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JUDICIAL REVIEW AND DEMOCRACY: A NORMATIVE DISCOURSE ON THE (NOVEL) ETHIOPIAN APPROACH TO CONSTITUTIONAL REVIEW

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The Ethiopian Constitution, in an “original stroke”, provides the power to “interpret”¹ the Constitution to the House of Federation (the House), which is referred to by some writers as the “Upper House” or “Second Chamber” of the bicameral parliament. The Constitution also establishes the Council of Constitutional Inquiry (the Council), a body composed of members of the judiciary, legal experts appointed by the House of Peoples’ Representatives and three persons designated by the House from among its members, to examine constitutional issues and submit its recommendations to the House for a final decision. This is, of course, very different from a number of other more well-known legal systems which vest the power of constitutional review either in general courts or in constitutional courts set up exclusively for constitutional matters.

The formal way through which issues of constitutional interpretation take place is via the Council. Issues of constitutional interpretation are referred to the Council by a court or “the interested party”² to a dispute. The Council, after examining the constitutional issue, can either remand the case to the competent court after it has found no need for constitutional interpretation, or submit its findings on constitutional interpretation to the House. The House, after deliberating

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

2 The term “interested party” is taken to mean any person or body (i.e. an interested group, a human rights NGO, an association, a federal or regional agency) directly affected by the impugned legislation. For further discussion see M. Abebe, *Who is the Interested Party to initiate a Challenge to the Constitutionality of Laws in Ethiopia*, 1 The Law Student Bulletin (1999) 9–12.

on the suggestions of the Council, can either accept or reject the recommendations of the Council. It should be noted that a party not satisfied with the order of the Council to remand the case to the competent court for lack of grounds of constitutional interpretation, may appeal against the order to the House.

The Ethiopian approach to constitutional review, one may argue, is a response to the counter-majoritarian dilemma.³ By excluding the involvement of ordinary or special courts from the business of constitutional review the government has made it impossible for the court to “usurp legislative power”. A question, however, remains whether this really represents an adequate response to the counter-majoritarian dilemma.

This research paper poses a normative question to the approach adopted by the Ethiopian Constitution. It asks who should interpret the Constitution. It, in other words, evaluates the legitimacy of the system. In the aim of meeting this main objective of the research, it seeks to inquire the counter-majoritarian problem which focuses on the relationship between judicial review and democracy. It then seeks to determine whether the Ethiopian approach represents an adequate response to the counter-majoritarian problem. It also goes beyond that and seeks to determine whether Ethiopia has adopted an institution that is well suited, competent and impartial to discharge the task of constitutional interpretation and constitutional review.

It is the thesis of this research that the Ethiopian approach to constitutional review seems to represent a response to the counter-majoritarian dilemma and solve the problems it raises. A close examination, however, reveals that the system not only fails to represent an adequate response to the counter-majoritarian dilemma but also lacks “characteristics that make it a good part of a well designed constitutional system”.

Two disclaimers are in order. The thesis, first, focuses on the political question of constitutional interpretation and constitutional review. It only strives to evaluate the legitimacy of the Ethiopian approach to constitutional review. To that extent, it does not deal with the theory and different methods of constitutional interpretation and other related constitutional issues. It may, however, discuss some of the methods of constitutional interpretation but only when it is relevant to make a point to the main thesis of this research. Second, in so far as the discussion on constitutional review and democracy is concerned, this is not an original thesis. It is not original in a sense that it doesn’t strive to give complete conclusions and to resolve current debate on the topic. The aim is rather to undertake an informed examination of the matter and, in the process, develop a coherent set of ideas to be applied when analysing the Ethiopian case.

An overview of the sections that follow might be helpful. Section two provides us with a brief comparative account on the development of constitutional review in

3 The counter-majoritarian problem, as it shall be discussed in section two in greater detail, refers to the problem of having unelected and unaccountable judges invalidate the acts of elected and accountable representatives of the people. It is also referred as the counter-majoritarian dilemma or difficulty.

the different parts of the world. Section three, by way of providing a background for the main thesis of this research, discusses the counter-majoritarian difficulty. It shall in particular examine the relationship between judicial review and democracy. This shall be done with a view to develop a sort of theoretical framework for the main objective of this research. It is in light of this framework that the Ethiopian approach shall be evaluated.

Section four is primarily concerned with the main objective of this research. It questions whether the Ethiopian approach represents a response to the counter-majoritarian dilemma. It further goes on to evaluate the approach in a principled way. It shall ask whether the Ethiopian approach "as an institution has characteristics that make it a good part of a well-designed constitutional system". Section five, the final section, shall conclude the discussion.

I. A BRIEF COMPARATIVE NOTE ON THE DEVELOPMENT OF CONSTITUTIONAL REVIEW

Constitutional review, the power to determine the constitutionality and, therefore, the validity of the acts of the legislature,⁴ takes various forms. This depends on various factors. Irrespective of these differences, however, most countries in the world have been practising some form of constitutional review.⁵

The subject of constitutional review, however, gained considerable attention only after 1803 when the American Supreme Court in *Marbury v. Madison* asserted its power to review the conformity of legislation with the constitution and to disregard a law held to be unconstitutional.⁶ Since then it is not uncommon to find ordinary courts empowered to control the compatibility of legislation and executive acts with the terms of the constitution. This is what is often referred as centralized or diffuse systems of constitutional review. In such a system, of which America is a good example, constitutional review is a power exercised by all courts.

This system of constitutional review, which is also alternatively referred as the "American" system of control, failed to strike root in Europe. This is attributable to various reasons, among which are the different legal traditions of Europe and America,⁷ the inability of the ordinary European judges to exercise constitutional

4 The term constitutional review in this research is used interchangeably with judicial review. Judicial review, in this study, refers to the act of reviewing the constitutionality of statutes or legislation.

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

6 *Marbury v Madison* (Supreme Court of U.S 1803 5U S. (1(Granch) 137, 2, L.Ed.60 in D. Kommers and J. Finn, *American Constitutional Law: Essays, Cases and Commentary Notes* (2000) 25.

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

review and the different level of status accorded to constitutions in Europe and the United States between the two world wars.⁸

A number of European countries have, as a result, adopted, by and large, a different model of constitutional review. In most of the European countries the power of constitutional review is assigned to a single organ of state. This may be either a supreme court or a special court created for that particular purpose. This system is called a concentrated system of constitutional review.⁹

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

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

8 See generally Louis Favoreu, *Constitutional Review in Europe* in L. Henkin and A.J. Rosenthal (eds), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (1990). Until the post world war II period only a few European constitutions, most notably the 1920 Austrian constitution, recognized constitutional review. It was not introduced in France until the introduction of the institution of the *Conseil Constitutionnel* in the 1958 Constitution. For further discussion see C. Sampford and K. Preston, *Introducing the Constitution: Theories and Principles and Institution* (1996) 22–25.

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

10 See generally J. Bell, *French Constitutional Law* (2001) 1–27.

The system of constitutional review adopted by various African countries appear to be broadly based on these western models of either the American or European system of control, albeit with some modifications or adjustments. There was no disposition to adopt an original or, if you want, an "African system of review".

In some of these African states, the power of constitutional review is vested on all ordinary courts while the highest court in the system provides for the uniformity of jurisdiction. This is what is earlier referred as the decentralized or diffused system of review. In Nigeria, for example, the Constitution confers authority on the High Court, Court of Appeal and the Supreme Court to interpret and enforce the provisions of the Constitution. The courts are also vested with the power to rule on all matters relating to the constitutionality of legislation with the power to make final decision resting on the Supreme Court.¹¹ Botswana, Gambia, Guinea, Malawi, Ghana, Seychelles, Sierra Leone, Tanzania and Swaziland have also adopted a similar system of review.¹²

This system of review posits the judge as the guardian of the Constitution. That is, in fact, what a judge of the Botswana Court of Appeal said in a leading judgement on sex discrimination in citizenship matters:

The Constitution is the supreme law of the land and it is meant to serve not only this generation but also generations yet unborn. It cannot be allowed to be a lifeless museum piece; on the other hand the Courts must continue to breath life into it from time to time as the occasion may arise to ensure the healthy growth and development of the state through it....We must not shy away from the basic fact that whilst a particular construction of a constitutional provision may be able to meet the designs of the society of a certain age such a construction may not meet those of a later age...I conceive it that the primary duty of the judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society.¹³

The majority of the African countries have, however, adopted the concentrated system of constitutional review. In these systems, constitutional matters are dealt with by specialized constitutional courts with special qualified judges or by ordinary supreme courts or high courts or their special chambers in a special proceedings. In South Africa, for instance, the Constitutional Court is the court of final instance on constitutional matters.

