Revisiting the Justifications for Vesting Constitutional Interpretation Authority in the House of Federation

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Abstract

The Ethiopian Constitution framers advanced contractual and democratic arguments for vesting constitutional interpretation authority in the House of Federation (HoF) instead of the courts. They contended that the Constitution is a political contract between and among the 'nation, nationalities and peoples' of Ethiopia and the HoF, as representative of these groups, is the appropriate organ to interpret it. The democratic basis for turning away from the courts and vesting constitutional interpretation authority in the HoF is based on the claim that courts are deficient from the point of view of democracy in that they are unelected.

Except for the contractual argument, the framers have not provided substantive justification for why constitutional interpretation authority should be vested in the HoF: their argument on the basis of democracy is not an argument as to why the HoF should have constitutional interpretation authority but rather why the courts should not have it. This is based on popular but unexamined view of the connection between constitutional judicial review and democracy. Their only substantive justification, the contractual argument, is not entirely clear and tenable on any plausible interpretation of what it means.The preference to the HoF as opposed to the courts is not the democratic and contractual arguments but their communitarian political viewpoint.

1. Introduction

One of the controversial issues in Ethiopian constitutional discourse is the question of who is and should be in charge of constitutional interpretation. Unlike many other constitutional juris-

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dictions which usually vest this power in the courts, the Federal Democratic Republic of Ethiopia (FDRE) Constitution assigns the authority to do so to the second chamber of the federal government, the House of Federation (HoF). This was a controversy that emerged during the making of the Constitution, and it continues unabated two decades after the latter was ratified. It thus remains a contentious issue in academic discussion and published articles whether and to what extent courts in Ethiopia have the power to interpret the Constitution.

Most of the views are oriented towards showing that, in one way or another; Ethiopian courts have room for and can engage in interpreting the Constitution.Several arguments have been marshalled along these lines. These range from the claim that judicial review is an inherent power of the courts and that the Constitution does indeed declare that judicial power is vested in the courts, to claims that one has to read between the lines of the clauses of the Constitution that deal with assignment of constitutional interpretation. The principal purpose of these arguments seems to be to establish that, in spite of the Constitution's explicit stance that the HoF has authority to interpret the Constitution, the Ethiopian courts have not been excluded and therefore play some part in constitutional interpretation. The bigger claim seems to be that, on any interpretation of the Constitution, it is difficult, if not impossible, for courts to take judicial decisions without involving constitutional interpretation and such interpretation is therefore a joint power with the HoF.

Nonetheless, this is a legal and constitutional issue that needs to be settled by drawing the appropriate lines between the jurisdiction of the HoF and that of the courts.In these debates , however, one core issue that has been neglected is the normative question vesting the authority to HoF, instead of courts, raises.

In all of the discourse on constitutional interpretation, the normative dimension has received little or no attention.[1] This de-

1 The only article which attempts to address the normative question head-on is by Yonatan (2006). Though my article is also a theoretical re-evaluation of the justifications for vesting constitutional adjudication power in the HoF, it differs from Yonatan's in a number of respects. First, my understanding of his article is that his primary focus on is on whether the framers of the constitution have passed the test of avoiding the counter-majoritarian difficulty, which he seems to agree hesitantly that it has. I also take up this issue, but argue that there is no universally

serves a thorough treatment on its own, however, as it raises a larger theoretical question: Which institution, in a constitutional democracy, ought to be vested with the power to interpret a constitution?

There is little discussion in Ethiopia on the propriety and adequacy of the justifications for stripping courts of the power of constitutional interpretation and giving it to the HoF. This article calls for a fresh evaluation: it revisits the nature, propriety and adequacy of the justifications that have been provided for vesting constitutional interpretation power in the HoF.

The Constitution's framers advanced contractual argument and argument on the basis of democracy, for vesting constitutional interpretation authority in the HoF instead of the courts. They contended that the Constitution is a political contract and that the HoF is hence the appropriate organ to interpret it. The democratic basis for turning away from the courts and vesting constitutional interpretation authority in the HoF is that, first, courts are not the impartial arbiters they profess tobe, and secondly – a familiar argument –they are deficient from the point of view of democracy in that they are unelected.

This article argues that, except for the contractual argument, the framers have not provided substantive justification for why constitutional interpretation authority should be vested in the HoF: their argument on the basis of democracy is not an argument as to why the HoF should have constitutional interpretation author-

agreed concept of democracy and therefore it is the case not only that the framers fail to avoid the counter-majoritarian difficulty but that, in any interpretation of democracy, it is hard to see how the HoF can overcome the democratic deficiency. Secondly, I attempt to address, to the extent possible, the single substantive justification provided by the framers of the Constitution, the contractual argument. In this respect too, as with the democratic argument, I argue that the framer's justification is improper and inadequate. Thirdly, Yonatan's article seems to combine an efficiency argument with the normative argument. I pursue a purely theoretical investigation on the nature, propriety and adequacy of the justifications for vesting constitutional review power in the HoF. Fourthly, I question if the justifications proffered by the framers are at all genuine. Instead, I not only argue the impropriety and inadequacy of the contractual and democratic arguments but maintain that a communitarian political viewpoint seems to be the justification lurking behind the choice of the HoF as the organ to be vested with the authority to interpret the Constitution.

ity but rather why the courts should not have it. It is argued that, even within the terms of the framers' own argument, the democratic argument is not a sufficient reason to strip courts off the authority to interpret the Constitution. Their only substantive justification, the contractual argument, is deeply flawed. It is also argued that what motivated the constitution-makers' preference for the HoF as opposed to the courts is not the democratic and contractual arguments they advanced but the fact that they fell into the trap of adopting a communitarian political viewpoint.2

The article sets the scene by first exploring one of the most fundamental questions in a constitutional democracy, namely who should interpret a constitution? In its second and third parts, the article examines the justifications given for Ethiopia's approach in preferring the HoF to the courts as the organ responsible for constitutional interpretation; the fourth section considers the adequacy of these justifications. The article ends with a conclusion and a number of observations.

