institutions.

---

[85] The case of Prime Minister Meles Zenawi vs Ex-Defense Minister Seeye Abraha (2004) at http://www.aigaforum.com/TheCaseofSiye.pdf (accessed 07 February 2020).

[86] See, *Coalition for Unity and Democracy v. Prime Minister Meles Zenawi Asres*, Federal First Instance Court, File 54024, ruling of June 3, 2005.

In the *Melaku Fenta vs. Federal Public Prosecutor case (Melaku Fenta Case)*,[87] the issue before the CCI and HF was whether article 8(1) of the Federal Courts Proclamation[88] and articles 6 and 7(1) of Anti-corruption Proclamation[89] which provides that the Federal Supreme Court shall have first instance jurisdiction on offences for which officials of the Federal Government are held liable is consistent with the right to appeal recognized under article 20(6) of the FDRE Constitution. The HF held that allowing the Federal Supreme Court to assume first instance jurisdiction over such kinds of cases is unconstitutional because it undermines the right to appeal protected under Article 20(6) and discriminatory contrary to article 25 of the Constitution. Consequently, the HF rendered article 8(1) of the Federal Court Proclamation and articles 6 and 7(1) of Anti-corruption Proclamation as an unconstitutional, and ordered that Melaku's corruption case be heard at the Federal High Court.

In the *Wessen et* al Case, the visually impaired applicants, graduates of law, had completed a post-law school judicial training offered for prospective judges and public prosecutes. After completion of the training, judges and public prosecutors were selected by lot system as per the working rules of the institutions. However, in this case, the regional training institute denied the applicants from taking part in the lot placement and directly placed them to be public prosecutors based on the assumption that judgeship is a difficult job for visually impaired persons. Subsequently, the applicant challenged the constitutionality of this decision arguing that it contravenes Article 41(2) which guarantees every Ethiopian the right to choose means of livelihood,

---

87 *The Former Director General of the Ethiopian Revenues and Customs Authority, Melaku Fenta V. Anti-Corruption Prosecutor Team* (Decision of HF on Thursday, January 2, 2014 unpublished).

88 Article 8(1) of the Federal Courts Establishment Proclamation No 25/1996 provides that the Federal Supreme Court shall have first instance jurisdiction on offences for which officials of the Federal Government are held liable in connection with their official responsibility.

89 Article 7(1) of the Revised Anti-Corruption, Special Procedure and Rules of Evidence Proclamation No. 434/2005 provides that the Federal High Court will have first instance jurisdiction other than those cases for which the Federal Supreme Court has first instance jurisdiction.

occupation and profession and Article 25 of the Constitution which guarantees the right to equality. The HF, accepting the arguments of the applicants and concurring with the recommendation the CCI, finally decided that the decision that excluded visually impaired persons from serving as a judge is unconstitutional.

In *Administrative Tribunal of the Civil Service Ministry v Ethiopian Revenues and Customs Authority Case*,[90] the CCI and HF reversed their earlier standing in *Ashenafi and Others Case* claiming that the same regulation issued by the Council of Ministers that give the head of governmental authority to dismiss its employees without any possibility for judicial scrutiny violates the right to be heard, access to justice, and equality as enshrined under the FDRE Constitution and ICCPR.

Leaving issues of independence and impartiality aside, the question would be whether the HF and CCI are competent enough to effectively and efficiently discharge a constitutional interpretation mandate.

Currently, the HF has hundred plus members, of which the presence at a meeting of two-thirds of the members of the HF constitutes a quorum.[91] The House can only reach a decision upon the approval of the majority of members present and voting.[92] Given the large number of members of the House, the HF is not an ideal forum to deliberate and decide on issues of constitutional adjudication which often involves complex arguments.[93] Members of the House also lack the requisite legal knowledge and skills to engage in constitutional adjudication.[94] Indeed, strengthening the Secretariat

[90] *Civil Servants Administrative Tribunal vs. FDRE Revenues and Customs Authority*, File No. 2189/09 (Tir 8, 2011 E.C. (2019)); and *Administrative Tribunal of the Civil Service Ministry v Ethiopian Revenues and Customs Authority*, (File No. 72/2019, House of Federation, June 9, 2019).

[91] FDRE Constitution, art. 64(1).

[92] *Id.*, art. 64(1).

[93] Yonatan Tesfaye Fessha, *supra* note 79, at 74. See also Mustefa Nasser Hassen, *supra* note 83, at 49.

[94] Yonatan Tesfaye Fessha, *supra* note 79, at 75.

of the House could to some extent contribute in alleviating the legal expertise deficit in the House.[95]

The limited number of meetings of the HF[96] coupled with the House's engagement in other activities means that it has little time for thorough constitutional interpretation. In his research, Mustefa explicates the gravity of this problem as follows:

> *For instance, the House, in its 5th term, 3rd year and first session in 2017, has passed a decision on 8 cases up on a recommendation of the CCI that merit constitutional interpretation, and rejected some 21 appeal cases for they do not merit constitutional interpretation within half a day. Simply put, the House decided on issues of constitutionality of almost 30 cases in four hours duration. The practice shows that the Constitutional Interpretation and Identity Affairs Standing Committee often read the case with recommendations to the House for a final decision where the House often cast a vote for endorsing the recommendation of CCI. This is done with little deliberation on constitutional matters where acceptance of the recommendation will automatically become the final decision of the HF on the matter.*[97]

The HF's scarcity of time for meetings and deliberations not only does turn it in to a rubberstamp institution but also resulted in delays in making decisions and case backlogs. Indeed, the HF Proclamation enjoins the House to 'pass prompt decisions after investigating constitutional issues and resolve constitutional cases in a short time.'[98] It is required in particular to 'pass decisions, within thirty days, over the recommendation submitted to it by the

---

[95] The Secretariat is established by Establishment of the Secretariat of the House of the Federation Proclamation, Proclamation No. 556/2008. One of the responsibilities of the Secretariat mentioned in article 4(8) of this Proclamation is to provide professional opinion in relation to constitutional interpretation when requested by the House.

[96] Article 46(1) of the HF provides that The House shall convene at least twice in a year.

[97] Mustefa Nasser Hassen, *supra* note 83, at 49.

[98] Art. 13(1) of the HF Proclamation.

Council of Constitutional Inquiry.'[99] The reality is, however, different from what the law requires.

Although the CCI meets more frequently than the House, it is still a part-time institution which meets on monthly basis with a possibility to hold a meeting within shorter time when convened by its chair.[100] Needless to say, lack of fulltime engagement has adverse impact on the speediness of its investigation and thereby cause delays. Based on February 3, 2020 data, there were more than 2,500 pending cases awaiting its decision.[101] The status quo is at odds with the law which requires that a case before the Council may not be postponed for repeated appointments unless there has been a good cause.[102] Unlike the HF Proclamation, the CCI proclamation does set the maximum time limit within which the CCI should notify its decision to the applicant or submits its recommendation to the HF. It leaves the matter to be determined by directive to be issued by the Council.[103] It is also doubtful whether the members of the Council have the requisite expertise for constitutional interpretation. Of its eleven members, three of which are to be nominated from members of the House are not even expected to be a lawyer. Even if the Constitution requires that the six legal experts who serve as members of the CCI should possess a proven professional competence and high moral standing, this is not the case as a matter of reality. They seem to be selected owing to their affiliation and sympathy to a ruling party instead of their outstanding competence in constitutional law. As these members are not fulltime employees and are busy to earn a living, they may not have time to read and update themselves.

