LITIGATING CONSTITUTIONAL RIGHTS IN ETHIOPIA: A JOINDER TO MIZANIE ABATE TADESSE

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Abstract

This article joins Dr. Mizanie's recent contribution that deals with litigation of constitutional rights in Ethiopia. In his article, Mizanie points out that there has so far been an unacceptably low level of constitutional rights litigation in the country. He contends that one of the reasons for such a state of fact is the non-existence of rules and procedures on constitutional remedies to facilitate litigation-based enforcement of constitutional rights. He attempts to demonstrate this claim by discussing the legal and practical dispensations in areas such as jurisdiction of the Council of Constitutional Inquiry and the House of the Federation and the role of courts in constitutional interpretation; locus standi in constitutional litigation; and constitutional remedies. This article aims at expanding the discourse on constitutional rights litigation by reflecting on Dr. Mizanie's contribution. It is also meant to critically engage with some of the author's viewpoints in order to offer additional perspectives. The article also supplements Mizanie's analysis and offers fresh perspectives by using recent legal developments.

Key-terms: constitutional litigation; constitutional remedies; constitutional rights; House of Federation; Courts; Council of Constitutional inquiry; justiciability; access to justice

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Introduction

In his recent article[1], Dr. Mizanie contends that constitutional remedies that could emanate from the 1995 Constitution of Ethiopia have been rarely applied or enforced. Without denying the possible veracity of the argument that the constitution interpretation modality chosen by the framers of the Constitution may have contributed to this unhappy reality, he argues that "the lack of clear and comprehensive Bill of Rights litigation procedure as well as redress for violations of constitutional rights could also contribute to the current unacceptably low enforcement level of the Bill of Rights of the Constitution via constitutional litigation".[2]

This article is meant to advance the discourse on the litigation of constitutional rights in Ethiopia by mostly expanding on Mizanie's points of view and the arguments presented in the article under consideration. In addition, it attempts to critically review some of his points in order to offer an additional perspective and thereby present a menu of ideas for the reader. Major legal developments after Mizanie's piece was published are also discussed in this article. The article will engage in doctrinal analysis of the relevant legal texts and the literature on constitutional interpretation in Ethiopia and other jurisdictions. The *Travaux Préparatoires* of the 1995 Constitution will also be consulted where necessary. It will also analyze cases decided by the House of the Federation (HoF) that will help the article achieve its purposes.

[1] Mizanie Abate Tadesse, "Rethinking Litigation Grounded Enforcement of Constitutional Rights in Ethiopia", *Journal of Ethiopian Law* 32 (2020), p. 125.

[2] *Id.*

The article proceeds as follows. The next section (section 1) provides a brief summary of Mizanie's main research findings, arguments and contentions. The rest of the article is structured following Mizanie's topical organization of his article. This will help the reader grasp the ideas that are forwarded in relation to the major discussions made by Mizanie. Accordingly, section 2 deals with the jurisdiction of the CCI/HoF and the role of the courts in the interpretation of the Constitution. Section 3 takes up standing (*locus standi*), section 4 deals with the issue of exhaustion of administrative and judicial remedies while section 5 considers constitutional remedies. Finally, the article will offer a brief conclusion.

1. Mizanie A. Tadesse's Major Arguments and Contentions

I do not intend to repeat here the discussions made by Mizanie in the article under consideration. I will rather briefly recap his major contentions in order to be able to make an easy reference to them as I engage with the points of view he has advanced.

In his general comments on the Bill of Rights of the Ethiopian Constitution, Mizanie points out that although the Constitution contains a long list of fundamental rights and freedoms, it is not a prototype of complete bills of rights. He observes that the "lack of explicit recognition of certain human rights; an uncommon classification of constitutional rights into human and democratic rights… attachment of claw-back clauses to a number of civil and political rights and ambiguous limitations to certain human rights; making the right to life derogable [in times of public emergency]; and bad formulation of socio-economic rights" are the most notable defects

of the Constitutional text.[3] He further notes that these and other constitutional gaps could have been remedied if we had "a strong judicial activism".[4]

Dubbing the limited invocation of the constitutionally protected rights before judicial and quasi-judicial bodies in the face of widespread violation of human rights in the country paradoxical, Mizanie surmises that the surest way to bring about "legal accountability and remedy for infringement" is the enforcement of the Bill of Rights of the Constitution.[5] Mizanie says that the constitutional interpretation arrangement designed by the framers of the Ethiopian Constitution "is proven to have a debilitating negative impact on [the] enforcement of constitutional rights of individuals by shielding the legislature and the executive from any meaningful scrutiny".[6] He, thus, laments:

> The most shattering deficiency of the FDRE Constitution, however, is the institutional architecture for the enforcement of constitutional rights. 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 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 ([HoF]): a non-judicial second house of parliament.[7]

[3] *Id*, p. 127.
[4] *Id.*
[5] *Id.*, pp. 128-29; 130.
[6] *Id.*, p. 142.
[7] *Id.*, p. 130

According to Mizanie, however, the snatching of the power to interpret the Constitution from the ordinary courts and entrusting it to the House of the Federation (HoF) is not alone to blame for the current low level of constitutional rights litigation. As earlier noted, the absence of clear and comprehensive litigation procedure for litigating constitutional rights and the lack of redress for violation of constitutional rights have made a huge contribution to the current state of affairs of constitutional rights litigation in Ethiopia. The main thesis of his article, he notes, is "to canvass whether and the degree to which lack of detail[ed] 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" by focusing on those areas where scholarly inputs have so far been lacking.[8]

In the article, Mizanie discussed the importance of the right to an effective remedy in human rights violations and the obligation of governments in providing it. All international and regional human rights instruments consider the existence of an effective remedy for violations of human rights as the cornerstone of the human rights protection system. He rightly points out that the mere entrenchment of human rights in constitutions if not matched by effective remedy when the rights are violated is a travesty and a deception at the same time.[9]

Stating that the Constitution is not accompanied by full-fledged enforcement rules, Mizanie observes that some procedural rules exist albeit scattered in the Constitution and other sub-constitutional laws, namely, the House of the Federation Proclamation No. 251/2001 and

[8] *Id.*, p. 131.
[9] *Id.*, pp. 132-33.

the Council of Constitutional Inquiry (CCI) Proclamation No. 798/2013. In describing the contexts in which constitutional rights litigation may arise, Mizanie notes that individual or group grievances of violations of any of their rights recognized in chapter three of the Constitution may arise in or outside judicial proceedings. He says "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".[10] "Furthermore", Mizanie says, "any individual who alleges 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".[11] According to Mizanie, when a constitutional interpretation case reaches it in either of the two avenues of submission noted above, "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 [HoF] for a final decision".[12]

In regards to the rules of procedure, Mizanie notes that the following procedural matters are addressed by the three laws on constitutional interpretation mentioned above: standing, exhaustion of other remedies, order of suspension of judicial proceeding until the CCI decides on the matter referred for constitutional interpretation, gathering of professional opinions and production of evidence, decision making procedure, the precedent effect of the decision of the HoF on constitutional interpretation, the time span within which the