2 It is true that, towards the end of the twentieth century, collective or group rights became increasingly recognized. There is on-going theoretical debate about whether and how far liberalism can accommodate such rights. It is not the intention in this article, however, to engage with or try to settle this debate. All it does is to evaluate, within the Ethiopian context, the nature, adequacy and propriety of the justifications for departing from the near-universal approach of vesting constitutional interpretation in the courts, whether regular or ordinary. There is an abundant literature now on group-based claims and group rights in general and on the compatibility of liberalism and nationalism in particular. The theoretical debate, however, is not yet settled, nor is it entirely clear what multiculturalism entails in terms of the specific form that the institutional design should take in respect of constitutional interpretation. First, at a theoretical level, it remains to be seen what the new nexus of liberalism and multiculturalism has to offer in the way of a coherent, theoretically defensible, alternative institutional approach which is sympathetic to group rights or group-based claims. Secondly, radically different institutions for constitutional interpretation outside of courts have not been seen in practice among nations which embraced groups' rights or group-based claims. This is evident in India, Nigeria and Switzerland (allowing in the latter case for some innovations to do with aspects of constitutional interpretation via referendum). The majority of European countries follow in the footsteps of the model of the German constitutional court model. The central claim of this article is that in choosing the HoF to interpret the Constitution, the makers of the Constitution have not offered an adequate justification of this choice.

2. Institutional Choice for Interpretation of a Constitution

In constitutional democracies, one of the most fundamental issues constitution makers have to decide is the question: which organ of government ought to be vested with the authority to interpret the constitution? There is, however, no universal consensus on which organ is appropriate for this role. The various jurisdictions to the matter may be divided into those that take the approach of giving the power to courts and those that either have no suchconstitutional judicial review, as in Britain,[3] or vest the power to interpret the constitution neither in ordinary courts nor in constitutional courts.

Even within jurisdictions that vest constitutional interpretation authority in the judiciary, one finds two models: the decentralized and the centralized constitutional review systems. In the decentralized model, also called the American model, all courts exercise judicial review power. The alternative model, predominant in Europe, is the centralized judicial review system, also known as the Austrian or European model: here, constitutional interpretation is vested in a special court, namely a constitutional court (Stone, 2012, p. 817). In the centralized model, constitutional adjudication is the exclusive province of such a constitutional court, which is usually organized neither as part of the regular court structure nor as part of the other branches of government (Stone, 2012, p. 817).

The major differences between the two models are, first, that in the centralized mode the constitutional court has monopoly power to invalidate infra-constitutional norms, whereas in the decentralized model judges at all levels have that authority (Stone, 2012, p. 818). Secondly, in the decentralized model, no distinction is made between types of litigation (Stone, 2012, p. 818). For example, the US Supreme Court is the highest court of appeals for almost all legal disputes whereas in the centralized models the constitutional courts do not have jurisdiction on litigations,

3 Britainstill avowedly continues with its unwritten constitutional traditionin which parliamentary sovereignty, one of the pillars of these constitutional conventions, excludes British courts from checking the validity of legislation made by Parliament. In the Netherlands, as in Britain, there is also little constitutional judicial review, despite the country's having a written constitution. See Kokott& Martin (2012), p. 798.

which is the jurisdiction of ordinary courts. Third, though constitutional courts have links to, they are part of neither the legislative, nor the executive, or the judiciary (Stone, 2012, p. 818). Constitutional courts have a "constitutional space, which is neither clearly 'judicial' [...] nor 'political'"(Stone, 2012, p. 818). Fourthly, in the decentralized model, particularly in the US, there is only concrete review, whereas most constitutional courts exercise abstract review as well (Stone, 2012, p. 818).

2. 1 The Counter-Majoritarian Difficulty

Jurisdictions which vest constitutional interpretation authority to courts, in particular which authorize the courts to invalidate laws and actions of the executive and legislature on the ground of inconsistency with the constitution, give rise to the problem of its compatibility with democracy. The core of the objection is that such power is illegitimate from the perspective of democracy.[4] Constitutional judicial review is regarded as antidemocratic.

In the US, following the landmark decision in Marbury vs. Madison, courts of all levels, and ultimately, the Supreme Court, have got the authority to exercise judicial review to determine the constitutionality of the laws made by Congress and of the actions of the President. It has been argued, however, that this creates a tension with democracy,[5] in that the exercise of judicial review power is held to be un- or anti-democratic: the President and members

4 The objection to judicial review on the ground of democracy, though the most popular, is not the only one. It is also attacked as elitist, anti-populist and anti-republican. See Dworkin (1996). The first chapter of the latter is devoted wholly to explaining the issue: Dworkin's position is that the claim that judges' judicial review power offends democracy is unfounded.