Commenting on the need to empower the courts with the power of constitutional review, Chaskalson P said:¹⁴

11 Constitution of Nigeria (1999), Chapter seven, sec 230ff.

12 A. Mavric, *A Tabular presentation of constitutional/Judicial review around the world*, available on <http://www.concourts.net/tab/index.html> (accessed 20-07-2005).

13 *Unity Dow v Attorney General* 1992 (LRC) (const) 623 at p.668.

14 A. Chaskalson quoted in Lord Lester of Herne Hill, *The Challenge of Bangalore: Making Human Rights a Practical Reality*, (1999) Commonwealth Law Bulletin 47, 50.

The very reason for establishing the new legal order [in South Africa], and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights through the democratic process.

Benin has as well adopted the concentrated system of constitutional review. Its unique Constitutional Court¹⁵ has the power to rule on the constitutionality of organic laws and of laws in general before their promulgation. It also has the power to rule on the constitutionality of treaties and international agreements. Interestingly, the Court can act on its own motion to determine the constitutionality of laws and regulations that threaten the fundamental rights of people and public liberties.¹⁶ Angola, Benin, Burundi, the Central African Republic, Egypt, Equatorial Guinea, Gabon, Madagascar, Mali and Togo have similarly established specialized courts (i.e. Constitutional court) to exclusively deal with constitutional matters. Countries like Burkina Faso, Cameroon, Chad, Niger, Sudan, Zaire and Zambia have, on the other hand, vested the power of constitutional review either in the high courts or their specialized chambers.

A number of African states, it seems, are also influenced by the French model of constitutional review. The system of constitutional review in Morocco, which has some sort of political and preventive review, is one such good example. In line with the practice of the *Conseil Constitutionnel* of France, the Constitutional Council in Morocco practices a preventive control on the constitutionality of laws.¹⁷ The constitutionality of a law is examined prior to its adoption. The Council, according to article 77 of the Constitution, is composed of four members nominated by the King, four other members nominated by the President of the Chamber of Representatives after consultation with the groups and another member who serves as the President of the Constitutional Council and who is as well appointed by the King. Each member of the Council, including the President of the Council, is appointed for a period of six years. The right to refer to the Council any legislation to examine its constitutionality is reserved to the King, the Prime Minister, the Speaker of the Parliament or 25% of the members of the Parliament. A similar political and preventive review is adopted by Algeria, Comoros, Djibouti, Ivory Coast and Mozambique.¹⁸

The recent constitutional exercises undertaken by some African countries do not as well depart from the usual trajectory of adopting either the European or American model of constitutional review. Currently, Kenya is engaged in the process of drafting a new constitution. The draft Constitution provides the power

15 The Court coalesce the task of a state sponsored human rights institution with the stature and institutional gravitas of a constitutional court. It can be considered a hybrid institution that encompasses the competencies typically associated with constitutional courts and a human rights mandate generally advanced by state sponsored human rights institutions. See generally A. Rotman, *Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights*, 17 *Harvard Human Rights Journal* (2004), 289.

16 As above.

17 As above.

18 Aboul – Enien, *supra* note 5 at 314.

of constitutional review to the High Court, the Court of Appeal and the Supreme Court.¹⁹ The High Court is the court of first instance for cases involving the constitutionality of legislation. The High Court shall also have unlimited original jurisdiction in all matters relating to the interpretation and enforcement of the provisions of this constitution. The Court of Appeal, by way of appeal, may also decide on cases that involve the interpretation and enforcement of the provisions of the Constitution. The Supreme Court, on the other hand, have appellate jurisdiction to hear appeals on similar matters from the Court of Appeal or from any other court or tribunal. The constitution makers in Kenya, it seems, are intending to adopt the American model of constitutional review.

II. THE COUNTER-MAJORITARIAN DILEMMA AND DEMOCRACY

Proponents of extra-judicial constitutional interpretation (i.e. those who want to take the power of constitutional review away from the courts) argue that judicial review is undemocratic. It is so because it permits unelected judges, who are accountable to nobody, to nullify the acts of democratically elected legislatures who are accountable to the public. They point out that when a supreme court or a constitutional court declares a statute unconstitutional, it is overturning what appears to be the popular will. When judges reject the products of majoritarian democracy, they argue, they engage in counter-majoritarian law making. Hence, the counter-majoritarian problem.

The counter-majoritarian problem finds its roots in the broader structural theory about popular sovereignty and majoritarian governance. A theory which is based on the premise that important decisions like the power of constitutional review should not be uncoupled from the electorate or a body that represents the electorate.²⁰ It is based on this theory that constitutional scholars question the legitimacy of judicial review: why should a majority of justices appointed for life be permitted to outlaw as unconstitutional the acts of elected officials or of officers controlled by elected officials? In the words of Alexander Bickel, who for the first time labelled this question as the “counter-majoritarian difficulty,

[t]he root difficulty is that judicial review is a counter-majoritarian force....when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representatives of the actual people of the here and now; it exercises control, not in behalf [sic] of the prevailing majority, but against it. That without mystic overtones is what actually happens. . . [I]t is the reason the charge can be made that judicial review is undemocratic.²¹

19 Draft constitution – 2004 available on <http://www.kenyaconstitution.org> (accessed 20-07-2005).

20 T.W. Ruge, *A Question which Convulses a Nation the Early Republic's Greatest Debate about the Judicial Review Power* (2004) Harvard Law Review 857.

21 A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* as cited in J. Perry, *The Constitution in the Courts: Law or Politics?* (1994) 16.

The counter-majoritarian problem has given rise to a considerable amount of literature that some have even started to wonder if this has become an “obsession” that has gripped the minds of constitutional theorists. The centrality of this dilemma to constitutional theory can hardly be overstated.²² Some of the most important works in constitutional jurisprudence are attempts to resolve or dissipate the counter-majoritarian problem.²³

Some of these constitutional theorists argue that those who view judicial review as an anti-democratic force do so because they have a “reductionist” view of democracy. For them democracy is more than majority rule. They argue that constitutional review does not undermine democracy. In fact, it enhances democracy. Others, while conceding that it is an anti democratic force, still stress that it is an important institution that we need to retain if we are going to have effective constitutional governance and democracy. As a result, proponents of this argument have often attempted to reconcile judicial review and democracy rather than to regard it as an illegitimate institution in a democratic society. More often than not the debate turns on the definition of democracy.

The definition of democracy is a matter of deep controversy. Political science theorists diverge greatly about what democracy means and no theory can claim a “goes-without-saying” status. As pointed out by Ronald Dworkin, there is no consensus as to which kinds of arrangements or combination of arrangements as far as representation, election or allocations of power are concerned provide the best available version of democracy.²⁴ The particular conception of democracy to which a constitutional theorist adheres determines and often explains his or her position on the counter-majoritarian problem.

Any majoritarian version of democracy understands democracy in procedural terms. According to this position, the outcome of important matters should be determined according to the will of the majority of citizens or their representatives.²⁵ Any law that the government legislates and policies it adopts should be the ones that have received the blessing of the majority.²⁶ Democracy is thus primarily seen as a means of arranging and managing representative government in which the core principle is the rule of the people, often equated with the rule of the majority. This, many believe, provides the very essence of democracy.

For these theorists, who explain democracy in procedural terms, policy choices must be made by those representative of and accountable to the electorate.²⁷ Judges are supposed to follow these choices of the majority. They should not be allowed to reject the products of majoritarian democracy. Allowing a judge to do so would be to effectively transform such a judge into “a

22 A. Farber and S. Sherry, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (2002) 144.

23 R.J. Lipkin, *Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism* (2000) 8.

24 R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996) 15.

25 Dworkin, *supra* note 24 at 16.

26 B. Brian, *Democracy and Power: Essays in Political Theory* (1991) 25.

27 M.H. Redish, *The Constitution as Political Structure* (1995) 8.

philosopher king, sitting in judgments on the wisdom and morality of all society's social policy choices".²⁸ Any government that allows judges to thwart the acts of the legislature, they conclude, has lost the essential characteristics of a democratic system.