Lack of or limited competence on the part of the HF and CCI to interpret the Constitution has hampered the crystallization of well-developed and meaningful jurisprudence in the application of the Bill of Rights of the Constitution. The recommendations of the CCI and decisions of the HF are

[99] *Id.*, art. 13(2).
[100] Art. 23 of the CCI Proclamation.
[101] So far, the CCI has received 5,064 applications.
[102] Art. 10(3) of the CCI Proclamation.
[103] *Id.*, art. 12(3).

fraught with lack of consistency and predictability; are essentially based only on text of the Constitution; make little reference to international jurisprudence and best experience of countries; devoid of proper explanation and argumentation to reach at conclusions; and wrongly apply legal provisions knowingly or otherwise.[104]

2.3 Application of the Bill of Rights and the Principle of Avoidance

In principle, the direct application of the Bill of Rights of the Constitution ensues to litigations in which the right of a beneficiary of the Bill of Rights has been violated by an individual, government or other legal person. Unlike the international human rights treaties to which Ethiopian is a party that are applicable where the treaty rights are infringed by the state, the FDRE Constitution made it clear that both the state and other non-state actors have the duty to respect and ensure the observance of the Constitution in general and its Bill of Rights in particular.[105] Put differently, complaints of individuals or groups involving violation of constitutional rights by government laws and decisions as well as conduct of individuals and other non-state actors could be submitted to the HF via the CCI for constitutional interpretation. However, direct application of the Constitution to resolve disputes should be a measure of last resort and must be avoided to the extent possible. Thus, as much possible, decisions on violation of constitutional rights must be resolved through judicial application of ordinary legislation and precedents and avoid direct invocation of constitutional provisions.[106]

---

[104] For details on these issues, see Mustefa Nasser Hassen, *supra* note 83; and Habib Abajebel Abasimel, *The Jurisprudence of the Council of Constitutional Inquiry and of the House of Federation on Property Related Claims: A Critical Study*, LL.M Thesis, Addis Ababa University School of Law, January 2018, http://213.55.95.56/handle/123456789/12750 (last accessed, 23 September 2021); Adem Kassie, supra note 78, P. 75; and Anchinesh Shiferaw, *The Jurisprudence and Approaches of Constitutional Interpretation by the House of Federation in Ethiopia*, 13(3) MIZAN LAW REVIEW 419-441 (2019).

[105] Art. 9(2) of the FDRE Constitution.

[106] Takele Soboka Bulto, *supra* note 19, at 107.

The doctrine of avoidance, recognized and developed in other jurisdictions, such as the US and South Africa, requires that direct application of the Bill of Rights, which is geared towards showing inconsistency between the Bill of Rights and law or conduct, should be pursued only where there are no other alternatives to provide remedy. This, in other words, means that indirect application of the Bill of Rights should first be pursued before applying the Bill of Rights directly to the dispute.[107] The jurisprudence of South Africa, Canada and the US shows that courts adhere to the doctrine of avoidance to circumvent abstract constitutional review; allow the 'constitution the normative deference that it should command, and put it on par with other legislations that are called into application in everyday judicial decision-making'; and 'allow incremental development of norms, and encourage the development and interpretation of other legislations in conformity with the constitution'.[108] In addition to these reasons which could also be relevant to Ethiopia, another more pragmatic justification for a serious application of the doctrine of avoidance by courts and the CCI in Ethiopia is timely disposition of cases. As mentioned above, due to the part time position of the CCI itself and the HF as well involvement in other activities, delays in disposition of cases are not uncommon. Case referral by courts and settlement of cases by the CCI in face of alternative legal basis for settlement of dispute would amount to complicity in denial of justice on the part of these institutions. Thus, where the CCI is convinced that the case submitted to it can be resolved by courts through the application of other laws, it needs to reject the case or refer it back to courts. Likewise, where the court determined that a pending case could be adjudicated based on other laws than the Constitution, it should refrain from referring the case to the CCI. In the specific context of the Bill of Rights of the Constitution, it means that the court should make every possible effort to provide remedy to complaint of constitutional rights by way of applying other domestic legislation; interpreting, instead of invalidating,

[107] IAIN CURRIE & JOHAN DE WAAL, THE BILL OF RIGHTS HANDBOOK 24-25 (Fifth Edition, 2005).

[108] Takele Soboka Bulto, *supra* note 19, at 108.

domestic laws in line with the Constitution; and reliance on the precedent of the HF, if any.[109]

The doctrine of avoidance needs to be applied even in case where the applicant invoked the Constitution or the Constitution is applicable in the face of other laws that could be applied and provide remedy. Based on this, the referral of the case by the Federal First Instance Court (FFC) to the CCI in the *CUD Case* was inappropriate. The FFC could have resolved the case by applying Peaceful Demonstration Proclamation No. 3/1991 without referring the matter to the CCI.

In case of human rights violations, in particular, both the human rights treaties to which Ethiopia is a party and the Bill of Rights of the Constitution could be pertinent to contest a law or a decision. Where these options are on the table, countries take different approaches to determine which one to use. In US, a matter should be decided based on human rights conventions in so far as they are judicially enforceable.[110] This approach is the manifestation of the doctrine of avoidance. In France, on the other hand, 'if both treaty and the constitution can be used to challenge a statute, courts need to give priority to the constitutional issue and refer the case to Constitutional Council.'[111] For the reasons already mentioned above, the court in Ethiopia should manage to settle the dispute based on the international treaties and avoid referring the matter to the CCI.

The doctrine of avoidance, although not explicitly provided in the Constitution or the HF or CCI Proclamation, is implicit in articles 83 and 84 of the Constitution which require the intervention of the CCI and HF where there is a need for constitutional interpretation. So, application of the doctrine of avoidance should be entrenched through progressive interpretation of these provisions or legal reform.

---

[109] Adem Kassie Abebe, *supra* note 78, pp. at 156-161 and Takele Soboka Bulto, *supra* note 19, at 107.

[110] Gerald L. Neuman, *supra* note 61, at 26.

[111] *Id.*, 23-24.

2.4 Standing

In the context direct application of the Bill of Rights of the Constitution, standing refers to an entitlement to submit a claim of a violation of constitutional rights to an organ with a power to provide remedy. As discussed above, an action to challenge infringement of these rights could be submitted to the CCI either through courts or directly by individuals. Be it a constitutional issue that arises from a pending case or out-of-court submission, it is important to determine who has standing to approach this organ.