5 In the US, which originated and contributed the idea and institution of judicial review to the world, one of the recurrent controversies in constitutional theory is the legitimacy of judicial review from the point of view of democracy. Though it is contemplated in the *Federalist Papers* that US courts would have the power to interpret the Constitution, the latter does not explicitly identify who has the ultimate say in interpreting it. In the US, judicial review is a notion and practice that derives largely from the Supreme Court, which asserted judicial review power through interpretation of the Constitution. Hence, judicial review power of the court is a product, if not an invention or even appropriation of power, stemming from constitutional interpretation.

of Congress are elected by the people, whereas Supreme Court judges are appointed and for a lifetime,[6] and by virtue of being unelected are therefore unaccountable. Judicial review is considered undemocratic because unelected and unaccountable judges get the power to void the decisions of popularly elected and accountable organs of government, congress and the president. It is alleged that through the exercise of judicial review, judges wield huge power against or over the representatives of the people. It is a problem which Alexander Bickel has termed "the counter-majoritarian difficulty." According to him judicial review is a "deviant institution" as it gives unelected judges the power to overturn the decisions of the elected officials.(Bickel, 1962, p.18)

The debate on the nature of relationship between judicial review and democracy is a subset of the larger debate on the relationship between democracy and constitutionalism. "Democracy" is the most difficult term to define (Dworkin, 1996, p. 15).[7] There are a variety of views on what democracy is. These include the view which holds that it is majority rule, but so too the competing view that it is not just simply majority rule but majority rule that is subject to fairness (Dworkin, 1996, p. 15.[8] The first of these views – that equates democracy to majority rule – is potentially in tension with constitutionalism; the second view – that democracy entails majority rule subject to fairness – would not only make the terms "democracy" and "constitutionalism" consistent with each other, but help them get along together in practice.

6 See US Constitution, Article III, Section 2

7 Abundant works have been written on the subject of democracy, almost all which begin by noting how notoriously difficult it is to define. There are also competing views on forms of democracy, with numerous alternatives to Western majoritarian democracy, for a long time the dominant model, having been articulated. These alternatives usually are propounded in the context of divided societies, where ethnic, linguistic, religious e.tc differences have political salience. A variety of proposals have been made regarding the proper design of a democratic system for managing ethnically or linguistically based conflict, but two stand out: centripetalism and consociationalism. Consociationalism capitalizes on executive power-sharing and proportional representation, whereas the former advocates principally an alternative vote electoral system as a mechanism to manage societies bedeviled by ethnic conflict. These competing approaches focus on how the government institutions should be designed and on how group representation could manage ethnic conflict; they do not directly address the issue of whether and what institution should have the last word on what the constitution says.

8 See also Dworkin (2006), pp. 146-147.

Constitutionalism, on the other, is an idea borne out of mistrust that democracy's internal mechanism for preventing the tyranny of the majority is inadequate to the task (Murphy, 1993, p. 6). It emphasizes the danger that democracy poses to individual and minority rights and thus advocates for a limitation of government power (Murphy, 1993, p. 6). Constitutionalism employs a number of devices to do so. These include, among others, the breaking down of power both horizontally and vertically, indirect elections, the existence of a bill of rights, and judicial review (Murphy, 1993, pp. 6-7).

The concept which has been developed to strike a balance between democracy and constitutionalism is constitutional democracy (Murphy, 1993, p. 5). Many Western states are constitutional democracies; that is to say, they are neither pure democracies nor purely constitutionalist states. They prescribe certain legal limitations, usually through written constitutions, on the majority will, and, among other things, accept judges' exercise of judicial review power as a mechanism for ensuring that legal limits are observed. Constitutional democracies attempt to minimize the effects of the excesses of democracy and constitutionalism. If constitutionalism were pursued to the extreme, it would render government dysfunctional; on the other hand, if democracy is pursued to extremes, it poses the risk of tyranny by the majority (Murphy, 1993, p. 5).

Judicial review is one of the most important mechanisms that constitutionalism advocates for limiting governmental power. Dworkin claims that the charge that judicial review power in the US is anti-democratic is "a popular but unexamined assumption about the connection between democracy and majority rule" (1996, p. 6).

He contends that those who view judicial review to be undemocratic hold this position because they emphasize or adopt the majoritarian premise: that democracy comes down to majority decision and neglecting the constitutional conception of democracy. He argues that the majoritarian premise is wrong: although it is true that democracy advocates that the will of the majority should prevail, people accept, for instance in the US, that on some occasions the will of the majority should not govern (1996, p.16). Moreover, people agree "the majority should not always be the final judge of when its own power should be limited to protect

individual rights …" (1996, p. 16).

Dworkin therefore claims that "when we understand democracy better, we see that the moral reading of a political constitution is not anti-democratic but, on the contrary, is practically indispensable to democracy" (1996, p. 7). The constitutional conception of democracy denies that the defining goal of democracy is for "collective decisions always or normally be those that a majority or plurality of citizens would favour" (1996, p. 17). For Dworkin, the defining aim of democracy is that

> [c]ollective decisions be made by the political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect. This alternate account of the aim of democracy, it is true, demands much the same structure of government as the majoritarian premise does. It requires that day-to-day political decisions be made by officials who have been chosen in popular elections. But the constitutional conception requires these majoritarian procedures out of a concern for the equal status of citizens, and not out of any commitment to the goals of majority rule. (1996, p. 17)

Dowrkin, thus, concludes that " democracy does not insist on judges having the last word, but it does not insist that they must not have it." (1996, p.7) And the constitutional conception of democracy does not necessarily reject the possibility of judges being vested with the authority to interpret a constitution.