[10] *Id.*, p. 134.
[11] *Id.*
[12] *Id.*

HoF should make a decision, and service fee.[13] At the same time, he also lists out the procedural matters that he observes are hardly regulated by the existing laws. These are joinder of parties, admission of *amicus curiae*, oral hearing, period of limitation, withdrawal or discontinuance of applications, rules or techniques of constitutional interpretation, and types of redress for infringement of constitutional rights, except declaration of invalidity of law or conduct.[14] Stressing the importance of the procedural rules for the protection of human rights, Mizanie calls for rules on remedies, period of limitation, fairness and timely disposition of proceedings and standing to be regulated by a law to be passed by the federal parliament, rather than by the CCI or HoF.[15]

Addressing the controversial issue of whether the Ethiopian courts have the power to interpret the Constitution, Mizanie declared his view that "ordinary courts do not have the power to interpret the Constitution in general and the Bill of Rights chapter in particular" and that "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 [HoF]".[16] Mizanie further surmises that the legislative interpretation of the Ethiopian Constitution is that courts do not have any role (he says are "sidelined") in the interpretation of the Constitution. According to Mizanie, this position of the federal legislature has been made clear through Proclamation No. 798/2013 which, "contrary to how article 84(2) of the FDRE Constitution is understood", proclaimed that "constitutional interpretation by the [HoF] is necessitated not only where the constitutionality of a statute is challenged but also where the

[13] *Id.*, pp. 134-35.
[14] *Id.*, p. 135.
[15] *Id.*, pp. 135-36.
[16] *Id.*, p. 136.

constitutionality of 'customary practice or decision of government organ or decision of government official' is an issue".[17] He notes that the CCI and HoF have also been in line with the federal legislature and have in reality exercised interpretive power over matters Mizanie believes fall outside their jurisdiction.[18]

He then goes on to acknowledge the supportive role the ordinary courts play in the process of rendering a constitutional interpretation decision when such an issue arises. By citing the provisions of Proclamation No. 798/2013, he observes that the court that is considering a concrete case incidental to which a constitutional interpretation issue has arisen has to determine the constitutional interpretation issue and refer it to the CCI for the determination of the issue.[19] The law says further that if the court seeing the concrete case declines one of the parties' request to refer a constitutional issue that party believes exists, that party has the right to submit an appeal to the CCI.[20] Mizanie makes another important point that, once the constitutional issue that arises in a court is resolved in a manner contemplated by article 84(3)[21] of the Constitution and the court receives the interpretation decision, "the concerned court will then decide on the entire case and order remedy

[17] *Id.*, pp. 141-42.

[18] Mizanie cites *Wessen et al* case, in which the HoF examined the constitutionality of a decision of a government institution and found it in violation of the Constitution; Mizanie, *supra* note 1, p. 142.

[19] Proclamation No. 798/2013, article 4(3)-(4).

[20] *Id.*, article 4(5)-(6); Mizanie, *supra* note 1, p. 136.

[21] According to article 84(3) of the Constitution, the CCI may remand the case if it is convinced that there is no need for constitutional interpretation. The disputant in disagreement can however take the matter to the HoF as an appeal. But if the CCI finds that there is a need for constitutional interpretation, it submits its recommendation to the HoF for the latter's final decision. When the HoF makes its final decision on the constitutional issue, it sends its decision to the concerned court. The latter then resumes the consideration of the case or controversy incidental to which the constitutional issues has arisen and makes decision on the case.

if infringement of constitutional rights is found".[22] He also notes that courts have a role to apply the Constitution to resolve cases based on a previously handed down decision of the HoF owing to the fact that the latter's decision applies to similar constitutional matters that may arise in the future.[23]

According to Mizanie, although the courts have a robust role in the process of interpretation of the Constitution, they have however been prevented from effectively playing "their role due to the absence of Constitutional Bill of Rights enforcement rules".[24] He further remarks that "distinct rules of procedure that are different from criminal and civil procedural rules are needed that take into account the nature of constitutional litigation in terms of standing, litigation proceeding and remedies".[25] He cites the experience of Nigeria and Uganda as instructive examples for Ethiopia. In the case of Nigeria, the 2009 Fundamental Rights (Enforcement Procedure) Rules have been set forth to ensure 'expansive and purposeful interpretation, access to justice, public interest litigation, abolition of objections on grounds of *locus standi,* and expeditious trial of human rights suits, among others.[26] 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. Mizanie recites the said article of the Ugandan Constitution, which under its sub-article (1) stipulates: "'[a]ny person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been

[22] Mizanie, *supra* note 1, p. 136. However, if the CCI finds that there is no need for constitutional interpretation, the case will obviously be settled based on the applicable ordinary law and the question of constitutional remedy may not arise.

[23] *Id.*, p.136.

[24] *Id.*

[25] *Id.*

[26] *Id.*, p. 137.

infringed or threatened, is entitled to apply to a competent court for redress which may include compensation'".

Mizanie also observes that article 50(4) of the Ugandan Constitution 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. Mizanie tells us that the Act lays 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, and leaves other detailed procedural rules to other subsidiary laws.[27]

Another issue extensively discussed by Mizanie is the question of *locus standi* in constitutional interpretation matters. Holding the position that there is no clear regulation of standing as it pertains to constitutional litigation in our legal system at the moment, he calls for a liberal, proactive interpretation of the existing laws, such as article 37 of the Constitution, in order to allow not only those that have vested interest in the matter but also those who want to represent other people's or the public's interests in constitutional litigation proceedings.[28] He says that article 37 of the Constitution can be read to allow a broad standing platform, including what is known as public interest litigation.[29] In this connection, he observes:

[27] *Id.*
[28] *Id.*, pp.154-58.
[29] *Id.*, p. 155.