For others, however, democracy is not content-independent. They see democracy as "a regime characterized by certain ends and values towards whose realization a certain political group aim and works".²⁹ There are fundamental values to the "democratic enterprise" which cannot be amended or destroyed by the majority government. As a result, they argue, the political majority has no "exclusive claim" on the meaning of democracy and the Constitution.³⁰

Based on this understanding of democracy, they contend that an effective democratic society implies the existence of institutional limitations on the power of the majority government. The desire to ensure that the majoritarian branches adhere to the limitations imposed by the constitution calls for some form of institutional constraint. This, they contend, can best be achieved by the judiciary – an institution that is free from majoritarian pressure.³¹ According to them, the judiciary is best suited to interpret the constitution and to protect its principles.

The problem with this understanding of democracy is that it does not really help us much in determining the appropriate institution for constitutional review. One may find no problem with the assertion that there are fundamental values, which a government may not encroach upon. This, however, does not tell us how these values that characterise a democratic regime are to be protected against the decisions of the legislature. The fact that democracy is not content-independent and that there are rights that should have primacy does not suggest that the judiciary provides the best limitation on governmental power.

More importantly, the fact that the judiciary is the most competent organ to discharge the task of constitutional interpretation and constitutional review does not make it any more legitimate for a theorist who challenges judicial review based on its counter-majoritarian character. The counter-majoritarian problem is not about institutional competence or level of expertise. As indicated earlier, it is about popular sovereignty and majoritarian governance. The claim is that the institution of judicial review allows the imposition of the values of the judges over and above that of the people or, to be more specific, their representatives. Thus, even if there are fundamental values that need to be respected at all times, one cannot help but still wonder why we should succumb to the view of a few appointed and unaccountable judges rather than to the collective judgments of elected legislatures to identify and determine the contents and scope of these basic values.

The reality is that democracy is currently considered to be "the sum of current practices of representative government".³² As rightly pointed out by Hiebert, in

28 As above.

29 N. Bobbio, *Democracy and Dictatorship* (1989) 157.

30 E. Chemerinsky, *The Vanishing Constitution*, *Harvard Law Review* (1998) 76–77.

31 Redish *supra* note 27.

32 L.J. Hiebert, *Limiting Rights: the Dilemma of Judicial Review* (1996) 116.

the contemporary world democracy is discussed not as an ideal. It is not, for example, discussed as a social and economic environment that best enables citizens to express their diverse views and pursue different courses of action in their private and public lives.³³ It is not the normative component that defines democracy. What matters is the process. It is, for example, the process that legitimises a decision as democratic. Democracy is thus discussed as the actual practices and institutions of those polities through which the process is observed. Under such circumstances, the institution of judicial review is undemocratic in so far as it deviates from the democratic principle of leaving the outcome of important matters to the decisions of a body that represents the electorate.

From a democratic point of view, the court's role in the interpretation of a constitution can only be appreciated if they are considered as enforcers of "old majoritarian values". As explained by Robert Jackson,

The court is almost never a contemporary institution...The Judiciary is thus the check of the preceding generation on the present one; a check of conservative legal philosophy upon a dynamic people, and nearly always the check of a rejected regime on the one in being.³⁴

The fact that the courts are enforcers of old majoritarian values, however, does not make them less problematic from a democratic point of view. Rather, the fact that prior majorities control present majorities is by itself a counter-majoritarian process.³⁵

As the foregoing discussion suggests, judicial review and democracy are in obvious tension. Being cognizant of this fact, many constitutional theorists have attempted to reconcile judicial review and democracy by drawing and redrawing the limits of judicial power. Most of the suggestions focus on how the courts should interpret the constitution from a democratic perspective. We shall now turn to examine two such attempts.

A. Resolving the counter-majoritarian dilemma through originalism

It has been argued by a number of constitutional theorists that courts should interpret constitutional provisions according to their original meaning. Originalism, as a method of constitutional interpretation, contends that constitutional meaning is derived from the original intentions of the authors or the ratifiers of the constitution and its amendments.³⁶ According to this approach, the meaning of a constitutional provision as understood by those who represented the people

33 As above.

34 R. Jackson, *The Struggle for Judicial Supremacy* (1941) as quoted in R.K. Carr, *The Supreme Court and Judicial Review* (1970) 35. See also Lipkin *supra* note 23.

35 Seidman calls it "the intergenerational difficulty". He relates it to the right to self-determination. According to him, allowing courts to enforce old majoritarian values interferes with the right of people alive to govern themselves. See L.M. Seidman, *Our Unsettled Constitution* (2001) 16.

36 Lipkin *supra* note 23 at 13.

in the constitutional process (at the time the provision was constitutionalised) should be privileged.³⁷

It is argued that a reference by a contemporary judge to the “original” understanding of a particular constitutional provision at the time of its ratification results in a minimalist judicial role.³⁸ This it does by providing little or no opportunity for a judge’s own “subjectivity”.³⁹ A properly understood and followed originalist approach to constitutional interpretation brings about a relatively small or passive judicial role in constitutional adjudication, a constitutional adjudication that is more “legal” than “political”.⁴⁰ It is thus generally argued that an originalist approach to constitutional interpretation limits the power of judicial review, thereby eliminating the counter-majoritarian problem.

The problem with this argument is that it assumes that the meaning of a provision as understood by the framers of the particular provision is a “determinate” one. As pointed out by Perry and many others, “there is often more than one plausible conclusion to the inquiry into the original meaning of a constitutional provision, more than one conclusion an originalist judge can plausibly reach”.⁴¹ A simple reference to the works of “committed and competent scholars” reveals the sharp disagreement that prevails on the historical meaning of most of the important provisions of the constitution.⁴² To the extent that the historical record fails to point to a single answer to questions, the historical inquiry constitutive of the originalist approach is often indeterminate. This makes it difficult to capture the original meaning. Hence, the inescapable conclusion that more than one reading of original meaning is plausible and that judges can reasonably disagree about which reading more likely than not captures the original meaning.

It is furthermore not certain that an originalist approach to constitutional interpretation limits the influence of subjective values. Chemerinsky has said the following in this regard:

[E]ven on its own terms originalist interpretation cannot exclude the justices’ own values from the decision making process. Historiographers persuasively argued that the process of historical examination is inevitably interpretive and influenced by the values of the historian. Reading constitutional history for original intent cannot be value-neutral because of the subjective process of deciding whose intent counts (the drafters? the ratifiers? which ones?) of ascertaining which of their views matter and of determining the intent of a large number of people who often had different objectives.⁴³

37 Perry *supra* note 22 at 32.

38 Farber et al *supra* note 22 at 11.

39 Perry *supra* note 22 at 54.

40 As above.

41 As above, 56. See also Lipkin *supra* note 23 at 13–15.

42 Lipkin *supra* note 23 at 14.

43 Chemerinsky *supra* note 30 at 90.

The problem of following an originalist approach is further problematic because of the fact that it may sometimes result in absurd conclusions or undesirable conclusions which cannot be reconciled with the realities of modern society. A good example is the case of *Brown v Board of Education*, in which the American Supreme Court declared racially segregated schools unconstitutional. Historical evidence strongly suggests that the framers of the American constitution intended to protect only "formal equality", not "substantive equality". In other words, while they wanted blacks to be able to enter into contract or to own property, they never expected blacks to become socially equal with whites.⁴⁴ Under such circumstances, an originalist approach to constitutional interpretation would obviously require us to disavow the decision in the *Brown* case.⁴⁵

A determination of the meaning of a provision of the constitution with reference to the intent of the framers could thus result in undesirable conclusions as it may sometimes require us to be ruled or restrained by values and beliefs which might not be any more appropriate or relevant to the present day.⁴⁶ Under such circumstances, the constitution could not govern a country in the modern world. After all, the notion of a living constitution is based on the reality that modern society cannot be governed by the specific views of individuals who in the American case, for instance, lived two centuries ago.⁴⁷

As the foregoing discussion suggests, it is usually impossible to ascertain exactly what the framers of a particular clause intended to protect, thus, depriving the originalist approach of the necessary precision to resolve the counter-majoritarian difficulty.⁴⁸ It is therefore not necessarily true that an originalist approach to constitutional interpretation entails a minimalist judicial role and thereby eliminates the counter-majoritarian problem.

B. Ely's theory of judicial review: Another attempt to resolve the dilemma of judicial review and democracy

In the most celebrated footnote four of *Carolene products*, the American Supreme Court stated that judicial review is justified when legislation or other governmental action seems to obstruct political representation and accountability by distributing the law's benefits and burdens in ways that show a particular group to have been denied fair representation.⁴⁹ Accordingly, the judicial role is especially to reinforce majority rule, for example, by ensuring equal representation in the electoral process, by protecting discrete and insular minorities

44 Lipkin *supra* note 23 at 23.

45 For a detailed discussion of the fact that the *Brown* case does not muster the constitutionality test in a court that follows an originalist approach see Farber et al *supra* note 22 at 22–25.