3. The Ethiopian Approach to Constitutional Interpretation

Among the distinctive features of the FDRE Constitution is its approach to constitutional interpretation.[9] As noted, it vests

9 Other distinctive features include, first, the introduction of a predominantly ethnic-based federal system. Secondly, it vests "nations, nationalities, and peoples" with the right to self-determination. Thirdly, this right includes the right to secession. Fourthly, it vests sovereignty in these nations, nationalities and peoples. Fifthly, it establishes a multiparty democracy.

the power to interpret the constitution in the HoF,[10] the second chamber of the federal government. Unlike the House of Peoples Representatives[11], the HoF is composed of "nations, nationalities, and peoples" (NNP).[12]

The HoF, in undertaking constitutional interpretation, is assisted by the Council of Constitutional Inquiry.[13] The Council is composed predominantly of lawyers, with the president and vice president of the Federal Supreme Court also being at the same time the president and vice president, respectively, of the Council.[14] The Council is not a court. Its authority is to examine constitutional petitions and recommend to the HoF whether or not they warrant constitutional interpretation.[15] The decision to accept or reject the constitutional opinion rests ultimately with the HoF.

4. Justifications for Providing Constitutional Interpretation Power to the HoF

Three principal justifications have been advanced for entrusting the HoF with the authority to interpret the Constitution,[16] but essentially they can be reduced to two: the first is the contractual

10 Article 62 of the FDRE Constitution. Among these powers are the enforcement of the self-determination right; determination of civil law areas that are needed to establish and sustain an economic union; determination of federal subsidy formulas and the sharing of revenues for joint taxation power; and the authorization of the federal government to intervene in the event of acts that endanger constitutional order.

11 This is the House composed of members through popular election and vested, among othere with legislative powers on matters that fall under federal jurisdiction. See

12 According to Article 39(5), a "Nation, Nationality or People" refers to a group of people who exhibit five characteristics. These include a common language, culture and "psychological make-up," a belief in a common or related identity, and inhabitation of a contiguous territory. According to Article 61 of the FDRE Constitution, each NNP has one representative; for each additional one million people, there will be one more representative.

13 Articles 83, 84 of the FDRE Constitution.

14 See Article 82(2) of the FDRE Constitution.

15 See Article 84 of the FDRE Constitution.

16 See የኢትዮጵያሕገመንግስትቃለጉባኤ፤ ጥራዝ 5. (The minutes of the Constituent Assembly, volume 5) These are the justifications presented by the chairman of the federal and regional states power division committee provided for in the Constituent Assembly minutes. The specific pages in which they wrote the justifications are barely visible.

argument, the second, the argument on the basis of democracy.

From a contractual perspective, the framers argued that the Constitution is a political contract and the parties to the contract are the NNP.[17] They held that, as a political contract, the Constitution is a political document.[18] Thus, they found it justifiable to vest constitutional interpretation power in the HoF than the courts. From this, it seems that they thought the courts are not the appropriate organs to be in charge of interpreting the Constitution; they believed that, given the political nature of the Constitution, the sole legitimate organ in which to vest constitutional interpretation power is the HoF.

From a democratic perspective,[19] the framers contended that vesting constitutional interpretation authority in courts is contrary to democracy. The objection emphasizes two principal deficiencies of the courts, objections which the framers advanced as a ground to strip them of the authority to interpret the Constitution. The first is the problem of the partiality of the judges. They stated that judges, as part of the community, are prone to partiality.[20] The framers thus feared that putting judges in charge of constitutional interpretation would give them license to interpret the Constitution on the basis of their political or ideological inclinations. Secondly, vesting the authority of constitutional interpretation in the court is antithetical to democracy. Though it does not come out forcefully, the framers seem to be following the line of argument that judges are not elected and are therefore not accountable.[21] This is a familiar argument, echoing similar objections made in Western jurisdictions that vest the power of constitutional interpretation in courts. As underscored earlier, this is an objection based on the idea that the exercise of judicial review power by judges, who are neither elected nor accountable,[22] is deficient in terms of democracy.

17 This is made abundantly clear in the first line of the preamble, which refers to "we, the Nation, Nationalities and Peoples of Ethiopia"; similarly, Article 8 explicitly vests sovereignty in "Nations, Nationalities and Peoples of Ethiopia"; Article 39 provides that "[e]very Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession."

18 See The Constituent Assembly Minutes Volume 5

19 See the Constituent Assembly Minutes Volume 5

20 This is explicitly stated in the Constituent Assembly minutes, volume 5.

21 See the Minutes of the Constituent Assembly. Volume 5

22 In fact, the example and the problem of judicial review in the US was

In view of these claims about nature of the Constitution as a political contract and the alleged deficiencies of courts from the perspective of democracy, the makers of the Ethiopian Constitution opted to vest the power in the HoF. The implication of this seems to be that the HoF is free from these defects and, therefore, in the view of the makers of the Constitution, it is the most legitimate body for this purpose, since it represents the NNP.

However, beyond the mere claim that the Constitution is a political document, the framers have not provided any substantive justification of why and how the HoF is theappropriate organ. The claim of democratic deficiency is an argument against vesting constitutional interpretation power in the courts; it is not a substantive argument as to how andwhy the HoF is a legitimate organ with which to vest the authority to interpret the Constitution. The contractual argument is the only substantive argument provided as to why the HoF is the legitimate organ for interpreting the Constitution, but even so,it is thin and flawed.

As will be shown in the next section, the main reason for the framers' preference for the HoF is, rather than the problem of the potential democratic illegitimacy that could arise from vesting judicial review power in the courts, it is the case that they fell into the trap of a communitarian political viewpoint. A reading of the minutes of the Constituent Assembly[23] reveals – sometimes explicitly, at other times implicitly – opinions that bring to light the framers' concerns that judges, working under the guise of constitutional interpretation, might trump the collective right to self-determination.

It is argued in this paper, however, that relying on the arguments of judicial partiality and democratic deficiency as a basis for stripping courts of the power of constitutional review is improper and inadequate, for a number of reasons.

mentioned several times in the minutes.