> From the way the sub-articles [of article 37] 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 [Article] 37(1), this vague provision need to be interpreted broadly so as to include a possibility whereby anyone may act on behalf of another person or in [the] public interest.[30]

Mizanie also calls for a liberal interpretation of "the term 'interested party' in article 84(2) of the Constitution", and together with that for article 5(1) of Proclamation No. 798/2013—which limits standing to persons whose constitutional rights are violated—to "either be amended or read in line with article 37 and 84(2) of the Constitution".[31] He argues that the liberal interpretation, for standing purposes, of articles 37(1) and 84(2) should apply to both interpretations of the constitution that arise in relation to both pending cases and those coming outside of courts to the CCI.[32]

Another matter covered in Mizanie's article is the notion of exhaustion of judicial and administrative remedies addressed under articles 3 and 5 of Proclamation No. 798/2013. He observes that "individuals or groups who seek to challenge the alleged violation of their human rights by laws, decisions of the government or customary practices

[30] *Id.*, p.155.
[31] *Id.*, p.155-56.
[32] *Id.*, p. 157.

before the CCI and [HoF] are required to exhaust available remedies before submitting their pleading to the CCI"[33]. By citing article 5(3) of Proclamation No. 798/2013, he notes that "the only case where applicants are exempted from exhausting both administrative and judicial remedies is claim involving allegations of violations of constitutional rights [ensuing] from primary legislation".[34]

Finally, Mizanie discusses constitutional remedies. According to Mizanie, "constitutional Bill of Rights litigation should produce constitutional remedies different from civil and criminal law remedies".[35] By citing the South African Constitutional Court's jurisprudence, he observes that:

> The object in awarding constitutional remedy should be, at least, to vindicate the Constitution and deter future infringements. Constitutional remedies differ from private law remedies because they are 'forward-looking, community-oriented and structural rather than backward-looking and individualist and retributive. he Court also observed that 'the use of private law remedies to vindicate public law rights may place heavy financial burdens on the state.'[36]

He further notes that the need for constitutional remedy may arise in cases where courts or administrative bodies unjustifiably deny redress to victims or when the relevant laws do not provide for remedies or, importantly, in cases where some constitutional rights do not have

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[33] *Id.*, p.158.

[34] *Id.*, p.158. Aricle 5(3) provides: "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".

[35] Mizanie, *supra* note 1, p. 164.

[36] *Id.*, pp. 164-65.

substitutes or counterparts in ordinary legislation.[37] Stating that the Ethiopian Constitution is not clearly forthcoming when it comes to constitutional remedies, Mizanie notes that the phrase 'obtain a decision or judgment' in article 37(1) could be construed to capture the different kinds of remedies that may arise from constitutional litigation.[38] He identifies three types of constitutional remedies: namely, declaration of invalidity; injunction or interdict; and constitutional damages.

In relation to the declaration of invalidity, Mizanie says that declaration of invalidity of statutes or inconsistent administrative decisions or customary practice is the jurisdiction of the HoF and that it perhaps is the only remedy the House can readily award.[39] In the case of injunction[40], Mizanie observes that although it is one of the best constitutional remedies, HoF and CCI's laws, Proclamation Nos. 251/2001 and 798/2013, respectively, have no provision on whether and under what circumstances it could be ordered.

Finally, as regards constitutional damages, Mizanie contends that the Ethiopian "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" and that neither has a case law emanated from the decisions of the HoF under article 37 of the Constitution that might shed light on the issue.[41] Thus, according to Mizanie, "owing to lack of distinct and detailed rules dedicated for

[37] *Id.*, p. 165.
[38] *Id.*, p. 165.
[39] *Id.*, pp. 166-67.
[40] He discusses different kinds of injunctions (interdicts) in the article; see Mizanie, *supra* note 1, pp. 167-68.
[41] *Id.*, p. 169.

this purpose, the court to which claim of constitutional damages 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".[42] He goes on to discuss the different possibilities by which litigants may use the Ethiopian Civil Code to claim constitutional damages.[43]

In the remaining parts of this article, I shall reflect on Dr Mizanie's main arguments and contentions that I have summarized above.

2. On the Jurisdiction of the CCI/HoF and the Role of Courts

Before directly addressing Mizanie's ideas on the jurisdiction of the CCI and the HoF, I will briefly elaborate the context in which issues of constitutional interpretation may arise. I will then discuss the jurisdictions of the CCI and HoF and address the arguments raised by Mizanie in relation to the jurisdictions of these bodies and the role of the Ethiopian courts.

Issues of constitutional interpretation may arise in three different contexts. The first one is when the constitutional text itself stands in need of interpretation. This can happen, for example, when there is a legal lacuna in the Constitution or a conflict between two or more constitutionally recognized principles or interests. Thus, the main task of the interpreter in such a case is to construct the constitution based on the factual circumstances and resolve the dispute. A pertinent example in our own system is the *Silte Identity case* decided by the HoF in 2000. The 1995 Constitution of Ethiopia does not contain any provision as to how a claim by a certain community for recognition of

[42] *Id.*, pp. 169-70.
[43] *Id.*, pp. 170-72.

a distinct identity can be addressed. Thus, in the *Silte* case, the HoF "filled" the gap in the Constitution by interpreting the text.[44]

The second meaning of constitutional interpretation refers to the more widely known type of interpretation, which is determining the constitutionality of sub-constitutional norms or decisions when a question of the latter's compatibility with the former arises. This is what is commonly known as "review of constitutionality" or—in systems where this is done by the judiciary—"judicial review". The central issue in the famous US case, *Marbury v. Madison*[45], the case celebrated rightly as the harbinger of the notion of judicial review, was the constitutionality of the Congress's Judiciary Act of 1789. That Act gave first instance jurisdiction to the US Supreme Court to issue a writ of mandamus while article III of the US Constitution does not give the Court original jurisdiction on such matters. Chief Justice John Marshall, having established that the Supreme Court was not given original jurisdiction to issue writs of mandamus, stated that a law repugnant to the Constitution cannot become the law of the land and, therefore, that a writ cannot be issued in the instant case based on an unconstitutional law. The Chief Justice observed that "certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and

[44] See, Getachew Assefa, "All about Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation", 24(2) *Journal of Ethiopia Law* (2010) 139, pp. 152-54. In fact, guided by the jurisprudence of the *Silte* case, the House of Peoples' Representatives laid out the procedures and requirements for identity determination in Proclamation No. 251/2001, and its recent law: Proclamation No. 1261/2021 which replaced the former proclamation.

[45] 5 U.S. 137 (1803).

consequently the theory of every such government must be that an act of the legislature repugnant to the constitution is void".[46]

Many review of constitutionality decisions have also been handed down by the HoF as well. One of these is the *Melaku Fenta et al.* case.[47] The constitutional issue in that case arose incidentally to the case brought before the Federal High Court on corruption charges. Among the 31 defendants in the case was found Mr. Melaku Fenta, who, prior to his facing the charges, had been the Director-General of Ethiopian Customs Authority with a ministerial rank. According to Federal Courts Proclamation No. 25/1996 (article 8), the Federal Supreme Court has an exclusive first instance jurisdiction over, among others, "offences for which officials of the Federal Government are held liable in connection with their official responsibility". The federal legislature later gave the Federal High Court original jurisdiction over corruption offences[48] without affecting the jurisdiction given to the Supreme Court in Proclamation No. 25/1996. The Federal High Court, which was seized of *Melaku Fenta et al.* case, on its own initiative brought up the issue of constitutionality of the indicated provisions of the above-noted two federal laws. The Court believed that in view of the constitutional right to appeal against decision by a lower court in article 20(6)[49] of the Ethiopian Constitution, the grant of original jurisdiction to the Supreme Court over offenses committed by officials of the federal government in connection with their official responsibilities would be inconsistent with the Constitution. During the hearing on the matter, the Prosecution opposed the Court's idea of constitutional

[46] *Id.*

[47] Decided by the HoF on 24 Tahsas 2006 (January 2, 2014).