46 As above.

47 For more discussions see D. Davis, M. Chaskalson and J. de Waal, *Democracy and Constitutionalism: The Role of Constitutional Interpretation*, in D. van Wyk, J. Dugard, B. de Villiers and D. Davis, *Rights and Constitutionalism: The New South African Legal Order* (1994) 2.

48 As above, 12.

49 H.L. Tribe, *The Puzzling Persistence of Process-based Constitutional Theories*, 89 *The Yale Law Journal* (1980) 1063.

and by assuring fair process.⁵⁰ The court, by focusing on the process can avoid dealing with substantive values, which makes the court's role problematic from a democratic point of view. In fact, as Tribe noted, this permits courts to "perceive and portray themselves as servants of democracy even as they strike down the actions of supposedly democratic governments".⁵¹

It was from this famous footnote that Ely derived his theory of judicial review. The theory recognises the need to reconcile the court's authority with a representative form of government. He believes that if the court acts as "reinforcer of representation" rather than adjudicator of dispute on substantive values, it can avoid the judicial subjectivity and the inconsistency with democratic theory.⁵² In fact, the judiciary will assume a role which is consistent with the democratic assumptions of the Constitution, particularly with its underlying theme of representation. It will safeguard the representative character of the political process. Thus, courts, in interpreting the open-ended provisions of the constitution, should not strive to establish substantive values but rather should restrict themselves to pursuing "procedural" or "participational" goals that open up and make effective the process of representative government and ensure the fair representation of minority interests.⁵³ This, according to him, prohibits the imposition of substantive outcomes by unelected officials. Judicial review, thus, becomes an "adjunct rather than an adversary of the democratic process".⁵⁴

Ely's theory of judicial review is commended for its emphasis on the democratic nature of the constitution and representation. It does not, however, provide adequate protection to the minority. This mainly has to do with the fact that mere representation in the process does not help "functionally powerless" minority groups much. It is not enough that barriers to participation in the political process have been removed. As indicated by Sunderland, even when barriers to minority participation in the political process have been removed, the majority may vote themselves advantages at the expense of others or refuse to take the minority's interests into account.⁵⁵ Equal representation in the sense of one person, one vote does not guarantee equality of treatment.

For the purposes of this research, what is more problematic about Ely's theory of judicial review is that even a judge following his theory of judicial review cannot avoid being involved in making value judgements. According to Ely, the role of the judge under such a system is to "unblock stoppages in the democratic process". In other words, the judge only needs to ensure that minority interests are fairly represented. They need to make sure that the legislators have not interfered with the fair process of popular representation. The problem with this

50 See Chemerinsky *supra* note 30 at 56.

51 Tribe *supra* note 49.

52 H.J. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) 87.

53 E.G. Lynch, *Review of John Hart Ely's Democracy and Distrust*, 80 *Columbia Law Review* (1980), 858.

54 As above.

55 V. L. Sunderland, *Popular Government and the Supreme Court: Securing the Public Good and Private Rights* (1996) 168.

theory is that a judge, for different reasons, needs to make value judgments in order to determine whether the legislative process is not perverted.

A judge applying an open-textured constitutional provision should give it content by asking what role the courts can most effectively play in a representative democracy.⁵⁶ This is partly because there is hardly a consensus as to the sort of democratic process that ought to prevail in a country.⁵⁷ The sort of democratic process a country adheres to depend, among other things, on the nature of speech, publication and political associational rights that individuals have against government. More often than not, there is no consensus on the content, contours and limits of these rights. In the absence of such agreement, there is no consensus as to “the democratic process”. In such cases, the judge would unavoidably embark on making value judgments and thereby impose his own values.

As it was also noted by Tushnet, the Court, as “representation-reinforcer”, needs to remove obstacles to the assertion of political power if it is to effectively play the role assigned to it by Ely’s theory of judicial review. This is not, however, a value-free occupation. Identifying the functional obstacles by itself entails making value judgements. This is so because the task of identifying functional obstacles, as pointed out by Tushnet, permits manipulation and requires the use of subjective values.⁵⁸ This, from a democratic point of view, is illegitimate as it is the value of the individual justice that serves as a basis to identify the functional obstacles.

The very same reason that allows Ely to reject the system that permits engaging in substantive due process can thus be used to reject any role for the courts to engage in what Ely calls “reinforcing the democratic process”. Ely rejected any role for the courts in determining substantive due process because there is no consensus as to the various values that the judiciary has to enforce in substantive due process cases. But as it is also pointed out above there is no consensus as to the sort of democratic process that ought to prevail in a country. This requires the courts to make value judgements. To that extent, a court under Ely’s theory of judicial review is not different from a court that is busy with the determination of substantive values. To that extent, Ely’s theory of judicial review also fails to reconcile judicial review and democracy.

Before wrapping up this section, it is important to note, by way of conclusion that constitutional texts often provide for a range of choices – choices that require value judgements. Under such circumstances, unelected courts cannot help but interpret and make the law when reviewing the vague and indeterminate constitutional provisions. Given the vagueness of constitutional provisions, this naturally means that the courts will give priority to some values over others. This is obviously unacceptable in a democratic society where elected legislators,

⁵⁶ Lynch *supra* note 53.

⁵⁷ J.M. Perry *The Constitution, the Courts and Human Rights* (1982) 79.

⁵⁸ M. Tushnet, *Darkness on the Edge of Town: The Contribution of John Hart Ely to Constitutional Theory*, 89(6) *The Yale Law Journal* (1980) 1045.

accountable through periodic elections, are supposed to make these kinds of choices. Thus, the basic claim that constitutional review by courts is inconsistent with the basic tenet of majority rule in a representative democracy remains unchallenged.

As the foregoing discussion suggests, constitutional theorists have strived to reconcile judicial review and democracy in a variety of ways. Since the suggestions made by these theorists do not relieve the judges from the business of interpretation and hence value judgement, they do not as such entail a minimalist judicial role and thereby eliminate the counter-majoritarian problem. To that extent, they fail to reconcile judicial review and democracy.

III. A NORMATIVE DISCOURSE ON THE ETHIOPIAN APPROACH TO CONSTITUTIONAL REVIEW

In the previous section, it is indicated that judicial review and democracy are in obvious tension. Many constitutional theorists have tried to reconcile judicial review and democracy but in vain. It is submitted that the tension between judicial review and democracy is irresolvable.

The Constitution of Ethiopia, it is indicated, has excluded the courts both from the general power of interpreting the Constitution as well as from the specific power of exercising constitutional review. The Constitution has provided the exclusive authority of interpreting the Constitution to the House, including the power to invalidate legislation for unconstitutionality. By adopting such a novel system, the Constitution, it seems, is attempting to avoid the counter-majoritarian dilemma. By entrusting the important power of constitutional review to a body other than the court, the Constitution seems to at least implicitly endorse the view that the tension between judicial review and democracy is irresolvable, hence its strong commitment to a majoritarian process.

The success of the constitution in avoiding the tension between judicial review and democracy, however, depends on how far the drafters of the Ethiopian Constitution have successfully avoided the counter-majoritarian problem and adopted a system that represents an adequate response to the problem. This, in turn, depends on how successfully the interpretation of the Constitution is made to squarely fall in the hands of a majoritarian body or process. Thus, the first task of this section is to look at the structure and composition of the House and find out whether it is a majoritarian House in order to determine whether the system represents a response to the counter-majoritarian problem.

The mere fact that a majoritarian process is adopted, on the other hand, does not make the system an effective part of the constitutional system. It is not enough that it avoids the counter-majoritarian problem. The adopted system should also be institutionally suited and competent to discharge the task of constitutional interpretation and constitutional review. Hence, based on the institutional suitability of the system and the competence of the institution, we need to determine whether the system can effectively play its role in developing

and protecting constitutional norms. This shall be the other main focus of this section.

In the following pages, we shall thus first set out the reasons why Ethiopia has adopted such a system and then examine whether it represents a response to the counter-majoritarian problem. Then we shall proceed to examine whether the House is institutionally competent to engage in this important function of constitutional interpretation and more specifically constitutional review. Finally, we shall turn our focus on the functional role of constitutional review and examine whether the adopted system can be an important element of our constitutional order that helps us to reinforce constitutional norms.