23 This was the body that was responsible for ratification of the FDRE Constitution, by virtue of the power vested in it by the Transitional Charter.

5. Weighing up the Propriety and Adequacy of the Justifications

Several objections can be raised against these justifications. First, we will address the adequacy of the contractual argument, after which we examine that of the democratic argument. The final part addresses what is arguably believed to be the fundamental reason motivating the framers' decision to vest authority for constitutional interpretation authority in the HoF, namely their adherence to the communitarian viewpoint.

5. 1 The Adequacy of the Contractual Argument

The contractual argument posits that the Constitution is a political contract and that the parties to the contract are the Ethiopian NNP. From this premise, the framers concluded that only these parties are entitled to interpret the Constitution, arguing that the HoF, which is designed to be representative of NNP, is the only organ that should be legitimately vested with constitutional interpretation authority.

It is not entirely clear what one is to make of this claim, as it is difficult to discern the meaning of a "political contract." One is therefore left to speculate about what it might plausibly mean to say the Constitution is a political agreement.

It is needless to mention that every constitution is a political document. In a broad sense, constitutions are political documents. But they are also legal documents. Indeed Constitutions are understood as both political and legal documents. However it would be a nonsensical position if the framers intended the FDRE Constitution to be regarded, understood and used exclusively as a political document. In fact, there is evidence in the Constitution that the framers sought it to be legally binding as well: in its Article 9, the Constitution declares that it is the supreme law of the land and that any law or government action contrary to it is void.

The contractual argument thus ignores or overlooks the fact that the framers intended the Constitution to be legally binding at the same time. Moreover, even if we concede that it is a political document, it is unclear how or why it follows logically that only the parties to the Constitution are entitled to interpret it. Does it not make sense rather that there should be another organ in charge

of interpreting this contract when there is a dispute about it? How is it logically the case that the parties to the contract should also be in charge of interpreting the very same contract whose terms are in dispute? What is to prevent their being a judge in their own cases?

One may speculate that, in viewing the constitution as a political contract, the framers might have thought in the literal sense in that each NNP entered in the contract. Even in the ordinary, literal interpretation of the framers' understanding of the Constitution as a political contract, there has not been a time in history when these groups independently, and actually, came together and entered into the contract or signed it. The political contract entailed by the Constitution can be understood only as a symbolic act.

Another possible interpretation of the contractual argument is that the makers of the Constitution might have social contract theory in mind. Even so, question arises how this fits their claim that only parties to the contract are entitled to interpret the contract. The soundness, plausibility and coherence of the framers' position, both at the higher level – that of social contract theory – and at the institutional level – the choice of organ for constitutional interpretation – is questionable.

Social contract theory provides that the legitimacy of government authority derives from contract (Alder, 2008, p. 23).[24] In the standard social contract theory, the parties to this contract are individuals rather than, as in the case of Ethiopia, ethnically defined groups; to reiterate, in the tradition extending from Hobbes to Rawls, the centrepiece of social contract theories, essentially and principally, is a contract between and among individuals (Alder, 2008, p. 23).

According to the theory, rationality dictates individuals in a state of nature enter into the contract by transferring some of their rights to set up the government (Alder, 2008, p. 23). The government derives its legitimacy, therefore, from the consent of the governed (Alder, 2008, p. 25). In its Lockean version, social contract theory is the foundation of liberalism (Heywood, 2004, pp. 198-199). Liberalism emphasizes individual freedom and autonomy, which predisposes it to support the limitation of government powers. Liberalism and social contract theory are not nec-

24 See also Heywood (2004), pp. 66, 198-199.

essarily opposed to the exercise of constitutional interpretation by courts.

If what the makers of the Ethiopian constitution had in mind was the social contract theory as a justification for vesting constitutional interpretation authority to the HoF instead of courts, they have turned it on its head. First, their interpretation and application of the theory in the context of collectivist paradigm is flawed and misses the point of the theory. One cannot, and does not, find indications within the theory that it was ever thought of or designed in the context of groups, let alone ethnic or linguistic groups. Consequently, it is hard to see how the Ethiopian case fits in with the fundamental assumptions of the theory, namely individual self-interest and rationality, conditions that exist and lead individualsto enter into the contract and form the government. It is implausible to suggest that groups, including ethnic or linguistic groups, have these attributes of self-interest and rationality. In particular, it is inconceivable to think thatethnic groups act and are moved by rational thinking.

Secondly, the framers' understanding misses the entire rationale behind the theory of the social contract. The central purpose of social contract theory is that it is an attempt to answer one of political theory's major questions, not to provide a historical account of how the state came into existence (Heywood, 2004, pp. 198-199). The theory has been devised to give a theoretical explanation why we are bound by the state (Heywood, 2004, pp. 198-199). In other words, it gives a rational answer to the question of why we should obey the state and law. It is therefore unsound to use social contract theory, developed to explain the rationality of obeying the state, as a basis for justifying why onlyparties to this notional social contract are entitled to interpret the constitution – a matter on which the theory does not pronounce.

The makers of the Ethiopian constitution have made an illogical move from the claim that the parties are ethnic or linguistic groups to the conclusion that only an interpretation undertaken by these groups is legitimate. In social contract theory, there is no conclusion from the fact that the parties are individuals that it is only individuals who should interpret the constitution or that a legitimate interpretation is one undertaken only by these individuals.[25] By contrast, the Ethiopian constitution-makers make

25 There is no discussion that the contract should be interpreted by the

two part claims. First, the Constitution is a political contract; secondly, the parties are NNP. From this they conclude that only NNP are entitled to interpret the Constitution. It is difficult to see why it is logically inevitable that because the parties to the contract are NNP, only NNP are entitled to interpret the Constitution.