[48] See, *Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No.434/2005*, art 7(1).

[49] It provides: "All persons have the right of appeal to the competent court against an order or a judgement of the court which first heard the case".

review. But the Court rejected the opposition of the prosecution and sent the matter to the CCI for the latter to consider the constitutional issue it identified. The CCI accepted the argument of the Federal High Court and found the need for constitutional interpretation. It based its reasoning on article 20(6), earlier cited, and also article 25 of the Constitution. The argument based on article 25—the right to equality and to the equal protection of the law—was to the effect that no differentiation of treatment should be made based on an individual's political position or status. Thus, the CCI recommended that article 8(1) of Proclamation No. 25/1996 and article 7(1) of Proclamation No. 434/2005 be severed from the proclamations and be rendered as having no effect, pursuant to article 9(1) of the Constitution. The HoF endorsed the recommendation submitted to it by the CCI and instructed the Federal High Court to continue its consideration of the case, the effect of which was that Mr Melaku Fenta was tried by the High Court.

The type of constitutional review in which the review of constitutionality arises incidentally to a case or controversy pending before a court of law—as in *Marbury* and *Melaku Fenta et al.*—is called concrete review (review "*incidenter*"[50]). Thus, in systems like Australia, Denmark, Japan, Norway and the US, the issue of constitutionality of a law is not brought before a court as the sole matter of litigation. As Cappelletti notes, "such questions must form part of a concrete case or controversy (whether civil, penal or any other type), and only arise to the extent that the law under consideration is *relevant* to the decision in the particular case"[51] and that same court has the competence also to address the question of constitutionality in these jurisdictions. But in

[50] Mauro Cappelletti, *Judicial Review in the Modern World* (Bobbs-Merrill Co. Inc 1971), p. 69.

[51] *Id.*, p. 70.

systems that follow the continental model of constitutional interpretation such as Austria, Germany and South Africa, if the question of constitutionality of a law arises in relation to a pending lawsuit and the court is convinced that a law relevant to the case violates the constitution, the court must refer the constitutional question to the Constitutional Court before the case can be decided.[52] In this case, the court suspends its consideration of the case and awaits the resolution of the constitutional issue, following which it then resumes the consideration of the case.

The other type of review that does not apply in systems like the US's, where ordinary courts interpret the constitution, is the one known as abstract review (review "*principaliter*"). In abstract judicial review, the question of constitutionality of a law is the sole matter at issue which the interpreter is required to determine. In abstract review, the interpreter acts on the basis of requests from government organs. In the German system, for example, the federal or a state government or one-fourth of the members of the *Bundestag* are the ones that have standing to request the Constitutional Court to give a decision on differences of opinion or doubts about a federal or state law's compatibility with the Basic Law.[53] Proclamation No. 798/2013 also provides a similar procedure for the review of constitutional issues it calls "unjusticiable". Article 3(2)(c) of the Proclamation thus provides:

[52] Donald P. Kommers & Russel A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd ed., Duke University Press 2012), p. 13. As can be seen from the above, the referral of a constitutional issue by the court where the question of constitutionality is posed to the CCI as set forth in Proclamation No. 798/2013 (article 4(3-4) resembles that of the continental system of concrete review. It is interesting to note, however, that while the Ethiopian system allows litigants to bring the question of constitutionality by overriding the court's rejection of the question of constitutionality (Proclamation No. 798/2-13, article 4(5-6)), in systems like German's, only the court has that power; Kommers & Miller, *supra* note 52, p. 13.

[53] Kommers & Miller, *supra* note 52, p. 15.

"constitutional interpretation on any unjusticiable matter may be submitted to the [CCI] by one-third or more members of the federal or state councils or by federal or state executive organs". In principle, therefore, any dispute relating to constitutional matters that are not amenable to judicial determination can be presented to the CCI in the form of abstract review of constitutionality.

The third and last meaning of constitutional interpretation is what is known as "constitutional complaint", or, in Latin American constitutional jurisprudence, "*amparo recourse*".[54] Kommers and Miller observe that in the case of Germany, persons who claim that the state has violated one or more of their rights under the Basic Law may file a constitutional complaint with the Federal Constitutional Court, after exhausting all available means to find relief in the other courts having jurisdiction over their cases.[55] Proclamation No. 798/2013 also empowers individuals whose constitutional rights and freedoms are violated by the final decisions of government organs or officials to approach the CCI for relief.[56] Proclamation No. 1261/2021 on the HoF, which replaced Proclamation No. 251/2001, as noted below, also stipulates that the House has the power to decide on claims by any person that his basic constitutional rights and freedoms are violated by the final decision of any government organ or government authority.[57]

Proclamation No. 1261/2021—enacted after Mizanie's article was published—addressed many of the problems Mizanie raised as gaps in

[54] Allan R. Brewer-Carias, "The Amparo Proceedings in Venezuela: Constitutional Litigation and Procedural Protection of Human Rights and Guarantees", 49 *Duq. L. Rev.* (2011), p. 161.

[55] Kommers and Miller, *supra* note 1, p. 11.

[56] Articles 3(1) & 2(a)-(b).

[57] A Proclamation to Define the Powers and Functions of the House of Federation Proclamation No.1261/2021, article 6(3).

the constitutional interpretation legal framework of the country. One such noteworthy area has to do with the jurisdiction of the HoF. Accordingly, article 6 of the Proclamation lists the following as constitutional interpretation questions over which the HoF has jurisdiction:

1) Questions relating to the scope and meaning of constitutional powers, functions and responsibilities of organs of state and other constitutional bodies;
2) Questions relating to the constitutionality of laws enacted by federal or regional legislative bodies;
3) Complaints by persons who allege that their constitutional rights and freedoms are violated by the final decision of organs and officials of state;
4) Dispute or misunderstanding between the Federal Government Organs;
5) Dispute or misunderstanding between the Federal Government and a Regional State;
6) Dispute or misunderstanding between Regional States;
7) Question relating to any non-justiciable constitutional matters with the request of one-third of the Federal or Regional Legislative Organ or Federal or Regional executive Organ;
8) Dispute or misunderstanding regarding the implementation of Federal laws in Regional States;
9) Questions regarding the incongruity between the Federal or Regional State laws and policies, and the national policy objectives and principles enshrined in the Constitution up on the request of the Federal Government, Regional Government, one-third of the

members of the House of Peoples' Representatives or one-third of members of a Regional State Council;

10) A request by a regional state's constitution interpretation body when it thinks it is necessary to give a different interpretation on a constitutional matter similar to which the HoF or other regional State's constitution interpretation body had given interpretation;

11) Constitutional disputes on other related matters.

Furthermore, article 7 of the Proclamation restates in a different wording the constitutional interpretation issues that may arise in courts of law, in relation to pending cases. Article 5 of Proclamation No. 1261/2021 for its part stipulates the broad interpretive mandate of the House saying that the House shall declare any law, customary practice or a decision of an organ of state or a public official as having no effect if it contravenes the Constitution.