As regards an action submitted out-of-courts, the relevant laws governing the matter are the FDRE Constitution, the HF and CCI proclamations. Article 37, entitled as the right of access to justice, is the relevant provision of the FDRE Constitution as regards the constitutional requirements of standing. It reads as:

> 1. *Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by a court of law or any other competent body with judicial power.*
> 2. *The decision or judgment referred to under sub-Article 1 of this Article may also be sought by:*
>
> a. *Any association representing the collective or individual interest of its members; or*
>
> b. *Any group or person who is a member of, or represents a group with similar interests.*

Article 37 is interpreted differently by different authors. On one side, there are authors who argue that article 37 requires personal vested interest in a particular action.[112] This, in the context of Bill of Rights of the Constitution, means that an action could only be brought by an individual or groups of individuals whose constitutional rights are or threated to be violated.

[112] See, for example, Sisay Alemahu Yeshanew, *supra* note 10, at 291; Adem Kassie Abebe, *Towards more liberal standing rules to enforce constitutional rights in Ethiopia* 10 AFRICAN HUMAN RIGHTS LAW JOURNAL 409 (2010).

According to this position, the apparent recognition of public interest litigation (*actio popularis*), under 37(1) is restricted by the requirements under 37(2) which requires '[t]he person to be a member of the affected group or an association representing the interests of its members.'[113] On the other side, there are writers who took a position that article 37 embraces public interest litigation (PIL).[114] This argument is based on article 37(1) which is construed to allow everyone to bring a justiciable matter in pursuit of their own interests or that of others or article 37 (2) (b) that allows any group or person who represents a group with similar interest to bring justiciable matters before a court of law or any other competent body with judicial power.

In my view, the interpretation that article 37 of the FDRE Constitution also recognizes a broad standing requirement is plausible. From the way the sub-articles are organized, it is clear that article 37(2) is added to article 37 (1) not to clarify or qualify the seemingly broad standing requirement under sub-one. It is instead to add other grounds of standing as it made clear by the caption of article 37(2) which says 'the decision or judgment referred to under sub-Article 1 of this Article may *also* be sought by…' (Emphasis added). Thus, in the absence of an explicit condition on the right of everyone to bring a justiciable matter to their own personal interests in 37(1), this vague provision need to be interpreted broadly so as to include a possibility where by anyone may act on behalf of another person or in public interest.[115] This broad

---

[113] See, for example, Sisay Alemahu Yeshanew, *supra* note 10, at 291; Adem K Abebe, *supra* note 111, at 417.

[114] Fasil Nahum, *supra* note 19, at 150; Yenehun Birlie, *Public Interest Environmental Litigation in Ethiopia: Factors for its Dormant and Stunted Features*, 11(2) MIZAN LAW REVIEW321-322 (2017); Yoseph Mulugeta Dadwaza, *Public Interest Litigation as Practiced by South African Human Rights NGOs: Any Lessons for Ethiopia?*, unpublished LLM thesis, University of Pretoria, (2005), p. 40-42, https://repository.up.ac.za/handle/2263/1135 (last accessed, 23 September 2021); and Getahun Kassa *Mechanisms of Constitutional Control: A Preliminary Observation of the Ethiopian System*, 20 AFRICA FOCUS 75, 86 (2007).

[115] Constitutions of other countries that embrace broad standing requirements mention five possibilities: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members. See section 85(1) of the 2013 Constitution of Zimbabwe; article 22 of the 2010 Kenyan Constitution; and section 38 (d) of the 1996 South African

understanding makes sense in the light of realizing the object and purpose of the Constitution.[116] One of the object and purpose of the Constitution articulated in the preamble, full respect of individual and people's fundamental freedoms and rights, can be achieved if everyone's constitutional right of access to justice is realized equally regardless of their socio-economic circumstances. To that effect, it is vital to adopt a generous and creative approach to the rules of standing.

The centrality of a liberal approach to the rules of *locus standi* and other procedural requirements in constitutional cases is strongly highlighted by scholars and adopted by courts of many African countries; 'for those whose rights are allegedly trampled upon must not be turned away from the court by procedural hiccups'.[117] A liberal approach to standing in constitutional cases is especially deemed 'necessary where poverty, illiteracy and governmental abuse of power is so prevalent.'[118] As Lugakingira J. in the Tanzanian case of *Mtikila v Attorney General* has noted, the

> *…notion of personal interest, personal injury or sufficient interest over and above the interest of the general public has more to do with private law as distinct from public law. In matters of public interest litigation this court will not deny standing to a genuine and bona fide litigant even when he has no personal interest in the matter …where the court can provide an effective remedy.*[119]

Consistent with the above interpretation, the term 'interested party' in article 84(2) of the Constitution should be interpreted liberally. It is further submitted that article 5(1) of the CCI Proclamation which limits standing to

---

Constitution. See also Paragraph 3(e) of the Nigerian 2009 Fundamental Rights Enforcement Rules.

116 JEFFREY GOLDSWORTHY, INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 130 (Oxford University Press, (2006).

117 JOHN HATCHARD, MUNA NDULO AND PETER SLINN, COMPARATIVE CONSTITUTIONALISM AND GOOD GOVERNANCE IN THE COMMONWEALTH: AN EASTERN AND SOUTHERN AFRICAN PERSPECTIVE 176 (Cambridge University Press, 2004).

118 *Ibid.*

119 Hight Court of Tanzania, unreported, 1994, at 11. Cited in John Hatchard, Muna Ndulo and Peter Slinn, *supra* note 116, at 176.

'any person who alleges that his fundamental right and freedom' either be amended or read in line with article 37 and 84(2) of the Constitution. Constitutional rights could be fully vindicated in Ethiopia only where their violations could be brought to the attention of the CCI and the HF by affected individuals and groups as well as public purpose spirited individuals and NGOs.

When an issue of a violation of constitutional rights that requires constitutional interpretation arises in the course of court litigation, it is contended that the same liberal standing rules of article 37 and 84(2) should apply. The term 'interested party' under article 4(1) of the CCI Proclamation should also be understood not only as applicants and respondents during court litigation but also others who wish to take the matter to CCI and the HF for constitutional interpretation. But what rules of standing should the court initially apply where a dispute with a constitutional interpretation potential is submitted to it? The same question arises in cases where the court entertains a matter that necessities the application of the binding precedent of the HF without a need to refer the matter to the CCI or an applicant files a case before a court for an additional remedy, say damage, following a declaration of invalidity of a law or government decision or a decision of the HF that a government conduct violated constitutional right(s). In such cases, the federal court which has the jurisdiction to handle the case has to apply the Civil Procedure Code (CPC) for lack of specific procedural rules applicable for the enforcement of the Bill of Rights of the Constitution.[120] However, the standing requirement in the CPC provided under article 33 and 38 require existence of vested interest. This requirement designed for civil litigations is, however, incompatible with the very nature of Constitutional Bill of Rights litigation. Accordingly, articles 33 and 38 of the CPC should be amended or

[120] Based on article 3 of the Proclamation No.25/96, cases arising under the Constitution fall under the jurisdiction of federal courts. Moreover, article 7 of the same provides that 'the Criminal and Civil Procedure Codes as well as other relevant laws in force shall apply with respect to matters not provided for under this Proclamation insofar as they are not inconsistent therewith'.

courts should interpret them in way that takes into account the broad standing standard of article 37 of the Constitution.

