JUDICIAL REFERRAL OF CONSTITUTIONAL DISPUTES IN ETHIOPIA: FROM PRACTICE TO THEORY

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I. INTRODUCTION

Legal systems have long known the pressure exerted by the executive or the legislative branches on their judicial counterparts in the battle for more operative legal space, or alternatively, to constrain judicial oversight of the respective activities of the other two branches of a state.[1] Likewise, jurisdictional competitions for adjudications of constitutional issues have reached heightened proportions in some countries,[2] due mainly to ordinary courts' reluctance to cede cases to the stand-alone constitutional courts or other similar tribunals.[3]

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1 C. Willis, *Essays on Modern Ethiopian Constitutionalism: Lectures to Young Lawyers* (unpublished, on file with the author), Addis Ababa University (1997), p. 32.

2 In Russia, for instance, the past decade saw the jurisdictional friction between the regular courts, led by the Supreme Court, on the one hand and the Constitutional Court on the other. The conflict that was dubbed 'war of the courts' was settled in favour of the regular courts, which came out winners in the jurisdictional battle. See, generally, W. Burnham and A. Trochev, 'Russia's War between the Courts: The Struggle over Jurisdictional Boundary between the Constitutional Court and Regular Courts', 55 *American Journal of Comparative Law* (2007): 381; P. B. Maggs, 'The Russian Courts and the Russian Constitution', 8 *Indiana International and Comparative Law Review* (1998): 99. For an example of similar jurisdictional friction in Italy, see J. H. Merryman and V. Vigoriti, 'When Courts Collide: Constitution and Cassation in Italy', 15 *American Journal of Comparative Law* (1967): 665.

3 See L. Garlicki, 'Constitutional Courts versus Supreme Courts', 5(1) *International Journal of Constitutional Law* (2007): 44, 64.

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In Ethiopia, the trend appears to depict the polar opposite: regular courts seem to have thrown in the towel long before the jurisdictional battle begins.[4] The trend of judicial referral of constitutional issues from and by the regular judiciary to the House of the Federation (HoF)[5] via the Council of Constitutional Inquiry (CCI)[6] shows that the regular courts have been too willing to relinquish their jurisdiction over constitutional disputes readily into the hands of the CCI/HoF. In some instances, such as the *Coalition for Unity and Democracy v Prime Minister Meles Zenaw Asre* case (the *CUD* case),[7] the judiciary channels cases to the CCI/HoF without specifying the specific provision which it deems needs interpretation, and against the will and open opposition of the complainant parties before them.[8]

The trend of swift and at times unquestioning judicial referral of constitutional disputes to the CCI has seemingly bordered on judicial surrender of its proper province of refereeing the possible unconstitutional trespasses by the legislative and executive branches. The underlying reasons, real or apparent, are many and varied but two deserve an explicit mention here as they lie at the heart of jurisdictional dilemmas surrounding the procedure of judicial referral of constitutional issues to the CCI/HoF. The first is the legal argument arising from the provisions of article 83(1) of the Constitution, which stipulates that 'all constitutional disputes' shall be decided by the HoF. This provision has given rise to the view, in judicial circles and beyond, that courts are relieved of – or, more appropriately, stripped of – the duty to interpret and apply constitutional

4 Studies have shown that, generally, Ethiopian courts avoid constitutional issues and are reluctant to interpret or apply the provisions of the constitution to a concrete case before them. It has been asserted that 'the [Ethiopian] courts are loathe to do anything which might indicate that they are engaged in constitutional interpretation.' See C. Mgbako et al., 'Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and Its Impact on Human Rights', 32(1) *Fordham International Law Journal* (2008): 259, 275; see also S. A. Yeshanew, 'The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia', 23 *Journal of Ethiopian Law* (2008): 135, 144 (hereafter, Yeshanew, 'Constitutional Protection of Economic and Social Rights'; Y. T. Fessha, 'Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review', 14 *African Journal of International and Comparative Law* (2006): 53, 79.

5 The HoF is one of the Federal Houses, the other being the House of Peoples' Representatives (Federal Parliament). The HoF is a purely political body composed primarily, if not exclusively, of elected or appointed executive officials of the regional states representing Nations, Nationalities and Peoples. Its members normally have no legal training whatsoever. The HoF has been established in terms of article 53 of the Constitution of the Federal Democratic Republic of Ethiopia, adopted 8 December 1994 ('FDRE Constitution' or 'the Constitution'). It has been entrusted, under article 83(1) of the Constitution, with the power to decide on 'all constitutional disputes'.

6 The CCI is an advisory body empowered to investigate constitutional disputes, and, whenever it sees the necessity for constitutional interpretation, to submit its recommendations to the HoF for the latter's consideration and final decision. According to article 62(2) of the FDRE Constitution, the HoF 'shall organize the Council of Constitutional Inquiry'. The CCI has 11 members, including the Chief Justice and Vice Chief Justice of the Federal Supreme Court and six other legal experts directly appointed by the country's President on recommendation by the House of Peoples' Representatives. See articles 82–4 of the FDRE Constitution.

7 *Coalition for Unity and Democracy v Prime Minister Meles Zenaw Asres*, Federal First Instance Court, File 54024, ruling of 3 June 2005.