In relation to the role of courts in interpreting the Constitution, a close look at Mizanie's article reveals that he advances three interrelated positions. His article broadly states that Ethiopian courts are sidelined by the constitutional order from interpreting the Constitution in general and the constitutional Bill of Rights in particular. It further holds that the legislature (the HoPR) has placed further restriction on the constitution interpretation power of the courts through Proclamation No. 798/2013 by denying them jurisdiction over matters other than federal or state proclamations, which article 84(2) of the Constitution apparently leaves to the courts. Finally, he argued that the role the courts could play within the existing legal sphere has been thwarted due to the absence of enforcement rules of the Ethiopian constitutional Bill of Rights.

I take issue with Mizanie's position regarding the role of courts in the interpretation of the Constitution on two grounds. First, courts have the power to interpret the Constitution when the interpretation needed, for resolving the dispute before it, is the interpretation of the text of the Constitution without there being the need to review constitutionality of sub-constitutional norms or decisions. As noted earlier, this may be necessary when we are faced with legal lacuna or ambiguity in the Constitution or a conflict between two or more constitutionally recognized principles or interests. For example, the court may, in relation to a case before it, be called up on to give a concrete meaning to the notion of "speedy trial" in article 19(4) of the Ethiopian Constitution or to do the same to the notion of "human dignity" in article 21(1) of the Constitution. A court that is asked to pass on such kinds of questions cannot refer the matter to the CCI/HoF. On the contrary, this precisely is how the courts discharge their "responsibility and duty to respect and enforce" the provisions of the constitutional Bill of Rights.[58]

I cite here two proclamations passed by the federal legislature in 2021 that support the argument I am trying to advance here, and which laws in my view are consistent with the Constitution. The Federal Courts Proclamation No. 1234/2021, under its article 11(3) provides that: "Notwithstanding [other] provisions of this proclamation and other relevant laws, the Federal High Court may render decision, judgement or order in order to protect justiciable human rights specified under chapter three of the Constitution".[59] The second law is Proclamation No. 1261/2021. As discussed earlier, the list of constitutional

[58] Ethiopian Constitution, 1995, article 13(1).

[59] The Federal Judiciary has taken a practical step for the realization of this power of the Federal High Court and designated "fundamental rights and freedoms division" as one of its specialized benches.

interpretation matters over which the House exercises exclusive jurisdiction does not include the interpretation of the constitutional text.[60] This means that such an interpretation does not fall within the exclusive jurisdiction of the House, which in turn means that the first port of call for such constitutional issues is the courts.

My second objection to Mizanie's argument relates to his remark regarding the constitutional division of labour between the HoF and the Courts to the effect that the interpretive mandate of the HoF is limited to review of constitutionality of federal or regional state proclamations while all other issues of constitutionality are left to the courts. I believe this position is not supported by the text of the Constitution.[61] Mizanie averred that his argument is based on article 84(2) of the Constitution. However, this argument is not plausible for many reasons. To begin with, article 84 is not determinative of the constitutional interpretation power of the HoF. Article 84 deals with the powers and functions of the CCI. The power of the HoF to interpret the Constitution and to settle constitutional disputes is stipulated in articles 62(1) and 83(1) of the Constitution. Even coming back to article 84 of the Constitution, it has two other substantive provisions: article 84(1) and article 84(3). Article 84(1) states: "The Council of Constitutional Inquiry shall have powers to investigate constitutional disputes. Should the Council, upon consideration of the matter, find it necessary to interpret the Constitution, it shall submit its

[60] This in fact is also true in the case of Proclamation No. 798/2013; see article 3 of the same.

[61] Mizanie, *supra* note 1, p. 141-42. In fact, other scholars, like Assefa Fiseha, also entertain the same position that the HoF's interpretive power should not extend beyond controlling the constitutionality of the laws enacted by Federal and regional legislative bodies; see Assefa Fiseha, "Constitutional Adjudication in Ethiopia: Exploring the Experience of The House of Federation (HoF), 1(1) *Mizan Law Review* (2007), p. 10.

recommendations thereon to the House of the Federation". The general reference to "constitutional disputes" here must be given a meaning and, in my view, it should mean any constitutionally significant disputes, as opposed to a mere application of a non-controversial provision of the Constitution to a given claim, that need to be settled by the HoF. Similarly, article 84(3), as a constitutional provision and as important as article 84(2), should be given a meaning of its own as well. The constitutional interpretation law in article 84(3) should obviously be different from that of article 84(2) for the framers cannot be expected to state the same thing under two different sub-articles.

I believe that it is a correct understanding to limit the review of constitutionality envisaged under article 84(2) only to concrete judicial review[62] of laws enacted by federal or regional state's legislative bodies, i.e., to federal or regional proclamations. Then, article 84(3) is to apply to all other cases where "issues of constitutional interpretation arise in the courts". A question may be asked as to what difference exists between the two cases. The important difference between the two is that in the case of review of constitutionality of federal or regional state proclamations, via article 84(2), the role of the CCI is limited to pure recommendation of its findings to the HoF[63]; it does not have the power to reject the request and remand the case back to the court where it comes form. This, in my view, has to do with the parliamentary form

[62] I say 'concrete judicial review of constitutionality' because article 84(2) envisages such a dispute of constitutionality to be referred to the CCI by court or interested party, which basically means one of the disputants.

[63] The same can be said to the request that comes via article 84(1). Those are cases of abstract judicial review of non-justiciable matters that directly come to the CCI. As per article 6 of Proclamation 1261/2021, request for review in such cases can come only from one third of the members of federal or regional legislative bodies or federal or regional executive bodies.

of government adopted by the Constitution. Because of the political significance of the parliament in the political power-structure erected by the Constitution, second-guessing the decision of the legislature through review of constitutionality has to be seriously taken. Thus, when the review of constitutionality relates to proclamations, the body that can pass a decision should be the body that is entrusted with the power to do so by the Constitution, the HoF; not its expert aide, the CCI. The same approach exists in the German legal system. Thus, in Germany, in concrete judicial review cases, courts or tribunals are required to refer such questions to the Constitutional Court if they believe a statute is invalid.[64] Professor David Currie says in this connection that "[t]he Constitutional Court's monopoly of the power to declare statutes unconstitutional expresses respect for the dignity of the legislature…"[65]

Finally, my reaction to Mizanie's remarks that the absence of rules of procedure for constitutional litigation has contributed to the low level of constitutional rights litigation is a partial agreement. We do not know for sure if the absence of such rules stymied the flow of cases. As far as I know, there is no study conducted to check this. There is no doubt that comprehensive and inviting rules of procedure could encourage litigants to come forward. However, its actual negative impact in our case seems minimal. The question of constitutional damages for example is a substantive law issue, not a procedural issue. Thus, procedural clarity in such area cannot overcome the policy/legal gap that exists in the country. I think, the more important reason for the low level of constitutional rights litigation has to do with the overall

[64] David P. Currie, "Separation of Powers in the Federal Republic of Germany", 41(2) *The American Journal of Comparative Law*, (Spring, 1993) 201, p. 254.