2.5 Exhaustion of Administrative and Judicial Remedies

Individuals or groups who seek to challenge the alleged violation of their human rights by laws, decisions of the government or customary practices before the CCI and HF are required to exhaust available remedies before submitting their pleading to the CCI. Articles 3(2) and 5(2) and (3) of the CCI Proclamation, dedicated to exhaustion, do provide specific requirements. First, 'if it is justiciable matter of court', it could be submitted to the CCI only after 'it has been brought to, and heard by, the court having jurisdiction'. Second, 'if it is justiciable matter of administrative organ', it could be submitted to the CCI only after 'a final decision has been rendered by the competent executive organ with due hierarchy to consider it'. The CCI Proclamation, under article 2(10), defines final decision to mean 'a decision that has been exhausted and against which no appeal lies'. Third, 'where any law issued by federal government or state legislative organs is contested as being unconstitutional, the concerned court or interested party may submit the case to the Council'.[121] Thus, the only case where applicants are exempted from exhausting both administrative and judicial remedies is claim involving allegations of violations of constitutional rights ensued from primary legislation. In this case, the court to which the claim is submitted is required to refer the matter to the CCI for resolving the issue of constitutionality or otherwise of a federal or regional proclamation. In all other matters, exhaustion of other remedies is a perquisite to access the CCI and HF.

As regards exhaustion of judicial remedies, it is required where it is 'justiciable matter of court'. The CCI Proclamation does not, however, give a clue as to what kinds of matters are justiciable before court of law. Based on the inherent power of courts to exercise judicial power, it could be argued that any claim challenging the constitutionality of customary practices, decisions of government organs, regulations and directives is judicially justiciable. If this

[121] Art. 5(3) of the CCI Proclamation.

is so, what are the matters that are not justiciable before courts? The CCI in the *Ashenafi and Others Case* and the Federal Supreme Court Cassation Division in the *Ethiopian Privatization and Public Enterprises Supervising Agency vs. heirs of Ato Nur Beza Terga Case*[122] clarified that a matter is justiciable before courts if their judicial power is not taken away and made administrative decisions are not made final by the parliament. Thus, where judicial power is ousted by law, there is no need to exhaust judicial remedy. In all other matters, prior adjudication by a 'court having jurisdiction' is mandatory. The term 'final decision' used in the CCI Proclamation suggests that the applicant should exhaust appeal or take the matter to a cassation bench as part of the exhaustion requirement.

The requirement of exhaustion of administrative remedies is applicable whether the decision of administrative bodies is final or amenable to further judicial scrutiny. The law makes it clear that this level of remedy includes appellate level remedies within the administrative hierarchy.

As is the case in other jurisdictions,[123] there are three main purposes behind the requirements of exhaustion of administrative remedies. First, it gives agencies a chance to correct their mistakes through an internal complaint handling mechanisms and appeal process. Second, exhaustion fosters the efficiency of institutions by reducing the number of cases to be forwarded to courts and the CCI. Third, exhaustion might also provide the reviewing institution with a more useful record and administrative expertise. These reasons could also be extended to analogously apply why judicial remedies should be exhausted before a constitutional dispute is submitted to the CCI. Resolving a dispute involving violation of constitutional rights by the HF through the direct application of constitutional interpretation should be a remedy of last resort. The principle is meant not only to benefit the

[122] Decision of the Federal Supreme Court Cassation Bench, file No. 23608, decided on November 2, 2010.

[123] Peter A. Devlin, *Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional Claims*, 93 NEW YORK UNIVERSITY LAW REVIEW 1241 (2018). The author clarified the issue based on the well know case of *McCarthy v. Madigan*, 503 U.S. 140 (1992). See also Jeffrey S. Lubbers, *Fail to Comment At Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, 70(1) ADMINISTRATIVE LAW REVIEW 111 (2018).

institutions but also applicants in terms of enabling them to pursue their claims in relatively physically accessible and competent organs and to get timely, cheaper and effective remedies.

While exhaustion of administrative and judicial remedies has a formidable policy rationale, there are times when this requirement could be absurd in which cases it should be set aside. Generally, the exceptions are applied when the interest of the applicant in getting prompt access to remedy outweighs countervailing institutional interests favoring exhaustion.[124] Consequently, it makes sense to waive the requirement of exhaustion of administrative and judicial remedies where exhaustion of administrative and judicial procedures would delay resolution for an unreasonable time; agency's or court's power to provide effective relief is questionable due to the fact that complaint is directed against the adequacy and fairness of the agency or court procedure itself; or it is futile to exhaust remedy because the agency or court has hitherto consistently rejected similar complaints. None of these grounds of exceptions to exhaustion are recognized in the CCI Proclamation though. In a country where denial and undue delay of administrative and judicial remedies is rampant, the lack of their recognition flies in the face of the right of access to justice of applicants.[125]

2.6 Statute of Limitations

Statute of limitations is a law that sets a deadline or stipulates the maximum period of time within which a plaintiff may bring a legal action. Statute of

[124] See Peter A. Devlin, *supra* note 122, at 241 & William Funk, *Exhaustion of Administrative Remedies - New Dimensions since Darby*, 18 PACE ENVTL. L. REV. 1 (2000) Available at: http://digitalcommons.pace.edu/pelr/vol18/iss1/1, P. 2 & 3.

[125] A good example of this is a request for internal self-determination by *Wolqayit* Identity Committee. Although two years had expired after a formal claim was submitted to the Tigray Regional State and the Regional State failed to act up on the request within two years as required in article 20(2) of the HF Proclamation, the HF rejected the appeal on the ground that regional level remedy has not been exhausted. The HF Proclamation, under article 20(3), allows applicants to submit their applications the HF immediately after the expiry of the two years period if the regional government has not decided on the matter.

limitations is normally computed from the time when an offence was committed or an injury has been sustained. Its purpose is to encourage plaintiffs to diligently bring legal action 'while evidence is already available and protect the defendant.'[126] The rules governing limitation of actions and the amount of time prescribed often vary depending on the nature of cases. Generally, unlike civil case, laws set no or longer periods of limitation for criminal cases, due to effect of the offence on the general public and the need to ensure that unnoticed crimes are charged.[127]

While the Criminal Code and Civil Code of Ethiopia have rules governing limitations of actions for criminal and civil cases respectively, the same is not true for cases of violation of constitutional rights. Thus, it is worth wondering: what is the statute of limitation to be applied by the CCI and the HF? It is also indispensable to ask: what period of limitation is applied by a court for damage claims as redress for violation of constitutional rights?