It is thus hard to see how social contract theory developed within the paradigm of individualism is pertinent to and equally applicable in the context of groups, let alone ethnically defined groups. If the fundamental assumptions, which are the bases of the social contract theory, do not hold for the collectivist paradigm, then the constitution-makers' use of social contract theory, if that was what they had in mind, in the context of ethnic or linguistic groups fails to fit not only at a theoretical level but also at the level of choosing which organ would be legitimate to interpret the Constitution. If their social contract theory was flawed, so was their choice, the HoF, which they thought of as legitimately suited for being vested with the authority to interpret the Constitution.

However, even if we were to concede that the framers' reinterpretation is indeed compatible with social contract theory, there remains the question of why it is logically necessary that, since the parties are ethnic or linguistic groups,it is they and they alone that should interpret the Constitution. Nor, secondly, is there reason to think that, since the Constitution is a political contract between and among ethnic or linguistic groups, the Constitution is a *purely* political document. Constitutions are both political and legal documents in the general sense. The same holds true of the FDRE Constitution, which declares that it is the supreme law of the land and explicitly repudiates laws and actions which are contrary to it.

Thus, the contractual argument in justification of vesting constitutional interpretation authority in the HoF – the only substantive argument advanced – is flawed as a result both of a misconstruction of social contract theory and of overlooking, if not neglecting, the legal dimension of the Constitution.

parties to the contract. In fact, in the Hobbesian version, individuals are not allowed to second-guess the authority of the government. Hobbes advocated absolute government. The Lockean version of social contract theory, on the other hand, provides that government authority is limited and that individuals reserve their rights to revolt if government breaches the contract. Thus, this seems to support the notion of a mechanism and an independent organ vested with the power to interpret the constitution.

5. 2 The Adequacy of the Democratic Argument

Several objections can be raised against the framers' contention that courts' exercise of constitutional interpretation is illegitimate from the perspective of democracy.

First, even if we are convinced that vesting this power in courts carries the potential risk of apparent illegitimacy from the democratic point of view, the framers' decision to vest the power of interpreting the Constitution in the HoF fails to redeem this ailment. It is hard to see, on any interpretation of what democracy is, how the HoF can have any better and higher democratic credential than the courts. If what the framers meant is that democracy is the capacity to represent the whole or every section of society, then the HoF's manner of composition belies this.

According to the Constitution, the HoF is composed of NNP.[26] This means it represents NNP. Its exclusive emphasis is on the representation of ethnic or linguistic groups. This definitely then raises the question, what about other groups and interests which are not necessarily identity-based? Given its composition, there are groups and interests that the HoF cannot and does not represent. Question is bound to arise on whether and how far the HoF itself can overcome the democratic deficiency courts are alleged to suffer. There is nothing, except that the members may be elected, that renders the HoF full or complete from a democratic point of view.Taking the fact that is an elected body as its only democratic credentials is too narrow a view of democracy brining it down only to election. In other words, the HoF composition is on a narrow basis of only ethnic identity and even if the members may be elected, it is short of the ideal of representation of other groups and interests.

In fact, the most popularly elected house is the House of Peoples Representatives[27]. If what makes the HoF democratic is that it is an elected body, no reason why the House of Peoples Representatives should not be preferred. The framers could have left the system without any designated organ to have the final say on what the constitution is, as in Britain and the Netherlands. Which means every organ is entitled to act in accordance with their understanding of what the constitution is and any consti-

26 See FDRE Constitution, Article 61.
27 See FDRE Constitution, Article 54 and 55

tutional question would be left to the democratic process. But as will be shown later, the framers preference to the HoF cannot be explained except as the product of their communitarian view. In any case,vesting constitutional interpretation power in the HoF does not render it to be more or better democratic.

Secondly, the justification itself cannot pass a threshold objection. Claiming that judicial review is undemocratic by nature because judges are not elected presupposes that democracy does not accept an institution such as judicial review. Stated differently, from the democratic point of view, the exercise of judicial review is alleged to be illegitimate. This brings to the fore the difficult question of what democracy is. It was noted earlier that there are competing views of democracy. The first holds that democracy comes down to majority rule; the competing view adopts the stance, namely that democracy is majority rule subject to protection of individuals and minorities.

The framers decision to vest constitutional interpretation power in the HoF, rather than the courts, seem to have been dictated by the first, popular, view of democracy. But since there is no consensus on what democracy is, it is hard to see what can justify upholding the majoritarian conception of democracy rather than the constitutional conception, which comports with judicial review or at least does not reject constitutional interpretation authority being vested in the judges (Dworkin,1996,p. 20). The charge that courts lack democratic legitimacy is made possible because one definition of democracy – majority rule – has been selected and the competing view neglected, namely the view that that democracy is majority rule subject to fairness.

According to Dworkin, democracy does not demand that courts should have judicial review power, nor does it hold the view that courts should not have that power (1996, p. 7). If so, and given the stance in many constitutional systems that the courts' exercise of judicial review is consistent with democracy from the perspective of constitutionalism and that the latter is the optimal compromise on democracy to advance the protection of individuals and minorities, then the framers' sweeping contention that, since judicial review is illegitimate from a democratic point of view, courts must be stripped of judicial review power, is improper.

Thirdly, if we attend to Dworkin's legal philosophy and constitutional theory, the suggestion that judges have too much discretion is questionable (Dworkin, 1996). The charge and fear of the democratic legitimacy in the exercise of judicial review arises because of the unique feature of constitutions – they contain broad and ambiguous clauses – which give the alleged unlimited discretion to judges.