[65] *Id.* But, in practice, the HoF and the CCI do not seem to observe the distinct routes regulated by article 84(2) and article 84(3), which in my view is erroneous.

issue of societal openness, democracy, and respect for the rule of law prevailing in the country, and the institutional modality designed to interpret the Constitution.

Mizanie himself called the constitution interpretation arrangement designed in the Constitution—that put a pure political body in charge of the task—"the most shattering deficiency" as regards the enforcement of constitutional rights.[66] He in fact extensively discussed[67] the problems of impartiality and competence of the CCI and HoF; the composition (primarily) of the HoF; and institutional set up and decision-making procedure of the latter which are widely raised by many scholars[68] to make the suitability of the two bodies for the task of constitutional interpretation highly questionable.

One should not also forget that, for a long time, the CCI and the HoF remained obscure when it comes to their role of constitutional interpretation. Until the mid-2000s, the total number of requests for interpretation submitted to the CCI was a few hundreds. As of April 2019, the total number of cases received by the CCI stood at 4267.[69] This can be contrasted with 9,128 communications (alleging various complaints) received by the German Constitutional Court in 2011 alone, out of which 6,036 were treated as proper constitutional

[66] See, above, the text accompanying footnote 7.

[67] Mizanie, *supra* note 1, pp. 143-51.

[68] See, for example, Yonatan Tesfaye Fessha, "Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review" in *African Journal of International and Comparative Law*, Vol. 14(1) (2006), p. 53; Chi Mgbako et al, Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights, 32(1) *Fordham International Law Journal* (2008), p. 259.

[69] Anchinesh Shiferaw Mulu, "The Jurisprudence and Approaches of Constitutional Interpretation by the House of Federation in Ethiopia", 13(3) *Mizan Law Review* (2019), 419, p. 422.

complaints for consideration by that Court.[70] The average total *annual* submission to the German Constitutional Court's docket is more than 6000[71], by far greater than the total number of applications received by the CCI since it opened its doors to applicants.

3. On Standing

Mizanie made interesting and bold proposals when it comes to the issue of *locus standi* in the litigation of constitutional rights. As noted earlier in section II, he contends that article 37(1) should be broadly understood to admit litigants that act on behalf others or of the public, without having a direct interest of their own in the matter.[72] He also submits that the term 'interested party' in article 84(2) of the Constitution should be interpreted liberally and that article 5(1) of Proclamation No. 798/2013 "which limits standing to 'any person who alleges that his fundamental right and freedom have been violated' should either be amended or read in line with articles 37 and 84(2) of the Constitution".[73] He says: "Constitutional rights could be fully vindicated in Ethiopia only where their violations could be brought to the attention of the CCI and the [HoF] by affected individuals and groups as well as public purpose spirited individuals and NGOs".[74]

Reading into article 37(1) of the Constitution a standing of public interest litigation type seems a long stretch. One of the areas where the making history of the Constitution relatively clearly shows the debates that shaped the framing of constitutional provisions into what they eventually turned out to be is the current article 37 in general and

[70] Kommers and Miller, *supra* note 52, p. 30.
[71] *Id.*, p. 31.
[72] Mizanie, *supra* note 1, p. 155
[73] *Id.*, pp. 156-57.
[74] *Id.*

article 37(1) in particular. During the consideration of the draft constitution by the Council of Representatives of the Transitional Government, long debate took place on the right to access to justice. As can be seen from the Minutes of the Council, the earlier draft received from the drafting Commission contained an explicit reference to public interest litigation (PIL). It was listed as part of sub-article (2) of the then article 35 of the draft that was devoted to access to justice.[75] But on the floor of the Council, it encountered lots of opposition, including from the minority view holders in the drafting Commission and the Chair of the Council, President Meles Zenawi. In fact the Chair said that the provisions on PIL would end up in becoming avenues for those who lack the required votes in decision-making bodies to get their wishes granted through litigation and, he believed, it would not be used to come to the aid of those who lack the means to hire lawyers.[76] As can be seen from the Minutes, the wording of the current article 37(1) was redrafted and given its current formulation by the Council.

Further, during the deliberations on the draft by the Constituent Assembly as well, a fair amount of discussion was made on the draft provisions on access to justice. It was reported that two committees of the drafting Commission—the Human and Democratic Rights, and Judicial Affairs Committees—had considered the issue of access to justice. The Chair of the Human and Democratic Rights Committee, for example, explained the *raison d'etre* for a stand-alone right to access to justice saying that it would be necessary for individuals to have recourse against executive officials that may use their positions and

[75] The current article 37 of the Constitution was article 35 in the original draft of the Drafting Commission, and it had 4 sub-articles to it; *Minutes of the Council of Representatives of Transitional Government of Ethiopia, Deliberation on the draft constitution*, Miazia 12, 1986, p. 105.

[76] *Id.*

violate their rights.[77] The Chair of the Committee further mentioned that under the then draft article 37(2), a person can bring his own case or someone else's case as well. This would give the sense that the PIL provision was maintained in article 37(2) when the draft reached the Constituent Assembly but was somehow removed at some point before the Constitution was ratified. Thus, given the fact that the idea of PIL was raised and rejected during the deliberation of the draft of what has become article 37 by the two bodies mentioned above, and particularly given that it has disappeared from the adopted Constitution, I believe it is hard to make the argument in favor of its existence in article 37(1) of the Constitution.

Similarly, the argument about the liberal interpretation of article 84(2) of the Constitution so as to give the phrase "interested party"[78] a broader meaning in that sub-article is also incongruent both with the plain meaning of the phrase and the intention of the framers of the Constitution. In the Amharic (and the controlling) version[79] of article 84 (2), the phrase "interested party" is rendered as "**ባለ ጉዳዩ**" (which means "the disputant" or "the party"). This therefore can only mean the person with an interest in the matter.

Having said the above, however, I contend that article 9(2) of the Constitution can be a possible provision of the Constitution where public interest litigation and litigation on behalf of others can be anchored. Article 9(2) provides: "All citizens, organs of state, political organizations, other associations as well as their officials *have the duty*

[77] Minutes of the Constituent Assembly, Deliberation on the draft constitution, Hidar 10, 1987, pp. 13-14.

[78] The phrase "interested party" appears in article 84(3) as well. But Mizanie did not call for its liberal interpretation in the case of this sub-article.