To begin with the first question, neither the FDRE Constitution[128] nor the HF and CCI proclamations prescribe the maximum period from which complaints of constitutional rights should be submitted to the CCI. What does the silence of these laws imply? How should we interpret it? One of the avowed canons of interpretation relevant to human rights is that 'limitation provisions shall be construed and applied in a restrictive way'.[129] Although this principle of interpretation is primary developed in relation to substantive limitations to human rights, it is also possible to extend it to statute of limitations. As substantive limitations do, statute of limitations, if not judiciously applied, have a potential to limit or deny the enjoyment of substantive rights through

---

126 Nadia Abed Alali Kathim, *Applicable Rules of Statute of Limitation: Comparative Study of United States & Saudi Arabia*, 4(2) International Journal of Law 200 (2018).

127 Andualem Eshetu Lema, *Revisiting the Application of the Ten-Year General Period of Limitation: Judicial Discretion to Disregard Art 1845 of the Civil Code*, 6 BAHIR DAR U. J. L. 1, 11-13 (2015).

128 The only relevant provision in the Constitution is article 28(1) which provides that 'Criminal liability of persons who commit crimes against humanity… shall not be barred by statute of limitation'.

129 MAGDALENA SEPÚLVEDA *ET AL*, HUMAN RIGHTS REFERENCE HANDBOOK 49 (University for Peace, 2004).

procedural hurdles. Accordingly, it makes sense to interpret the absence of period of limitation for submission of cases of violations of constitutional rights as cases not barred by period of limitations. One can also argue for longer or no period of limitation relying on the effect of violation of constitutional rights on the society at large.

This view is support by the experience of other countries where actions relating to infringement of constitutional rights are not either barred by period of limitation at all or barred after a longer period of time. For example, the 2014 Constitution of Egypt, under article 99, provides that civil and criminal liabilities arising from assault on rights and freedoms guaranteed in the Constitution are not affected by prescription. The 2009 Nigerian Fundamental Rights (Enforcement Procedure) Rules under Order III also states that '[a]n application for the enforcement of Fundamental Rights shall not be affected by any limitation of statute whatsoever'. Likewise, the 2019 Ugandan Human Rights (Enforcement) Act, under article 19, provides that 'actions for enforcement of human rights and freedoms shall be instituted within ten years of the occurrence of the human rights violation.' It goes on to add an exception to this general rule by giving the court a margin of appreciation to allow an action to be brought after the expiry of the 10 years period of limitation 'on being satisfied that the victim of the violation was unable, for any justifiable reasons, to bring such action within the time prescribed' in the rule.

The CCI and HF have dealt with a case in which a statute of limitations was one of the issues. In *Alemitu Gebre vs. Chane Desalegn case*,[130] Alemitu Gebre (the applicant) brought a suit against Chane Desalegn (the respondent)

[130] File No. 913/05, Sene 26, 2007 E.C., 1(1) JOURNAL OF CONSTITUTIONAL CASES 26 (2011 EC). The case originated from Southern Nations, Nationalities and Peoples Region (SNNP), Keffa Zone, Ginbo Wereda Court. In another case, *Andinet Kebede vs. Afar National Regional State Justice Bureau*, the HF held that the dismissal of the applicant by the Regional Prosecutors Administrative Council without giving him the opportunity to be heard and defend himself is inconsistent with article 37 of the FDRE Constitution. In its decision, the House did not give due regard to the prior rejection of the applicant's appeal by the regional Supreme Court due to the expiry of the appeal period. The cased was decided on 29/02/2010 E.C (2017).

requesting the court to order a return of two acres of agricultural land which, according to her, she has rented to the respondent for a period of five years. The respondent, on his part, argued that he has a title deed over the disputed land and has rented it from the applicant for 50 years. The lower court ruled that since the respondent was in possession of the land for 16 years supported by a legal document of possession adducing to that effect, the applicant's right to bring legal action is barred by the fifteen years period of limitation provided under article 1168(1) of the Civil Code. The Federal Supreme Court Cassation Bench to which the case was referred also affirmed the decision of the lower court. Accordingly, the matter was submitted by the applicant for constitutional interpretation.

The CCI, after reviewing the case, held that the 50 years agricultural land lease contract has resulted in eviction of the applicant from her possession and further argued that the decision of courts in favor of the respondent based on this contract is contrary to article 40(4) of the FDRE Constitution. In its recommendation, which is also approved by the HF, the CCI has turned down the argument that the suit is barred by period of limitation. What can be implied from this decision is the position of the CCI and the HF on the non-applicability of period of limitation for claims of violation of constitutional rights.

As regards courts, because damage or specific performance claims for violations of constitutional rights can only be entertained under law of extra-contractual liability,[131] they have no choice but to apply article 2143 of the Civil Code which provides for two years of period of limitation. The two exceptions to this are damage claims arising from the commission of a criminal offence and victims claim for the recovery of property in which cases the longer period of limitation in the Criminal Code and provisions relating to unlawful enrichment apply respectively. The exclusion of claims of recovery of property from the two years tort period of limitation is a progressive position in the old Civil Code. It could be invoked by individuals whose constitutional property rights have been infringed as a result of confiscation of their assets by the government. The possible application of the

[131] Art. 2035 and other specific provisions of the Civil Code.

two years period of limitation for damage claims arising from violation of constitutional rights is inconsistent with the nature of Constitutional Bill of Rights proceedings. Moreover, 'victims often need many years to overcome the pain of their abuse and time to obtain the courage needed to speak out about the abuse that they have suffered.'[132] This problem is acute in Ethiopia where people are generally scared to bring an action against the government for lack of awareness and the repressive tendencies of regimes. Moreover, the justification for adopting a short period of limitation in tort cases, difficulty of production of evidence to prove tort claims due to absence of any written agreement unlike the case of contract,[133] is unlikely to apply for most disputes of infringements of constitutional rights. What is more problematic is the potential application of this period of limitation to cases that went through CCI and the HF for constitutional interpretation. A party to whose favor the constitution has been interpreted and may take back the case to courts to enforce a compensation claim ensued from the violation of constitutional right. It is not clear whether the two years period of limitation is strictly applicable without due regard to the time spent at the CCI and HF.

3. Constitutional Remedies: The Outcome

3.1 Purpose and Kinds of Constitutional Remedies

The author of this article argues that Constitutional Bill of Rights litigation should produce constitutional remedies different from civil and criminal law remedies. As the Constitutional Court of South Africa in the *Metrorail case* put it, 'the object in awarding constitutional remedy should be, at least, to

[132] This kind of position was taken by states of the US in liberalizing laws governing civil claims arising from child sexual abuse. I argue that this reason also works for violation of constitutional rights in Ethiopia. See National Center for Prosecution of Child Abuse National District Attorney Association, Statutes of Limitation for Civil Action for Offenses Against Children Compilation, Last Updated May 2013, 1, https://ndaa.org/wp-content/uploads/Statutes-of-Limitations-for-Civil-Actions-for-Offenses-Against-Children-2013-Update.pdf (last accessed 23 September 2021).