In Dworkin's view this is wrong. So long as judges attempt to discover the fundamental principles in hard cases, the fear that they will impose their moral viewpoint on the people under the guise of constitutional interpretation is mistaken (Dworkin, 1996). In the context of constitutional law, Dworkin dismisses the claim that judges would impose their moral conviction under the guise of constitutional interpretation. He says:

> Constitutional interpretation is disciplined … by the requirement of constitutional *integrity …* Judges may not read their own convictions into the constitution. They may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges. They must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality, and they must take care to see that what they contribute fits with the rest. (1996, p. 10)

Not only Dworkin's constitutional theory but his legal philosophy lends support to the idea that the fear of the supposedly unlimited discretion of judges is misplaced, both in respect of constitutional interpretation in particular and the interpretation of law in general. He is a fierce critic of legal positivism, rejecting three of its central theses – the separation thesis, the pedigree thesis and the discretion thesis (Wacks, 2009, pp. 143-145).

According to positivism, when judges run out of rules in so-called hard cases, they have the discretion to make rules (Wacks, 2009, p. 144). Dworkin disputes this discretion thesis. He argues, first, that law is constituted not only of rules but principles (McLeod,

2003, p. 124; Wacks, 2009, p. 145).Secondly, law is a gapless system.(Wacks,2009, p.145) When judges find no applicable rules, they have to discover the applicable principles in the case before them.(Wacks, 2009,p. 145)So long as, and to the extent that, judges are committed to the discovery of principles, concerns that judges would have the discretion to impose their moral conviction on the majority is not as serious as it might appear. Speaking of the US, Dworkin says

> our constitutional law, and like all law, is anchored in history, practice and integrity. Most cases at law – even most constitutional cases – are not hard cases. The ordinary craft of a judge dictates an answer and leaves *no room for the play of personal conviction*. (1996, p. 11; emphasis added)[28]

Fourthly, judicial review can be justified from the perspective of Rawls's theory of justice. According to Rawls, there are two fundamental principles of justice. In order of priority, the first is equal basic liberties for all (Rawls, J, 1999, P.53). The second is the difference principle (Rawls, J, 1999, P.53). The difference principle itself contains two further principles. Again in order of priority,(Rawls, J, 1999, P.53)the first is the arrangement of social and economic institutions in such a way that they ensure equality of opportunity(Rawls, J, 1999, P.53). The second calls for consideration of the greatest advantage for the least advantaged(Rawls, J, 1999, P.53).

Implementation of his theory of justice passes through several phases. At the constitutional level, Rawls's theory demands the creation of government institution consistent with the two fundamental principles of justice (Dworkin, 2006, p.249). At the second, legislative level, there is a need to ensure that legislatures issue laws in accordance with the two basic principles of justice. (Dworkin, 2006, p.249) To this end, Rawls considers judicial oversight through judicial review legitimate because legislatures are held accountable. (Dworkin, 2006, p.249)

Fifthly, another drawback the HoF cannot escape is the problem of

28 Dworkin argues that positivists' discretion thesis exposes them to two further objections. For one thing, if judges make law in hard cases, as positivists hold, it means the judiciary is usurping legislative power, which means it is undemocratic. On the other hand, a consequence of positivists' discretion thesis is that judges decide cases, creating laws de novo, which results in making the laws retroactive.

political neutrality, which courts are credited for. In terms of organization and composition, the HoF is designed to be partisan. First, it is a house, as noted above, that represents only ethnic or linguistic groups, to the exclusion of other kinds of groups or interests.[29] Secondly, the manner in which members of the HoF are chosen underlinesthe HoF's lack of politicalimpartiality. According to the Constitution, there are two ways in which the members may be selected: the first is election; the second, selection. So far election has not been held to elect members of the HoF. The regional councils select from among members who are supposed to represent their NNP. There is therefore a possibility that the HoF may be packed by representatives who have allegiance to a certain a political party which is a majority at regional council. How is it that these representativesare supposed to remain aloof from politics when they vote in the HoF decisions involving constitutional litigation? By contrast, the judiciary has the virtue of being politically impartial since it is not elected organ, at least in Ethiopia. This attests how the framers decision to vest constitutional interpretation authority to the HoF was ill-though and lacks foresight.[30]

Sixthly, even if the fear that vesting constitutional interpretation authority in the judges, gives them to have unlimited discretion has a realistic basis, the people still retain the power to amend the Constitution whenever they find a constitutional decision unacceptable. Though this may be costly and cumbersome, the people are not without power to change, via amendment, any constitutional decision they do not like or find less than agreeable.

5. 3 Communitarian Influences?

On any understanding of what a "political contract" is and what "democracy" is, the contractual and democratic argument, as a basis on which to deny judicial review power to courts in Ethiopia, is misconceived, inconsistent and inadequate. In fact, it is plausible to assume that the single-most important factor in the framers' decision to vest constitutional review power in the HoF

29 See FDRE Constitution, Article 61.

30 In practice, no election has been held so far . Members are selected by the State Councils. There is a good chance that State Councils are controlled by a party which has a majority seat; this in turn means there is an even a higher chance that a member of the HoF will be selected on the basis of his or her party-political loyalty rather than loyalty to his or her NNP. On the dimension of neutrality, too, the HoF does not fare better than the courts.

is not the democratic and contractual argument but the influence of communitarian political viewpoints. There were two possible sources of the communitarian political agenda. The first is the socialist-ideology hangover;[31] the second is the rallying cause of the then ethnic-based movements that toppled the Derg regime: the right to self-determination of the nationalities (Bahiru, 2014, pp. 258-262).