[79] See, the Ethiopian Constitution, 1995, article 106.

to ensure observance of the Constitution and to obey it. (Emphasis mine). One of the ways through which citizens, associations, political organizations and their officials, among others, can ensure the observance of (and obey) the Constitution would be by challenging the violations of the Constitution, including the violation of its fundamental rights and freedoms provisions, before courts, administrative and quasi-judicial bodies not only in their own cases but also by bringing PIL and representing others who cannot stand for themselves. That said, it is imperative to mention here that we are in a better position at the moment because of a new legal development brought about by the Federal Courts Proclamation No. 1234/2021. Article 11(4) of the Proclamation provides: "Any person who has vested interest or *sufficient reason* may institute a suit before the Federal High Court to protect the rights of his own or *others*" (emphasis mine). Thus, a person—legal or juridical—that is mindful of the interest of the public or that of another person who for any reason is not in a position to act on their own behalf, and is determined to take that matter to the Federal High Court needs only to show a "sufficient reason" to do so. This is not a high threshold to cross. It is doable. The legislature has to be commended for having created this platform, responding to a long yearning from the minders of public interest and rights or interests of others who may not be in a position to assert their rights for various reasons.

4. On the Exhaustion of Administrative and Judicial Remedies

The requirement of exhaustion of administrative and judicial remedies before an applicant approaches a constitutional interpreter in jurisdictions that follow centralized constitutional review system is a

well-established practice.[80] When it comes to the Ethiopian case, what seems to be a problem of poor draftsmanship of articles 3 and 5 of Proclamation No. 798/2013 appears to have contributed to some lack of clarity in Mizanie's comments on the law. It is difficult to make sense of some of the provisions. For example, what article 5(3) provides is already covered by article 5(2)(a) if we see it in the light of articles 84(2) and 84(3) of the Constitution. The idea of exhaustion of available remedies before seeking redress from a constitution interpretation body is pivotal because litigants can have their cases resolved without the need to raise a constitutional question. This is in line with Mizanie's proposal to avoid the invocation of the constitution unless that becomes absolutely necessary.[81] It also underscores the important principle that constitutional interpretation bodies should not be the first instance forum for litigating justiciable matters.

Mizanie commented that Proclamation No. 798/2013 does not define what "justiciable" matters are. He also cited the decisions of the Federal Supreme Court and the CCI's opinions which gave the impression that justiciable matters mean whatever the legislative or the executive branches of government say they mean.[82] I contend that there should rather be a firmer, internationally acceptable understanding of the notion. I consider those decisions of the two bodies Mizanie cited as slippages under the burden of political interests, from the government at the time, which should not represent the established judicial stance. There should be more settled meaning for the notion whose lines are drawn in the sand. In this regard, we can learn something from the "political question" doctrine of the US Supreme Court.

[80] Kommers and Miller, *supra* note 52, p. 11.
[81] Mizanie, *supra* note 1, pp. 151-53.
[82] *Id.*, pp. 158-59.

In *Baker v. Carr*[83], the Supreme Court explained the concept of political question. A matter which the (US) Constitution makes the sole responsibility of the executive or the legislative branch of government is a question with which the judiciary should not deal because it is removed by the Constitution from the prerogatives of the judicial branch. The Court said:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[84]

The standards developed by the US Supreme Court cited above can help the Ethiopian courts to differentiate justiciable matters from non-justiciable matters. The important thing is that when they go about doing so, they have to use the Constitution as a reference point and not laws or policies of the political branches. The notion of justiciability is a constitutional principle, not a sub-constitutional principle.

[83] *Baker v. Carr* (1962).
[84] *Id.*, p. 12.

5. On Constitutional Remedies

The Ethiopian Constitution contains robust provisions regarding the application, implementation and accessibility of the Constitution as a whole as well as its Bill of Rights provisions. As earlier noted, article 9(2) stipulates that "[all] citizens, organs of state, political organizations, other associations as well as their officials have the duty to ensure observance of the Constitution and to obey it". It makes it unmistakably clear that both state and non-state actors, including citizens, have duties not only to obey it but also to ensure the observance of the Constitution. Focusing on the application of the Bill of Rights, Article 13(1) provides: "All Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of the [fundamental rights and freedoms] Chapter" of the Constitution. As regards how the Bill of Rights provisions should be interpreted, the Constitution entrenches an approach that we can call "interpretive universalism" by requiring the provisions of the Bill of Rights to be interpreted in conformity with the principles of the Universal Declaration of Human Rights, international human rights covenants and other human rights instruments adopted by Ethiopia. This clause anchors the interpretation and application of the constitutional rights to those of the international human rights system thereby wide-opening the opportunity for various actors that are required to respect, protect, enforce and cause the observance of the Bill of Rights enshrined in the Constitution to learn from and benchmark the international human rights standards.

The above provisions are further strengthened by the broadly formulated "right of access to justice" clause of article 37(1) of the Constitution, according to which "everyone has the right to bring a

justiciable matter to, and to obtain a decision or judgement by, a court of law or any other competent body with judicial power". Thus, so long as a certain matter is justiciable[85], i.e., is capable of judicial determination—whether it is a matter that arises in terms of the Constitution or under sub-constitutional norms, actions or decisions—one is entitled to take the matter to a court of law or any other competent body with judicial power and obtain a decision or judgement. Such matters can be those that involve interpretation of the Constitution or the application of the latter or other sub-constitutional norms. In the case of the matters that involve the interpretation of the Constitution, the decision or judgment that the applicant obtains can be in the form of declaration of invalidity of a law or a decision that contravenes the Constitution, an interdict (writ of mandamus) or even the award of constitutional damages. In this sense, therefore, we can say that the Ethiopian Constitution contains the normative structure based on which constitutional remedies can be claimed.

Nevertheless, I do agree with Mizanie that, compared to constitutions of other jurisdictions, the Ethiopian Constitution can be characterized as not clearly forthcoming when it comes to constitutional remedies in general and damages in particular. In this regard, the Kenyan Constitution of 2010 can be placed on the opposite side of the spectrum of explicitness to the Ethiopian Constitution. Article 23(1) gives the Kenyan High Court[86] the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Article 23(3), for its part, stipulates that:

[85] See the discussion on "justiciability" under section 4 above.

[86] Article 23(2) instructs the Kenyan Parliament to enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress with which the High Court is constitutionally mandated in sub-article (1) of the same article.

> *In any pr*oceedings brought under Article [22[87]], a court may grant appropriate relief, including––
>
> (a) a declaration of rights;
>
> (b) an injunction;
>
> (c) a conservatory order;
>
> (d) 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 [the limitation clause of] Article 24;
>
> (e) an order for compensation; and
>
> *(f)* an order of judicial review.