[133] For more discussion on this, see Andualem, *supra* note 127, at 16.

vindicate the Constitution and deter future infringements.'[134] Constitutional remedies differ from private law remedies because they are 'forward-looking, community-oriented and structural rather than backward-looking and individualist and retributive'. The Court also observed that 'the use of private law remedies to vindicate public law rights may place heavy financial burdens on the state.[135]

Apart from cases where applicants are denied remedies for violations of constitutional rights by administrative bodies and courts,[136] an award of constitutional remedies by courts and the HF may arise in respect of some constitutional rights that 'do not have substitutes in ordinary legislation'[137] and even if they do have ordinary law detailed counterpart, where the laws do not provide remedies in the event of violation of these laws.[138]

As regards kinds of constitutional remedies, the FDRE Constitution lacks sufficient clarity. However, article 37(1), the right of access to justice clause, affirms everyone's right to bring justiciable matter to competent judicial and quasi-judicial organ and *obtain a decision or judgment* (emphasis added). The phrase 'obtain a decision or judgment' could be construed to capture the different kinds of remedies that may arise from constitutional litigation.[139] There are also other constitutional remedies scattered in other provisions of the Constitution including declaration of invalidity (article 9), compensation

---

134 Rail Computers' Action Group v Transnet Ltd/a Metrorail 2005(2) SA 359 (CC) Para. 80.

135 *Ibid.*

136 Courts and administrative bodies may provide remedy to violation of constitutional rights through enforcement of ordinary legislation, such as the labor, tort, criminal, family and electoral laws.

137 Examples include the right not to be victim of non-retroactive application of the law (article 22) and the right not to be victim of double jeopardy (article 23).

138 A common problem that characterizes the laws and policies that seeks to ensure access to health, housing and other social services is their failure to incorporate various types of remedies. They almost exclusively prescribe penalties for perpetrators of the offences and, by inference, stoppage of the unlawful activity, without leaving a room for other types of remedies, such as restitution and rehabilitation. See Mizanie Abate, *Rights-Based Approach to HIV Prevention, Care, Support and Treatment: A Review of Its Implementation in Ethiopia*, Pro quest, USA, 2012, 295.

139 Adem Kssie, *supra* note 8, at 69.

for expropriation of private property (article 40(8), compensation for government assisted development-induced displacements (article 44(2)) and habeas corpus (article 9(4)). Generally, based on these provisions of the FDRE Constitution and that of others,[140] declaration of invalidity, declaration of rights, interdicts, habeas corpus, and constitutional damages are the principal constitutional remedies. What follows in the next sub-sections is a discussion of issues pertaining to declaration of invalidity, interdicts and constitutional damages.

3.2 Declarations of Invalidity

Declaration of invalidity of statutes or inconsistency of administrative decisions or customary practice is the jurisdiction of the HF and perhaps the only remedy it can award. This power has been exercised by the HF in *Melaku case* and *Wessen et al Case* in declaring selected provisions of statutes and decision of the government unconstitutional. Such power emanates from article 9(1), article 62(1) and 83(1) of the FDRE Constitution. Although article 9(1) renders *void ab initio* any law, customary practice or a decision of an organ of state or a public official which contravenes the Constitution, the HF Proclamation made it clear that the decision of the House, presumably with underlying motive to foster public order and the common good, shall have prospective effect and the HF may even give a grace period not exceeding six months with a view to enabling the legislature to amend or repeal the law before it makes the final decision of unconstitutionality.[141] However, nothing prevents the HF from ordering the retrospective effect of its decision as long as this is explicitly stated.[142] In this regard, the law lacks clarity on the test the HF may use to order the retrospective application of its decision. What can be learnt from the experience of other countries is the cautious approach courts

[140] For example, article 23(3) of the 2010 Kenyan Constitution lists the following remedies for violation of constitutional rights: a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and an order of judicial review.

[141] Art. 16 of the HF Proclamation.

[142] *Ibid.*

take to limit the retrospective effects of invalidity to exceptional circumstances and their indifference to 'allow sweeping, retrospective effects on the validity of acts previously done'[143]

By accepting the doctrine of severability, a statute is declared invalid to the extent only of its inconsistency with the Constitution.[144] It is only where it is necessary that the entire legislation is declared unconstitutional.[145] This provision has been used by the HF in the *Melaku Fanta Case* in which the constitutionality of article 8(1) of the Federal Courts Proclamation and article 7(1) of the Revised Anti-Corruption Proclamation were challenged as unconstitutional. Consequently, the House has ordered the invalidation of only these provisions of the proclamations as unconstitutional for contravening article 20(6) of the Constitution.

3.3 Interdict

Interdict, also sometimes known by the name mandamus in India and injection in the US, is a constitutional remedy which goes beyond declaration of invalidation and 'orders a party to either do something (mandatory interdict) or to not do something (prohibitory interdict)'.[146] Thus, be it a permanent interdict or an interim interdict, it is 'essentially future oriented as they aim to regulate future conduct'.[147] Without excluding its relevance to other sets of rights, authors emphasize on the effectiveness of this remedy in the context of socio-economic rights cases.[148] While prohibitory interdicts

[143] David Kenny, *Grounding Constitutional Remedies in Reality: The Case for as-Applied Constitutional Challenges in Ireland*, 37 DUBLIN U. L.J. 53, 58-59 (2014).

[144] Art. 12 of the HF Proclamation.

[145] *Ibid.*

[146] M Bishop, *Remedies*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 9–130 (S Woolman, T Roux & M Bishop (eds.), 2 ed., 2014).

[147] S LIEBENBERG, SOCIO-ECONOMIC RIGHTS - ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION, 409 (Juta & Co. Ltd., 2010) 409.

[148] C Mbazira, *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 170, file:///Users/mizanie/Downloads/2009_litigating_socio-economic_right_in_South_africa.pdf (last accessed 23 September 2021).

could be ordered in cases where constitutional rights violation occurred as a result of non-observance of a negative obligation, mandatory interdict may be ordered where an infringement to a right arises due to non-observance of a positive human rights obligation.[149]

Interdict orders could specify the timeframe within which it should be executed under court supervision.[150] This form of interdict is known by the name structural interdict.[151] The purpose of structural interdicts is 'to remedy structural violations by focusing on changes that need to be effected in institutional or organizational design and functioning.'[152]

Notwithstanding that interdict is one of the best constitutional remedies, the HF and CCI proclamations have no provision on whether and under what circumstances they could be ordered. The only provision on this issue is article 6 of the CCI Proclamation based on which the CCI may order stay of court proceeding until the HF gives final verdict on matter that needs constitutional interpretation. Thus, the HF and CCI do not have a legal basis and guidance to order structural interdicts and provisional interdict when they feel that the applicant may suffer irreparable damage while the case is pending before it. Interim measures are particularly important where an application is submitted directly to the CCI and HF in which case the applicant does not have the benefit of injunction order by courts.

Although the order is solely made based on the application of the claimant, courts could order temporary injunctions based on articles 154-159 of the CPC. Courts may also order final interdicts based on articles 2118 and 2121 of the Civil Code although the provisions are not detailed enough and inflexible in respect of structural interdicts.