A. The Ethiopian approach to constitutional review: A response to the counter-majoritarian dilemma?

The House is often considered as one of the legislative institutions of the federal government. A brief look at the powers and functions of the House, however, reveals that it does not exercise any legislative function. Rather, it suggests that the House functions as an institution that forges and maintains a harmonious relationship between the regional states and the federal state. The Constitution assigns to the House the task of an overseer of the whole constitutional order.⁵⁹ This is reflected in “the few but weighty functions” the Constitution has entrusted to the House.

The role of the House in maintaining and balancing the relationship among the nation’s nationalities and peoples⁶⁰ of Ethiopia and the federal state commences with its duty to “promote the equality of the peoples enshrined in the Constitution and enhance their unity based on their mutual consent”.⁶¹ This includes the responsibility to seek solutions to misunderstandings that may arise among states.⁶² The House furthermore has the function of delimiting the areas of civil law, which are important for the development of one economic unity and, thus, require federal legislation.⁶³ The only financial function of the House relates to the relationship between the federal and the regional states. It pertains to the determination of the division of funds between federal and state governments on revenues derived from joint tax sources.⁶⁴ It is also this same House that is empowered to determine the amount of subsidy the federal government may provide to the states.⁶⁵

59 F. Assefa, *Constitutional Interpretation: The Respective Role of Courts and the House of Federation in Proceeding of the Symposium on the Role of the Courts in the Enforcement of the Constitution* (2000) 108.

60 Article 39 (5) of the Constitution defines “nation nationality or people as “group of people who have or share a large measure of common culture or similar customs, mutual intelligibility of language, belief in common identity or related identities, a common psychological make up, and who inhabits an identifiable, predominantly contiguous territory”.

61 Article 62(4) of the Constitution.

62 Article 62(6) of the Constitution.

63 Article 62(8) of the Constitution.

64 Article 62(7) of the Constitution.

65 As above.

The House is also the ultimate defender of the constitutional order in Ethiopia. In this regard, the House can order federal intervention if, in violation of the Constitution, a member state endangers the constitutional order.⁶⁶ Another important function of the House has to do with the controversial article 39 of the Constitution, which provides the right to self-determination including secession. It is this House, which, in accordance with the Constitution, decides on issues relating to the rights of Nations, Nationalities and Peoples of Ethiopia to self-determination, including the right to secession.⁶⁷

The most important function of the House is the interpretation of the Constitution. As indicated earlier, the House, with the expert help of the Council, provides the final and ultimate decision in constitutional disputes. As a reading of the minutes and other relevant documents prepared during the making of the Constitution suggest, this was an important subject of debate during the drafting and ratification of the Constitution in Ethiopia. Many argued that vesting the power of constitutional interpretation in a legislative arm would disrupt the principle of separation of powers.⁶⁸

The “undemocratic nature of the judiciary”, according to the drafters of the Constitution, was the main reason why the power of interpreting the Constitution was entrusted to the House rather than to the courts. According to them, the courts should not have the power to interpret a constitution made by the people.⁶⁹ This was clearly indicated by the Secretary of the Constitutional Commission when he said the following:

How can a constitution that has been ratified by the people’s assembly be allowed to be changed by

professionals who have not been elected by the people. To allow the Courts to do the interpretation is to invite subversion of the democratisation process. Since the Constitution is eventually a *political contract of peoples, nations and nationalities*, it would be inappropriate to subject it to the interpretation of judges. It is the direct representatives of the contracting parties that should do the work of interpreting the constitution.⁷⁰ (Emphasis added)

The drafters of the Constitution, it seems, were convinced by the argument that the judiciary is not the appropriate forum for constitutional interpretation. According to them, un-elected and virtually unaccountable judges should not be allowed to strike down statutes that are the “fruits of the majoritarian branches”. The fact that they regarded the Constitution as a “political contract” rather than a mere legal document also suggests that the interpretation of the Constitution was

66 Article 62(9) of the Constitution.

67 Article 62 (3) of the Constitution.

68 A. Meaza, *Ethiopia: Process of Democratization and Development* in An – Narim *supra* note 12 at 30.

69 As above.

70 Newsletter of the Constitution Commission No.3.

considered by them to be a political rather than a judicial function. They therefore vested the power to interpret the Constitution to the House, which is a political body. A question, however, still remains why they chose to entrust this task to the House while the lower house, the House of Peoples' Representatives, is also composed of peoples directly elected by the people.

The explanation for this can be found, according to Andreas Eshete,⁷¹ in the Constitution which vests all sovereign power in the Nations, Nationalities and Peoples of Ethiopia. He makes reference to articles 8 and 61 of the Constitution. Article 8 reads:

1. All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia.
2. This constitution is an expression of their sovereignty.

Thus, by linking article 8 to article 61, which states that the House is composed of representatives of Nations, Nationalities and Peoples, he contends that the latter is the most legitimate body to interpret the Constitution as it, by implication, is the body in whom all sovereign powers reside and the Constitution is but an expression of their sovereignty. Thus, according to Andreas Eshete, the drafters of the Constitution, by entrusting the task of interpreting the constitution to the House, have given the Constitution back to the people with whom all the sovereign power resides. The drafters, by taking the Constitution away from the courts and entrusting it to the House, have thus successfully avoided the counter-majoritarian problem.

The writer of this research is, however, not sure whether the Constitution has really successfully avoided the counter-majoritarian problem. It is submitted that the mere fact that the Constitution vests sovereign power in the House is not sufficient to suggest that the House is the kind of institution that the proponents of the counter-majoritarian problem had in mind when contemplating to take the Constitution away from the courts and giving it back to the people or their representatives. This mainly has to do with the structure and composition of the House.

The House, as stated above, is composed of representatives of Nations, Nationalities and Peoples of Ethiopia. Each Nation, Nationality and Peoples is represented in the House. According to the Constitution, each Nation, Nationality and Peoples shall be represented in the House by at least one member.⁷² Moreover, the same paragraph stipulates that each Nation or Nationality shall be represented by one additional representative for each one million of its population. Thus, as a result, larger nations have greater representation than smaller ethnic groups.

In this respect, the arrangement makes the House less susceptible to the kind of criticisms often directed against the American Senate, which, like the House, is

⁷¹ Comments by Andreas Eshete on the Draft Constitution, 22 Nov 1994, 5.

⁷² Article 61(2) of the Constitution.

also an "upper house". It is often argued that the Senate is not a majoritarian house. This mainly has to do with the fact that the Senate is elected from states with unequal population sizes. In the Senate, each of the fifty-one states has two representatives, irrespective of the size of the population they represent. This means that Wyoming, the smallest state, has the same voting power as California, the largest state. This has raised the question whether those fifty-one senators representing the smallest states potentially accounting for just over 17 percent of the US population act on behalf of the majority when they enact or block legislation. Based on this analysis some have concluded that it is not clear that the American Supreme Court is less democratic than the Senate.⁷³

The drafters of the Ethiopian Constitution have attempted to avoid such criticisms by ensuring that the House is a majoritarian House. This they did by making sure that not only each nationality is represented by one member in the House but also by allowing the presence of one more representative for each one million of the population. Thus, as a result, the population with the largest size ends up having more seats than the others in the House. This may tempt one to conclude that any decisions the House takes represents the will of the majority of the population; thus suggesting that any interpretation of the Constitution by the House is tantamount to an interpretation made by the people themselves. This would have put the Ethiopian Constitution among the ranks of other constitutions that reflect a commitment to the majoritarian process and its basic premise that important decisions like the power to interpret the Constitution and review legislation for constitutionality should not be uncoupled from the electorate or a body that represents the electorate.

The problem with judicial review is, however, also the fact that it permits unelected judges, who are not accountable to the electorate to nullify the Acts of a democratically elected legislature who is accountable to the people. It is this same fact that renders judicial review a deviant institution in a democratic society. To avoid the counter-majoritarian problem it is therefore not sufficient that the House is composed of representatives of the different Nations, Nationalities and Peoples of Ethiopia. It is also not sufficient that groups with a larger population have more votes than the others. What is equally important is that the representatives sitting in the House should be elected and directly accountable to the public. This is important if the House is to avoid the kind of criticisms often directed against judicial review based on its counter-majoritarian character.