The timing of the making of the Constitution – right after the ousting of the Derg regime by the ethnic-based liberation fronts – attests to the fear harboured by the party in power then and now, namely that, under the guise of constitutional interpretation, judges would hijack the fruits of their battle, the right to self-determination of the NNP. Needless to say, the process of constitution-making was undertaken under the watchful eyes of this party. Its socialist and communitarian inclination was the principal driving force for the decision to vest constitutional interpretation power in the HoF.

Alongside their clear collectivist inclination in the choice of the HoF for constitutional interpretation, the makers of the Constitution nevertheless also went a considerable distance in recognising the human rights of individuals. Their ambivalence is evident in the Constitution. They attempted to have two political doctrines co-existing side by side: individual fundamental rights and freedoms, the origins of which lie in liberal political theory, and the self-determination rights of NNP, which tend to exhibit the party's communitarian inclination.[32]

The Constitution provides for individual rights and freedoms ranging widely from civil, political, social and cultural rights to collective ones.[33] Its commitment to these values is apparent

31 The ruling party's devotion to socialist ideology is well documented. See ገብሩአስራት፣ሉዓላዊነትናአንድነት. 4ተኛእትም፣ 2007(GebruAsrat, Sovereignty and Unity, 4th ed.) See also ልደቱአያሌውመድሎት፡ በኢትዮጵያፖለቲካየ3ኛአማራጭነት፣ 2ተኛእትም፣ፕሮግረስማተሚያቤት፣ 2002LidetuAyalew, (2002) 'Medlot':The Third Way in Ethiopian Politics, 2nd ed., Progress printing Houses; see also Bahiru, Z. (2014).

32 Chapter three of the FDRE Constitution is dedicated to fundamental rights and freedoms. But within the same chapter, Article 39 provides for the collective right to self-determination of what it calls "nations, nationalities, and peoples."' As noted before, these groups are vested, too, with sovereignty.

33 See Articles 13-44 of the FDRE Constitution.

from the amount of space it devotes to them – they amount to no less that than one-third of the provisions of the Constitution – and from the absence of a hierarchy of, or preference for, either individual rights over the collective right to self-determination, or vice versa. The Constitution's ambivalence to give primacy to either the liberal or communitarian political paradigm is further attested by its failure or omission to provide a harmonization scheme in the event of conflict between individual rights and the collective right to self-determination of NNP.

But in doing so, the constitutional framers' desire to uphold both the liberal and communitarian values in tandem, without priority or hierarchy, collapsed by tilting the balance in favour of the communitarian agenda at the expense of the liberal one. The failure to provide a harmonization scheme between the two value systems has left it to the whim of members of HoF to determine whether and how the two of them should be accommodated, or when and how compromises should be made between them if they are found to be at odds with each other.

It is plausible to conclude, therefore, that it is neither the contractual nor the democratic argument that animated the decision to vest the power of constitutional interpretation in the HoF, as the stated justification the framers would like us believe: it is the communitarian political viewpoint that provided the impetus for the decision to vest it in the HoF rather than the courts.

6. Conclusion

One of the fundamental issues in a constitutional democracy is the question who should interpret the constitution. Within liberal democracy, there seems now to be consensus that courts, whether ordinary or special, should exercise this power. Judicial review power of courts is either justified in terms of the constitutional (rather than the majoritarian) conception, of democracy or, where it is found to be in tension with democracy, considered a small price to pay for the greater good of protecting individuals and minorities from the tyranny of the majority.

The stated reasons why the makers of the Ethiopian constitution preferred the HoF to the courts as the organ for exercising the au-

thority of constitutional interpretation rely on a contractual and a democratic argument. However, it has been shown that these are incoherent and inadequate as grounds on which to strip courts of this power and vest it in the HoF.

Beyond the mere declaration that judges are unelected and unaccountable, no substantive argument is provided as to why the HoF, which is designed to represent ethnic or linguistic groups exclusively, overcomes the deficiency of democracy which allegedly afflicts the courts. On any interpretation of what democracy is, it is difficult to adduce convincing reasons as to why the HoF would be better in exercising review power than the courts or be able to overcome the allegedly undemocratic features of the courts' exercise of this power.

If we take the makers of the Constitution to have meant that the HoF is democratic, the HoF is, from the democratic point of view, as deficient as the courts. In its composition, it represents nations, nationalities and peoples; this entails that there are groups and interests that are not represented. The HoF is defective because it does not represent interests beyond or outside ethnic or linguistic groups. Indeed the House of Peoples Representatives is far more democratic in its credentials than the HoF.

The claim that exercise of judicial review is undemocratic is a popular but unexamined view. The constitutional conception of democracy accepts limitations on the majority's power and any enforcement of such limitations via judicial review is consistent with this conception or at least it does not regard it anomalous. If we attend to Dworkin and Rawls's theories as well, both largely endorse the legitimacy of judicial review, and the failure of the Ethiopian constitution-makers to heed these theories makes one wonder if the political contract and democracy arguments provide the true reasons for the preference given to the HoF over the courts.

Indeed, it is plausible to argue that the main reason behind the preference for the HoF is the influence of communitarian ideologies and interests. The consequence of this was that the makers of the Constitution betrayed what they set out to achieve – namely, advancing both liberal and communitarian values under conditions of parity – by vesting the power of constitutional interpretation in the HoF. In so doing, they paid a disservice to the rights

of individuals as contained in the Constitution, leaving their fate to whatsoever pleases members of the HoFin their constitutional interpretations.

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