149 *Ibid.*

150 I Currie & J de Waal, *supra* note 106, at 19.

151 S Liebenberg, *supra* note 147, at 424.

152 C Mbazira, *supra* note 148.

3.4 Constitutional Damages

Unlike the constitutions of many other countries,[153] the FDRE Constitution does not explicitly incorporate constitutional damages as a remedy for violation of constitutional rights except in specific cases of compensation in the event of expropriation of private property and development induced displacement; nor did the HF affirmed its implicit recognition in the Constitution based on interpretation of article 37. Although it is almost none in the past, we cannot rule out the possibility for submission of these kinds of claims. Due to the limited role of the HF to award only a remedy of declaration of invalidity, claims of constitutional damages for violation of constitutional rights need to be brought to courts either following the handing down of constitutional interpretation by the HF or directly based on the binding precedent of the HF.

Owing to lack of distinct and detailed rules dedicated for this purpose, the court to which claim of constitutional damage is brought will obviously apply tort law. However, the application of tort law is a misfit given the distinct nature and purpose of constitutional damages compared to ordinary tort in private laws. In the English case of *Anufrijeva*, Lord Woolf distinguished the purpose of damages in the private sphere from that in the public sphere as:[154]

> *[H]uman rights damages should be a remedy of last resort, subject to open-ended judicial discretion, and capable of being denied or reduced according to judicial perceptions of what lies in society's best interests. According to this 'public law' paradigm what is of primary importance*

[153] See, for example, article 23(3) of the 2010 Kenyan Constitution, articles 14(5) and 14(7) of the 1992 Ghanaian Constitution, article 25 of 1992 Estonian Constitution, article 25 of the 1991 Constitution of the Republic of Slovenia and section 35(6) of the 1999 Nigerian Constitution. In other countries, constitutional damages are developed either through judicial decisions or ordinary laws. For example, in Ireland, in *Blasacod Mór Teo v Commissioners of Public Works* (No 4) ([2000] 3 IR 565, 591), Budd J held that damages could be recovered where constitutional rights had been infringed as a result of a piece of invalid legislation once the damage 'is proved to have flowed directly from the effects of the invalidity without intervening imponderables and events.'

[154] *Anufrijeva v Southwark LBC* [2004] QB 1124.

> *is bringing an authority's unlawful conduct to an end, while compensation is of secondary, if any, importance.*[155]

Consequently, forward-looking constitutional remedies, interdicts and declaratory relief, are often more appropriate than backward-looking relief in the form of compensatory damages.[156] Nevertheless, there are two circumstances where constitutional damages could have utmost significance. First, this is a case where 'a declaration of invalidity or an interdict makes little sense and an award of damage is then the only form of relief that will vindicate the fundamental rights and deter future infringements.'[157] This could be, for example, in the case of unlawful restriction of liberty, wrongful conviction, the delay of justice, and property-related infringements. Second, where the court believes that 'the possibility of a substantial award of damages may encourage victims to come forward to litigate, which may in itself serve to vindicate the Constitution and to deter further infringements.'[158] In the latter case, article 2116(3) of the Civil Code could be a bottleneck in Ethiopian for it provides that 'the compensation awarded for moral injury may in no case exceed one thousand Ethiopian Birr'.

In line with the objective of constitutional damages, courts in a number of jurisdictions have a wider discretion on whether to award damages and the quantum thereof, in particular, where the claim is against public bodies and officials. By availing themselves of their power, courts may decide to deny or award meagre damages. Quite often, courts tend to show indifference to order large sum of money against government and its officials. This is justified by 'qualified immunity which enables government officers to go about their business without debilitating fear of damages liability';[159] the need to direct

---

155 JASON NE VARUHAS, DAMAGES AND HUMAN RIGHTS (Oxford: Hart Publishing, 2016).

156 Michael L. Wells, *Constitutional Remedies: Reconciling Official Immunity with the Vindication of Rights*, University of Georgia School of Law, Research Paper Series, Paper No. 2015-5, March 2015, 113 and 129, file:///Users/mizanie/Downloads/SSRN-id2577483.pdf (Last accessed, 23 September 2021).

157 Iain Currie & Johan de Waal, *supra* note 106, at 209.

158 Ibid.

159 See PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 59-81 (Yale University Press, 1983).

resources away from cash compensation for past injury and toward the prevention of future harm and reform;[160] and the importance of protecting public funds.[161] If used by courts, the Ethiopian tort law has also a room to use this flexibility under article 2090(2) of the Civil Code. Based on article 2090(2), the court may deviate from monetary damages as long as it has a reason to believe that other non-pecuniary measures, such as injunction and reinstitution, could limit damage though preventing its likely occurrence or reoccurrence.[162] However, rules authorizing an award of more than actual damage, intended, for example, to encourage victims to come forward to litigate and deter future violations, are absent from the Ethiopian tort law.[163] It should be noted, however, that punitive or exemplary damages are awarded in legal systems throughout the world 'by way of punishment or deterrence, given entirely without reference to any proved actual loss suffered by the plaintiff.'[164] The general requirement for awarding these kinds of damages is that 'the conduct of the defendant be malicious, reckless, oppressive, abusive, evil, wicked, or so gross that some type of deterrent or punishment is necessary.'[165]

In the event of violations of rights by public officials, there are two options for the victims: an action for constitutional damages could be theoretically brought against the specific delinquent official or the government. A closer look at the Ethiopian Civil Code indicates that government officials and employees are deemed to commit fault and hence incur tort liability[166] on a number of provisions which could be relevant to violation of constitutional rights. These include: the catchall tort of infringement of the law (article 2035), and other specific articles, such as physical assault (article 2038) and interference with the liberty of another (article 2040). However, the scope of liability is quite limited because senior public officials are immune from tort-

[160] John C. Jeffries Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. (1999).

[161] *Id.*, 8.

[162] GEORGE KRZECZUNOWICZ, THE ETHIOPIAN LAW OF COMPENSATION FOR DAMAGE 34-37 (Addis Ababa University, Faculty of Law, 1977).

[163] *Id.*, 240.

[164] Dinah Shelton, *supra* note 23, at 403.

[165] *Id.*, 405.

[166] See article 2126(1) of the Civil Code.

based liability pursuant to article 2137 of the Civil Code. As regards tort liability of the government, the Civil Code allows the vicarious liability of the state for its civil servants and employees provided that they commit professional fault.[167] Professional fault is said to exist 'where the person who committed it believed in good faith that he acted within the scope of his duties and in the interest of the State'.[168] In reality, it could be difficult to show the commission of professional fault. Having due regard to the nature of human rights, in some jurisdictions, mere infringement of human rights gives rise to damages without proof of harm (pecuniary loss and non-pecuniary losses).[169] Given that damage is the central element of Ethiopian tort law, it would be difficult to imagine payment of damages without the victim enduring material or moral injury.[170]

In relation to constitutional damage, an issue worth raising is whether compensation to violation of constitutional rights applies to all rights or is limited in scope to certain rights only. In countries, such as Germany, Portugal, Italy and the US, 'damages remedies are more broadly admitted for violations of civil and political human rights than for violations of economic, social or cultural human rights'.[171] This is due to the difficulty of direct applicable of socio-economic rights without further statutory contents.[172] In the absence of such explicit or implicit stipulation, one may argue that violation of all constitutional rights in Ethiopia could result in claims for damages as long as the conditions provided in the tort law are fulfilled.