Article 61(3) of the Constitution states that state councils shall elect members of the House. As the reading of the second statement of the same article suggests, election of the members of the House can be either direct or indirect. The decision is left to the councils of member states. Thus, the state councils may decide to hold an election to have the members of the House elected directly by the people or they may themselves elect representatives to the House. Adherence to the first option, that is direct election by the people themselves, makes the House, in fact,

73 For more see Farber et al *supra* note 22.

a majoritarian body, which is also accountable to the people. This would make the task of interpreting the Constitution fall squarely in the hands of a majoritarian House, enabling the Constitution to successfully avoid the counter-majoritarian problem. It would adequately respond to the counter-majoritarian problem which basically claims that the Constitution is taken away from the people and placed in the hands of few unelected and unaccountable professionals or "elite".

In practice, the first option has never been adhered to. The state councils have never held elections to have the members of the House directly elected by the people. Rather, following the second option, it is the state councils themselves who have elected representatives to the House. More surprisingly, the members are not elected by the state councils as such. As indicated earlier, the Constitution states that the members of the House should be elected directly by the people themselves or by the state council. In the latter case, it seems, the state councils need to hold an election within their respective councils. The practice, however, is that the state council, rather than conducting an election to elect representatives, merely appoints individuals to represent the state in the House. Under such circumstance, the use of the phrase "elect representatives", under article 63(3), is a misnomer as the state council merely appoint members to the House. Thus, what we have in the House are not individuals who are elected by the people but appointed by the state councils.

In so far as members of the House are not elected but appointed by the state councils, they are almost in the same position as judges of the Ethiopian courts. Presently all judges are appointed by the House of People's Representatives from a pool of nominees forwarded by the Prime Minister.⁷⁴ The Prime Minister, in turn, receives the names of candidates from the Federal Judicial Administration Council.⁷⁵ State Court judges are also appointed through a similar process. It is thus clear that judges survive the "majoritarian process of appointment and confirmation". Just like judges, members of the House are not elected and, thus, not accountable to the people. The fact that they are appointed by the state councils does not make them any different from judges as the latter are also appointed by the federal or state parliaments. This indicates that as far as the members of the House are appointed by the state councils, the Ethiopian approach to constitutional review cannot escape from the same criticisms that judicial review provokes.

In conclusion, the Ethiopian Constitution, by creating a novel system of constitutional review, attempted to respond to the counter-majoritarian problem. However, as the foregoing discussion reveals, the approach does not represent an adequate response to the counter-majoritarian problem. Its attempt to take the

⁷⁴ Article 81 of the Constitution.

⁷⁵ The Federal Judicial Administration Council is responsible for the nomination of federal judges. It also determines matters of code of professional conduct and discipline as well as transfer of judges of any federal court. It is composed of members of the Judiciary and the House of Peoples Representatives. See articles 78 and 81 of the Constitution.

constitution away from an “unelected and unaccountable body” is not successfully accomplished as the Constitution has again found itself in the hands of a federal body, which is composed of individuals who are not elected but rather appointed by the state councils.

B. Institutional and functional competence of the House

A close look at the organisation of the House and the fact that it is assisted by a body that is composed of individuals representing different interests suggest that the Ethiopian approach may find its justification in constitutional theory that considers a constitution not only as a legal document but also as a political contract. Unlike the disciples of Chief Justice John Marshall of the United States who consider the constitution merely as higher law,⁷⁶ there are other constitutional theorists who understand the constitution as an instrument different in kind from ordinary law. For them, the “constitution, in addition to serving as a legal document, is also vital politically in the sense that it engineers the whole political order”.⁷⁷ The constitution is not only a legal document but also a political document. As a result, they regard the enforcement of the constitution as an extraordinary political act.

Based on this understanding of the constitution, it is often suggested that issues involving constitutional interpretation should be investigated under a different socio-political context than the often legalistic environment under which ordinary law cases are examined. This means, among other things, that the organ that is entrusted to interpret the constitution should not merely be a collection of legal professionals. It must also have individuals who have substantial experience in the political arena. Some of the members must thus have background in law, others in politics. The members must also be selected by a much more open political process than is the case with ordinary judges.

The House is obviously a political body. Furthermore, the Council, which assists the House in interpreting the Constitution, is composed of individuals with both a legal and political background. As indicated earlier, the Council is composed of the President and Vice President of the FSC, six legal experts appointed by the House of Peoples’ Representatives, and three other members designated from the House.⁷⁸ The legal professionals provide the House with the necessary legal expertise while the representatives from the political branch ensure that the findings of the Council do not “inject too many norms into the law making process, supplanting legislative considerations of other arguably more important matters.”⁷⁹ This, one may argue, makes the House a legitimate institution to interpret the Constitution and review legislation for constitutionality.

76 Snowsis, *Judicial Review and the Law of the Constitution* (1990) 1.

77 W. Murphy, J. Fleming and B. Sotirios, *American Constitutional Interpretation* (1995), 266.

78 Article 82 of the Constitution.

79 M. Tushnet, *Policy Distortions and Democratic Debilitation: Comparative Illumination of Counter-Majoritarian Difficulty*, 94 *Michigan Law Review* (1995) 2–4.

The fact that the adopted system is consistent with some principle of constitutional theory is, however, of no use unless the system has also the necessary institutional structure and competence to carry out the task. The institution must also be well suited to discharge the function of interpreting the constitution and more specifically constitutional review. In other words, one also needs to see if the House, as an institution for constitutional interpretation, is most suited to discharge this task or how well it has done so far. This relates to the institutional competence of the system or its effectiveness in ensuring the observance of constitutional norms. It also relates to the impartiality of the House. One may also want to see if the House has so far been able to change our "thin constitution" into what one may call "thick constitution".⁸⁰ In the following pages, we shall attempt to examine the House from these perspectives. We now proceed to this part of the research by discussing first the institutional competence of the House.

1. Institutional competence

As already indicated, any matter that requires constitutional interpretation is first referred to the Council, which examines constitutional issues and submits its findings to the House. The House has the power to provide a final decision on constitutional issues. Presently, the House is composed of 118 members representing 58 "ethnic groups". The presence at a meeting of two-thirds of the members constitutes a quorum. The House, according to article 64 of the Constitution, can only reach a decision upon the approval of the majority of members present and voting.

This decision-making arrangement of the House is, however, problematic. It is true that such decision-making arrangement is the most common way of making a decision in any legislative institution. It is not, however, an appropriate forum to reach a decision on an issue like constitutional interpretation which normally is resolved by a small group of persons – as small as 9 in the case of America or 11 as in the case of South Africa. This mainly has to do with the fact that adjudication of constitutional issues most often involves or requires one to engage in complex arguments. This, however, is not possible in a "large" gathering like the House. This parliamentary feature of the House makes "the process of engaging in [such] complex arguments difficult".⁸¹ Under this kind of institutional arrangement, the urgency of the issues, the reliance of members on others for guidance and the complexity of the problems presented often prevent meaningful constitutional analysis.⁸²

80 I adopted this terminology from Mark Tushnet. The usage of these terminologies, however, may not be exactly as envisaged by him. Here "thin constitution" refers to the document as it is adopted by the constitutional assembly or a referendum: rules stated in general terms. A "thick constitution", on the other hand, refers to a constitution that is developed as a result of constitutional interpretation. For Tushnet's version of these terminologies see generally, M. Tushnet, *Taking the Constitution away from the Courts* (1999).

81 A. Mikva, *How Well does Congress Support and Defend the Constitution?*, 61 *North Carolina Law Review* (1983) 587.

82 As above.

Being cognizant of this difficulty, some have suggested that the House should delegate its power of constitutional adjudication to a committee consisting of its own members just as it does with its other activities. The establishment of a committee, it is argued, would provide the House with a small group of experts thus presenting an optimum format to deliberate on the often technical and complex nature of constitutional adjudication. After all, it is further argued, the pressure on parliament and specialised procedures often urges legislatures to establish a variety of committees – standing and ad hoc – for different types of activities including investigations and scrutinising of the functions of ministries and other agencies of the country.⁸³ In this regard, reference is made to article 62(10) and (11) of the Constitution, which allows the House to establish permanent and ad hoc committees and to adopt their rules of procedures and to organize their internal administration for such committee.