Other constitutions, although not as explicit and as comprehensive as the Kenyan, provide for some details. For example, the Ghanaian Constitution of 1992 and the Nigerian Constitution of 1999 (also cited by Mizanie) provide that compensation should be paid to persons who are unlawfully arrested or detained by public authority or any other person. Thus, the Ethiopian Constitution textually is nowhere near the above constitutions in regards to constitutional remedies. As I alluded to earlier, it is possible that the courts or the CCI/HoF may, through litigation that comes before them on the basis of article 37 and other provisions cited, develop jurisprudence that reads appropriate constitutional remedies into the Constitution. In that sense, thus, Mizanie's statement that "the [HoF] and CCI do not have a legal basis and guidance to order structural interdicts and provisional interdict

[87] Article 22 of the Kenyan Constitution deals with *locus standi*. It provides, among others, that a person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened either on his own behalf or on behalf of public interest, or the interest of another person who cannot act in their own name.

when they feel that the applicant may suffer irreparable damage while the case is pending before [them]"[88] seems to me to be an incorrect reading of the law. Nonetheless, legislative enactment of appropriate procedural rules to implement the general provisions of the Constitution or the elaboration of the constitutional text through constitutional amendment can better address these legal gaps. Additionally, with respect to the remedy of interdict, we now have the problem of legal gap resolved (as far as the HoF is concerned[89])—albeit in a manner narrower than what Mizanie advocated for. Proclamation No. 1261/2021 empowers the Speaker of the House to order stay of execution "when the House believes that there will be irreparable damage to an applicant requesting constitutional interpretation, or there may be other serious compelling reason".[90] The law also empowers the Speaker to talk with the parties before ordering the stay at his/her discretion.[91]

Mizanie observes that the application of tort law (to which Ethiopian courts may resort owing to lack of distinct and detailed rules on human rights damages in other laws of the country) to address claims of constitutional damages is a misfit given the distinct nature and purpose of constitutional damages compared to ordinary tort in private laws. But damages, including damages awarded to redress violations of constitutional rights, have a civil nature regardless of the perpetrator of the violation. Thus, its being covered in the Civil Code would not be a problem. But, the Civil Code's lack of full coverage of all remediable constitutional rights is indeed a problem.

[88] Mizanie, supra note 1, p. 168.
[89] But the legal gap in the case of the CCI still remains.
[90] Article 19.
[91] *Id.*

Regarding the appropriateness of tort law for constitutional damages, opinions seem to vary. In a recent comprehensive work on damages and human rights, Jason Varuhas opines (in the context of the common law legal system) that "applying the ordinary common law rules on concurrent liability, a monetary award in tort may suffice to fully remedy a human rights violation"[92]. He further notes, by giving an example that:

> if concurrent claims in false imprisonment and for violation of Article 5(1)[93] are upheld, then the award for the tort would compensate for all relevant damage and loss suffered, rendering a separate award under the [Human Rights Act] unnecessary; to make two awards for the same damage would constitute double recovery and an unjustified windfall for the claimant. The award for false imprisonment includes compensation for normative injury to liberty as well as for consequential non-pecuniary or economic effects.[94]

Mizanie rightly observes that the cap on the amount of damages for moral injury in the Civil Code is unacceptably low.[95] However, recently enacted laws of the country have set aside the limits of the Civil Code by allowing more substantial moral damages. To cite a couple of examples: the copyrights and neighboring rights protection law states that the amount of compensation for moral damage brought about by the violation of these rights "shall be determined based on the extent of

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[92] Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing, 2016), p. 140.

[93] Art 5(1) of the Act provides that everyone has the right to liberty and security of person and that no one shall be deprived of such liberty except in specific cases provided in the same sub-article and in accordance with a procedure prescribed by law. See the Act here: https://www.legislation.gov.uk/ukpga/1998/42/data.pdf.

[94] Varuhas, *supra* note 92, pp. 140-41.

[95] Mizanie, *supra* note 1, p. 170.

the damage and [may] not be less than Birr 100,000 (Birr one hundred thousand)".[96] The Media Proclamation No. 1238/2021 for its part provides that "a moral compensation for defamation by the media shall not exceed Birr 300,000 (Three Hundred Thousand Birr)".[97]

Finally, Mizanie expressed the fear that immunity of government officials granted by the Civil Code could thwart possibility for redress of victims of human rights violations by such officials. Although ministers, members of parliament and judges are immune from liability for an act connected with their official functions, it is my view that the immunity envisaged here are for those acts that may not involve serious violations of constitutional rights. In addition, article 2139 makes an exception to the immunity provision that it (art. 2138) shall not apply where the immunity holders have been sentenced by a criminal court for acts pertaining to their office and invoked by the plaintiff. In fact, in relation to the members of parliament, the Ethiopian Constitution also provides that they are not accountable to civil, criminal or administrative liability in connection with the votes they cast or opinions they express in the House. The Constitution does not give immunity from arrest or prosecution for criminal offenses. All it does is setting forth the manner of arrest or prosecution in *flagrante delicto* and non-*flagrante delicto* cases whereby a prior immunity waiver is required to undertake arrest or prosecution in the latter situation.[98] The Constitution therefore doesn't change/abrogate the law in the Civil Code in regards to immunity. The point is that most state-inflicted human rights violations—whether they are committed by senior government officials who may or may not be members of

[96] Copyrights and Neighboring Rights Protection Proclamation No. 410/2004, article 34(4).

[97] Article 80(3).

[98] Ethiopian Constitution, 1995, article 54(5)-(6).

parliament or low-ranking government officials—would fall within the realm of prosecutable offences. This makes it possible for redress to be granted by using the Civil Code's relevant provisions on damages for acts committed by the state. It is good to note also that the provisions of the Civil Code that deal with fault-based tortious damages, which I believe involve mostly non-state actors, are specific in regards to the acts that give rise to damages. But in the case of vicarious liability, the Code's provisions tend to be more broadly stated making it possible for any violations of human rights to obtain redress by way of compensation, among other appropriate ones.

Conclusion

It is clear from Mizanie's article that he wanted to investigate why there has been a negligible constitutional rights litigation so far in Ethiopia, in spite of the widespread violations of the rights. In this connection, he wanted to bring to the limelight the absence of helpful rules of procedure for litigating constitutional rights and has argued that their absence has contributed to the low level of constitutional rights litigation. Although this article concurs with his view that the non-existence of robust rules of procedure may have played a part in the low level of constitutional litigation, it has argued that more significant reasons lie elsewhere.

This article has attempted to offer additional perspectives to the arguments and contentions Mizanie made in his article. I have shown that, contrary to Mizanie's position, courts have indeed the power to interpret the text of the Constitution to handle justiciable matters. This article has also attempted to shed light on the meanings of constitutional interpretation, which often is linked only to one of its meanings, i.e., review of constitutionality of sub-constitutional laws

and decisions. In relation to article 84(2) of the Constitution, the article has attempted to dispel the commonly held untenable argument that considers article 84(2) as solely determinative of the scope and meaning of constitutional interpretation under the Constitution. Regarding the issue of *locus standi* in relation to constitutional litigation, the article has pointed out that reliance on article 37 of the Constitution as a basis for PIL may not be tenable, but rather reliance on article 9(2) of the Constitution could be tenable. Further, the article discussed new legal developments after the publication of Mizanie's article. Overall, this article will give the reader a more up to date state of the law and the practice about constitutional rights litigation in Ethiopia and is believed to spur further research in the area.

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