A final point worth considering is the issue of compensation for a multitude of people who suffered massive and systematic violation of human rights in the hands of the Ethiopian Government over the past 27 years or so. The author acknowledges that this is an extremely complicated matter that deserves separate research; but, convinced also that it will not be fair not to

[167] *Id.*, art. 2126(2).

[168] *Id.*, art. 2127(1).

[169] See EWA BAGINSKA, DAMAGES FOR THE INFRINGEMENT OF HUMAN RIGHTS: A COMPARATIVE ANALYSIS 22 & 23 (Springer, 2016).

[170] See arts. 2027 and 2090 of the Civil Code.

[171] Ewa Baginska, *supra* note 168, at 4.

[172] Ibid.

raise the issue altogether in this article. I am of the opinion that the issue of reparation received no attention on the part of the current reformist leadership which came to power in April 2018. This is a strange development in the light of the government's admission of its hitherto enormous involvement in serious massive violations of human rights, including torture, arbitrary deprivation of liberty, extra-judicial killings and lengthy pretrial detention as well as the commitment of the current leadership in taking, albeit slowly and precariously, other measures that would enable the country to deal with the legacy of large-scale human rights abuses through ensuring accountability and achieving reconciliation.[173]

If the current Ethiopian political and democratic transition has to be successful, the government should give priority to the urgent issue of compensation for thousands of victims of serious and widespread violation of human rights similar to the attention it paid to prosecution of perpetrators, institutional reform, peace and reconciliation.[174] Here, it should be noted that the government cannot discharge its constitutional and international human rights obligations through the existing judicial and tort law approach. Judicial compensation to individual claimants may not be possible in this case since it may take too much time and prove too costly.[175] Mass human rights violation is proven to 'present unique challenges regarding evidence, statutes of

[173] United States Department of State, Bureau of Democracy, *Human Rights and Labor, Country Reports on Human Rights Practices for 2016 and 2017*, https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/ (last accessed, 23 September 2021) .

[174] Although it does not have a comprehensive roadmap and measures taken so far are far from success, the Ethiopian government is arguably implementing transitional justice. It has established Reconciliation Commission by Proclamation No.1102 /2018. It has also persecuted some senior officials suspected of serious violation of human rights; and taken a range of institutional reform measures. For a detailed discussion on elements of transitional justice, see Ronli Sifris, *The Four Pillars of Transitional Justice: A Gender-Densitive Analysis*, in RESEARCH HANDBOOK ON INTERNATIONAL HUMAN RIGHTS LAW (Sarah Joseph and Adam McBeth (ed.), Edward Elgar Publishing 2010).

[175] Hae Duy Phan, *Reparations to Victims of Gross Human Rights Violations: The Case of Cambodia*, 4 E. ASIA L. REV. 277, 294 (2009).

limitations, and the identification of perpetrators.'[176] What can be understood from the experience of other countries that implemented transitional justice is that 'an administrative approach, as opposed to judicial approach, and collective measures, as opposed to individual measures, are more feasible and appropriate'.[177] Administrative and collective measures will enable the government to extend reparation to large number of victims; 'have less risk of incorrectly assessing the victims' sufferings'; and could be taken in conjunction with other measures of truth and justice.[178]

Following an administrative and collective model, several countries have enacted special legislation and institution as well as established state reparation funds to compensate victims of human rights abuses including in Austria, in 1990, for payments to Jewish survivors of the Holocaust; in Argentina, in 1991, for compensating human rights victims of disappearances; in Chile, reparations for all peasants excluded from agrarian reforms or expelled from their land; in Germany, to pay victims in post-war reparation; and South Africa, in 1995, for payment of reparations for gross human rights violations committed during the apartheid-era.[179] Aside from state funds, Ethiopia could also enforce perpetrators of human rights violations to pay reparations and seek contribution from the international community.

---

[176] Matthew F. Putorti, *The International Legal Right to Individual Compensation in Nepal and the Transitional Justice Context*, 34 FORDHAM INT'L L.J. 1131, 1178 (2011).

[177] *Id.*, at 1154.

[178] *Id.*, at 1154-178. See also Inter-American Court of Human Rights, Case of the *Afrodescendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia* (2013) Series C No. 270, para. 470.

[179] Hae Duy Phan, *supra* note 175, at 292-94; Hennie Strydom, Sascha-Dominik Bachmann, *Civil Liability for Gross Human Rights Violations*, J. S. AFR. L. 448, 462-463 (2005); and Postamble of the Constitution of the Republic of South Africa Act 200 of 1993 and the Promotion of National Unity and Reconciliation Act 34 of 1993.

Conclusion

Protection of human rights is central to the achievement of the Ethiopia's national objective of building a political community founded on rule of law and democratic order. Cognizant of this, the FDRE Constitution guarantees a broad range of human rights in its Bill of Rights chapter. However, Constitutional Bill of Rights litigation involving the government is unacceptably low notwithstanding that the Constitution has been in enforce for close to twenty-six years and human rights violations have been routinely perpetrated by the government.

Admittedly, no single reason can explain the unacceptably low level of Constitutional Bill of Rights litigation. However, the most shattering deficiency of the FDRE Constitution is the institutional architecture for the enforcement of constitutional rights protection. Largely enthused about putting in place utmost protection to the group interests and rights of NNP arguably at the expense of individual rights, not only does it snatch the power of constitutional interpretation from ordinary courts but also put it in the wrong hands. The HF, and CCI albeit with some degree, lacks freedom from political influence, does not have enough time and is composed of members who are not competent enough to effectively and efficiently carryout a constitutional interpretation mandate.

The problem of lack of competent and independent institution(s) is compounded by absence of clear and comprehensive Bill of Rights litigation procedure as well as redress for violation of constitutional rights. The procedure for litigation of the Bill of Rights of the Constitution and remedies can be found scattered in the Constitution, the HF Proclamation, CCI Proclamation, the Civil Code and CPC. These laws, however, lack comprehensiveness and clarity as well as lay down procedural standards that are not tailored to the specific nature of constitutional litigation. Accordingly, the federal parliament should adopt a comprehensive Constitutional Bill of Rights enforcement law that could be applied by the HF, CCI and courts based on the power vested in it under articles 13(1), 9(2), 51(1) and 55(1) of the Constitution.

The would-be comprehensive Constitutional Bill of Rights enforcement law should explicitly recognize, *inter alia*, the doctrine of avoidance which makes constitutional litigation as a measure of last resort; liberal standing rules including PIL; legitimate exceptions to the requirement of exhaustion of administrative and judicial measures; no or longer statute of limitations for violations of constitutional rights; (structural) interdicts as a remedy with the necessary guidance; judicial discretion in award of constitutional damages; rules that limit the immunity of senior public officials from tort-based liability; and adopt and implement an administrative and collective strategy to compensate the multitude of people who suffered massive and systematic violation of human rights in the hands of the Government over the past 27 years or so.

***