As noted by Mikva, the most likely place for constitutional dialogue is in a committee; committee sizes and format are most conducive to debate.⁸⁴ Thus, establishing an ad hoc or permanent committee might be helpful. This suggestion, however, seems to overlook the existence and role of the Council which provides the House with the “official competent and authoritative legal advice” on constitutional issues. The role of this organ is to assist the House in the discharge of its constitutional adjudicatory functions. Thus, any establishment of an ad hoc committee within the House for matters involving constitutional interpretation would only be a duplication of effort. There is almost nothing that the establishment of a committee will contribute that cannot be done or provided by the Council. Such a proliferation of mechanisms might also suggest lack of focus of resources and effort. Moreover, one should note that among the eleven members of the council three of them are already designated by the House itself from among its members. For the reasons stated above, it is submitted that the proposal that suggests that the House should establish a committee should not be accepted.

A related problem is the ability of the members of the House to engage in constitutional adjudication. Constitutional issues often present the most difficult value conflicts in society. It is also true that individuals who decide on the issue of constitutionality are required or expected to have the technical knowledge required to understand the background of every piece of impugned legislation.⁸⁵ As the profile of most members of the House reveals, most of them are either members of the executive branch of the state government or the state council. The majority of them, however, do not have the necessary expertise (legal or otherwise) to engage in a detailed discussion of constitutionality. The problem is not only that there are not enough lawyers but also that those who are lawyers do not have the capacity to engage in detailed constitutional analysis. They hardly have the time to keep themselves up to date on recent legal developments. In fact,

83 I. Ibrahim, *Constitutional Adjudication under the 1994 FDRE Constitution*, 1(1) *Ethiopian Law Review* (2002) 68.

84 Mikva *supra* note 81.

85 Mikva *supra* note 81.

the situation in the House confirms one common observation about legislative ability – that, generally, members of the legislature are seldom competent to examine the constitutionality of a law.⁸⁶

One may argue that the ability of the members to engage in constitutional adjudication should not be a problem as the Council can provide the House with the necessary legal advice. This would be true, however, only if the House served as the rubber stamp for the findings of the Council. The House, nevertheless, needs to deliberate on the reports of the Council before it decides to adopt or reject its recommendations. This definitely requires the House to engage in complex constitutional debate that obviously presupposes at least a working knowledge of the Constitution and other relevant laws. The finding of the Council aids the House by identifying issues and motivations but it is not a substitute for the judgment of the House. The Council cannot replace but only assist the House.

The ability of the House to engage in a detailed discussion of constitutionality is further curtailed by the fact that the House holds a limited number of annual meetings. According to article 67 of the Constitution, the House should hold at least two sessions annually. Although the Constitution does not specify for how long each meeting is to be held, in practice, the House has never met for more than ten working days per meeting. This obviously does not give enough time for the House to engage in a detailed discussion of the findings of the Council. Moreover, one should not forget that constitutional interpretation is not the only business of the House. As it was indicated at the beginning of this chapter, the House is also charged with other important tasks – tasks which equally require the attention and time of the House. The House does not hold meetings for the sole purpose of deciding matters of constitutional interpretation. Members of the House are also saddled with a variety of tasks in the regional states and federal government in their legislative and executive capacities. With such tight schedule, it is obvious that the House does not have enough time to engage in the necessary constitutional debate unless we expect it to serve as a rubber stamp for the findings of the Council.

The inability of the House to engage in constitutional adjudications confirms the position that legislatures or institutions like the House are less suited for the task of constitutional interpretation and constitutional review as they are less inclined to consider constitutional values seriously. Fiss has said the following in this regard:

Legislatures ... are not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead

⁸⁶ Some attempt to distort this issue by making reference to “infamous judgments” of courts. The issue, however, is not about making mistakes. The point is not that the legislators are bound to make mistakes. From any one’s point of view legislatures and the courts are bound to make constitutional mistakes. Unlike what Tushnet says, the real question is also not “whether in general legislatures or courts make more and more important constitutional mistakes”. The question should rather focus on the general ability of the legislature and the court to deal with matters of constitutional interpretation and constitutional review.

see their primary function in terms of registering the actual, occurrent preferences of the people – what they want and what they believe should be done.⁸⁷

As the foregoing discussion suggests, the House is neither institutionally suited nor competent to engage in complex constitutional debate which any consideration of the constitutionality of laws or the interpretation of the Constitution requires.

2. Independence and Impartiality

The scope and meaning of the independence and impartiality of any institution varies as we move from one jurisdiction to another or from one kind of institution to another. The precise contours and limits of these concepts is still a matter that scholars continue to define. For the purpose of this research, however, the terms “independence” and “impartiality” simply means that a member of an adjudicating, enforcement or supervisory body should be free from improper influences and bias.⁸⁸

It is submitted that the application of these principles should not be confined to functionaries called judges or institutions called courts. They should also apply to any institution that at least provides an authoritative settlement of disputes about constitutional or statutory rights and duties.⁸⁹ Thus, to the extent that the House exercises its power of constitutional interpretation and more specifically constitutional review, it is engaging itself in some form of judicial or quasi-judicial function, which involves the settlement of disputes about constitutional rights and duties. This suggests that it, at least, needs to comply with some of the most important elements of these principles.

One of the main elements of an independent institution is that its members should serve independently without any improper influence. This is endangered when there is a conflict of interests. A conflict of interests is bound to occur in a situation where a decision-maker has, for example, a personal stake in the outcome of a case. This also happens if the decision maker is engaged in any other activity, which is not compatible with his position or function as decision maker. Incompatibility occurs when there is a reasonable belief that the other activity might interfere with the independence or impartiality of the individual.⁹⁰

As the profile of the members of the House reveals, most members of the House perform functions within their respective regional governments. Most of

87 O.M. Fiss, *The Supreme Court, 1978 term, Foreword: The Forms of Justice*, 93(1) *Harvard Law Review* (1979) 7.

88 This is reflected in the various regional and international instruments. See, for example, Article 18 of the Protocol on the Establishment of the African Court on Human and Peoples Rights, article 17 of the American Convention on Human Rights and article 21(3) of the European Convention on Human Rights and Fundamental Freedoms as amended by Protocol 11. See also P.H. Russell, *Towards a General Theory of Judicial Independence*, in P.H. Russell and D.M. O'Brien *Judicial Independence in the Age of Democracy* (2001) 8–9.

89 As above.

90 As above.

them work either in the executive or legislative branch of the regional governments. The fact that most members of the House hold certain positions in the executive branch in political capacities while at the same time serving on the House has the potential to undermine the credibility of the latter. This is for the simple reason that there is a conflict of interest, which is naturally generated by the incompatibility of the functions assumed by the members of the House. Under such circumstances, one may argue, members of the House might formally be delegates of the people that elected them or the state council that appointed them. In substance, however, they also represent the executive branch of the government in so far as they, at the same time, serve on the executive branch of the government.

The incompatibility of functions gets particularly problematic when one considers the fact that some members of the House hold certain important positions in the federal government. This problem is further compounded by the fact that these government officials also hold an important position in the House. For example, currently a Minister is at the same time serving as Deputy Speaker of the House. The Minister is obviously an important member of the government and a member of the Cabinet of Ministers. It may seem that if a complaint were submitted to the House against the government challenging the constitutionality of a law initiated by his Ministry or the Cabinet, he would obviously have a direct stake in the outcome. Such an individual can hardly function as an independent member in discharging his functions.

Some may contend that the fact that they have political positions in the executive branch of the government should not be problematic. For them, what is important is the professionalism and integrity of the members. This, backed by strict rules of procedure or codes of conduct, can ensure that the members of the House discharge their obligations independently and impartially. The point, however, should be made that it is doubtful whether the public would be confident that individual members of the House are able to render decisions which are adverse to their own interests or responsibilities. Moreover, the House should not only assert itself as being independent but should also be perceived by the public as an independent body.

Generally, the House does not have the necessary mechanisms that guarantee its independence and impartiality. First of all, there is nothing in the constitution or in the subsequent laws that prohibits a member of the House from engaging in any activity that might interfere with the independence or impartiality of a member or the House generally. The presence of such provisions would have at least ensured that the members of the House do not engage in activities that conflict with their role as interpreters of the Constitution. Secondly, unlike most judicial systems, including Ethiopia, there is nothing in the rules of procedure of the House or other relevant laws that require a member to abstain from participating in a discussion that concerns the constitutionality of a law which he or she enacted as a minister or member of the federal or state government's executive branch.

What is more disturbing is that these problems appear to be inherent problems of the House that originate from the very composition of the House itself. It is mainly because most members of the House are also members of the executive or legislative branch of the government and the fact that there is nothing that prohibits such simultaneous assumption of office, that such a conflict of interest is bound to happen. Insofar as the situation continues as it is, it is almost impossible to introduce the protective mechanisms mentioned in the above paragraph as doing so will adversely affect the proper functioning of the House. This is because of the fact that almost all members of the House have dual responsibilities. The remedy thus lies in the composition of the House itself.

3. The "Thin Constitution"

Currently, Ethiopian courts rarely decide cases based on the provisions of the Constitution. There is a general conviction among judges that the courts are not allowed to discuss the provisions of the Constitution when they consider cases. Some judges jokingly argue that they are supposed to follow a hands-off approach when confronted with the Constitution.⁹¹

The reluctance on the part of the judges to make any reference to the provisions of the constitution is reflected in the manner the judges respond to constitutional adjudication.⁹² Some judges argue that the courts should not be worried about the constitutionality of a law. They are supposed to apply laws irrespective of their constitutionality. For them, it is only when the law-maker repeals or substitutes the impugned legislation or provision that they cease to apply the law. Others believe that where the issue of the constitutionality of laws arises, the courts are supposed to refer the issue to the Council instead of applying or discussing the impugned law. In its most extreme form, the reluctance to engage in constitutional adjudication has resulted in judges shying away from considering the provisions of the Constitution.⁹³

Despite the persistent encouragement by the academics and officials of the judiciary, the courts have generally been unwilling to engage in the interpretation of the constitution let alone constitutional review. It is rare to find, especially at the level of federal and higher state courts, decisions based largely or solely on the provisions of the Constitution. As recent research indicates,⁹⁴ neither attorneys

91 This comment has also some political connotations. Some judges believe that the power to interpret the Constitution is taken away from the courts only because the ruling party does not trust the judiciary. Note should be taken here that the present Constitution has not as such taken away the power of interpreting the constitution from the courts. In the Ethiopian legal tradition, the courts have never been entrusted with the power of constitutional review.

92 For more see D. Wondwossen, *The Role of Courts in the Enforcement of Constitutional Rights of Suspects*, in Assefa *supra* note 59 at 40.

93 Some have considered this as unnecessary judicial timidity. For more see M. Hassen, *Philosophical Basis for Judicial Review* (1999) as cited in Assefa *supra* note 59 at 115. It is also not uncommon to hear prosecutors and others challenge a decision of a court, which is based on the provision of the constitution, on the ground that judges do not have the power to consider constitutional provisions.

94 M. Rakeb, *The Enforcement of Human Rights in Ethiopia*, available on <[http:// www.telecom.net.et/~apap/research](http://www.telecom.net.et/~apap/research)> (accessed 17-02-2005). The research, in the aim of assessing the enforce-

representing individuals nor judges rely on the Constitution of Ethiopia to support their arguments. Even in the cases where the parties have made reference to the Constitution, the judges have avoided any engagement in constitutional debate by deciding cases based on statutes. Most often legal battles are fought at the level of statutory rights and obligations.

What is more disturbing is that the courts are not active in referring cases to the Council. As it was once stated by the President of the Supreme Court, who is also the Chairman of the Council, only one case has so far been referred by the courts to the Council, deeming that the issues raised involved constitutional interpretation.⁹⁵ In that case, the Council ruled that the case did not call for constitutional interpretation. Although it may not be conclusive, the dearth of cases referred to the Council by the courts may reaffirm the conclusion that the courts are most often reluctant to engage in constitutional debate and, thus, opt to settle cases based on statutory laws.

On the other hand, so far only few cases have been entertained by the House mostly as a result of applications made by individuals and other interested parties.⁹⁶ It is reported that twenty-three cases have been brought to the attention of the Council so far. Twenty of the cases were dismissed as not warranting constitutional interpretation. Five cases have been decided.⁹⁷

As a result of the dearth of constitutional debate within the adjudicating bodies, there is no complex interaction over questions regarding the meaning of the provisions of the Constitution. The scope of each of the rights guaranteed by the Constitution is still far from being clear. There is no jurisprudence indicating what the right includes, who may exercise it and in what manner. There are no indications as to what extent the government can limit the rights guaranteed by the constitution. There are also no indications that help us determine whether any limitations imposed by the government are legitimate. These are all issues that could have been made clear by a body that is suited to discharge the task of constitutional interpretation. The lack or absence of such an institution has denied us the opportunity to have institution(s) that explain constitutional values.

What is most disturbing is that the nearly comprehensive bill of rights, which forms a big chunk of the Constitution, has rarely been applied by the courts or the House. This is disturbing, considering the fact that the content of rights develops over time through on-going interpretation of their meaning in the context of concrete cases.⁹⁸ It also the utilization of such forums that has proven to be a

ment of human rights in Ethiopia, collected data from all the federal courts and from one of the biggest regional state, the Amhara State High Court. The Ethiopian Constitution contains a "detailed bill of rights".

95 K. Bedri, *Key Note Address*, in Assefa *supra* note 59.

96 Since neither the House nor the Council make their activities public, there is a problem in getting access to information concerning the activities of the House and the Council.

97 The House doesn't publish its decisions on cases submitted to it. The information concerning the number of decisions made so far by the House is acquired from the office of the Registrar of the House.

98 S. Liebenberg, *The Protection of Economic and Social Rights in Domestic Legal Systems*, in A. Eide et al (eds), *Economic, Social and Cultural Rights* (2001) 61.

critical starting point to build a human rights jurisprudence which will help in the effective legitimation of the human rights standards. Unfortunately, however, very few court decisions could be identified that directly or indirectly apply or refer to human rights provisions incorporated in the Constitution.⁹⁹ The same is also true with the House, which has decided very few cases in the last ten years.

The seclusion of the Constitution from the adjudication procedures raises the issue of the Constitution's continuing role. It seems that the document has become "museum material". The constitution might still have an important symbolic or "inspirational" role. Unfortunately, however, it has little or no effect on cases litigated before the courts. The Constitution, as a result, has remained to be that "thin" document whose terms are stated in very general terms. The fact that the normative content of the rights recognized in the Constitution are less developed is a reflection of their exclusion from adjudication procedures. In other words, the absence of institutions that are suited to engage in complex interactions on the meaning of the provisions of the Constitution have made it impossible to develop a constitutional jurisprudence. Although ten years have passed since the Constitution came into force, Ethiopia has still to come up with a body of constitutional jurisprudence.

IV. CONCLUSION

The drafters of the Ethiopian Constitution, being cognizant of the anti-democratic nature of judicial review, sought to adopt a novel system of constitutional review. Rather than entrusting the courts with the power of constitutional interpretation and constitutional review, they opted to give the task to the House, the upper house. The House, a political body, is assisted by the Council whose sole function is to provide the former with the authoritative legal advice on matters of constitutional interpretation.

Upon close scrutiny, however, it becomes clear that the Ethiopian approach to constitutional review has not escaped from the same criticism that is directed against judicial review. It is still vulnerable to the critics who challenge judicial review based on its counter-majoritarian character. This is mainly attributed to the fact that the House is composed of members who, like judges, are appointed and not elected. This, of course, does not put the Ethiopian Constitution in a class of its own as this is the case with most of the countries that have adopted an institution of judicial review.

What is more problematic about the Ethiopian approach to constitutional review is that it does not have characteristics that make it a good part of a well-designed constitutional system. It is not only that the House is not institutionally suited to discharge the task of constitutional interpretation, but it does not have the capacity to engage in the often complex and technical arguments that any examination of the constitutionality of a law or any interpretation of the

99 Rakeb *supra* note 94.

Constitution, for that matter, entails. The impartiality of the House is also questionable.

The Ethiopian approach to constitutional review is also problematic in that it totally excludes courts from the business of constitutional interpretation. In adopting this approach, there was a failure to consider the multitude of daily cases that are brought before the court that require the interpretation of the Constitution. It failed to appreciate the fact that the constitution does not only deal with lofty ideals and principles but also with many provisions on many ordinary matters. Any matter that requires the interpretation of the Constitution now has to be referred to the House through the Council. Not only does this pose a problem to the effective functioning of the courts, but it also unnecessarily elongates the process for claimants who require an immediate redress to their problem.

Generally, the Ethiopian approach can be commended for the novelty of the system that attempted to avoid the counter-majoritarian problem. However, it is not a commendable system of constitutional review. This is not only because it fails to represent an adequate response to the counter-majoritarian problem but also because it is not institutionally and “functionally” suited to discharge the task of constitutional interpretation and constitutional review. These institutional and functional problems have made it impossible for the institution to contribute towards effective constitutional governance. The “under-developed” nature of the Constitution illustrates this fact.