8 For a more elaborate discussion, see 'A. The regular courts' below.

provisions.[9] Thus it is believed that the constitution is taken away from the courts, and that for the regular judiciary to directly interpret and apply the constitution would mean that the courts were 'punching above their weights'. Consequently, the regular courts have been 'loathe to do anything which might indicate that they are engaged in constitutional interpretation'.[10] Another reason for judicial avoidance of constitutional adjudication is related to the judicial tendency to shun cases that involve politically sensitive issues which, more often than not, constitutional disputes tend to trigger.[11] The overall consequence has been that litigants, as much as the courts, have avoided citing constitutional provisions for fear of risking judicial referral of their cases to the more political bodies (the CCI/HoF).[12] This has been met by the practices of the CCI/HoF that have consistently sought to stretch their roles and powers to the limit in matters involving constitutional interpretation. If the practice is an accurate reflection of the law, it could well mean that the courts have been relieved of – or stripped of – the right and indeed the duty to interpret the constitution. There are thus apparent jurisdictional dilemmas between the CCI and HoF on the one hand, and between the regular courts and the CCI/HoF on the other.

This paper sets out to demonstrate that the constitution speaks with two voices: the main voice remains that of the regular courts, while merely the residual powers are ceded to the CCI/HoF procedures. It is argued that judicial referral of constitutional issues in Ethiopia is discretionary as opposed to mandatory, and that the procedure of referral pertains solely to questions of law as opposed to questions of fact. To that end, Section II presents a comparative overview of various systems of judicial review. This informs the analysis of judicial review of constitutionality in the Ethiopian context and the procedure of judicial referral of constitutional disputes to the CCI/HoF. Section III attempts at the analysis of the normative meaning of the 'constitutional dispute', which is determinative of whether a court needs to refer a case to the CCI or decide it itself. Sections IV–VII discuss the different dimensions of the procedure of judicial referral of constitutional issues to the CCI, and its implications for individuals' and groups' rights, before the conclusion in Section VIII winds up the discussion.

II. THE PURPOSIVE DIMENSION OF REFERRAL

A. Ensuring constitutional supremacy

The supremacy clause of the constitution is a shorthand expression of the fact that constitutional principles are sources of 'an objective normative value system, a

9 Yeshanew, 'Constitutional Protection of Economic and Social Rights', *supra* note 4, p. 143.
10 Mgbako et al., *supra* note 4, p. 275.
11 *Ibid*., p. 732.
12 S. A. Yeshanew, 'The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia', 8 *African Human Rights Law Journal* (2008): 273, 282 (hereafter, Yeshanew, 'Justiciability of Human Rights').

set of values that must be respected'[13] whenever laws are passed, interpreted or applied, and decisions are made or actions are taken. It is a local *Grundnorm* which, once established, becomes a wellspring of the normative order from which a country's overall legal system, institutions, procedures, processes and substantive principles flow.[14] The objective normative order and value system established by a constitution should provide a yardstick against which the legal validity of legislations and governmental (in)actions are measured.[15]

Under the Ethiopian constitution, '[a]ny law, customary practice or a decision of an organ of state or a public official' risks nullity if it deviates from the constitutional *Grundnorm*, the objective legal order sought to be installed by the constitution.[16] As well as all citizens, political organisations, other associations and their officials, *all organs of the state* have an explicit 'duty to ensure observance of the Constitution and to obey it'.[17]

Nevertheless, the constitution cannot create 'a track from which no one can deviate. It is simply not humanly possible'.[18] The best that can be hoped for is for it to provide an overarching framework that can 'facilitate the co-existence of all socially constituted entities, extending in size from the socially constituted self to the political community-at-large'.[19] A deviation from the constitutionally established 'objective legal order' is obviously unconstitutional, but questions arise in relation to the determination of whether a law, decision or practice of a state organ is indeed unconstitutional.

At the risk of a degree of oversimplification, it may be stated that attempts at guaranteeing constitutional supremacy involve three steps.[20] The first step is to codify meta-constitutional norms, higher societal values, into constitutions. This process 'positivises' the country's guiding principles and values and somewhat insulates them against their violation through constitutionally entrenched guarantees. The second step is to rigidify the constitutional principles and values, 'conferring a relative immutability on the superior law and the values it enshrines'.[21] The final step is to provide for an institutional guarantee for insuring against or remedying executive or legislative encroachments on the values and principles so consecrated. This, more often than not, would entail adjudication of complaints of unconstitutionality of legislative acts or executive conduct or both. It is in this third aspect that nations' experiences vary greatly in terms of the procedures and institutions designed to adjudicate constitutional disputes.

13 I. Currie and J. de Waal, 'Application of the Bill of Rights', in I. Currie and J. de Waal (eds), *The Bill of Rights Handbook*, 5th edn, Juta (2005), p. 32.
14 E. McWhinney (ed.), *Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review*, 5th edn, Martinus Nijhoff (1986), p. 114.
15 W. K. Geck, 'Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices', 51 *Cornell Law Quarterly* (1996): 250.
16 FDRE Constitution, article 9(1).
17 *Ibid*., article 9(2).
18 Willis, *supra* note 1, p. 30.
19 *Ibid*., p. 3.
20 M. Cappelletti, *Judicial Review in the Contemporary World*, Bobbs-Merrill (1971), p. viii.
21 *Ibid*.

1. The diffuse system

In the *decentralised* (diffuse/American) model of judicial review of constitutionality, control of constitutionality of legislative acts and executive conduct is exercised by all regular courts of all tiers.[22] In other words, the supremacy of the constitution is controlled solely by the regular judiciary, and questions of constitutionality of a legislative or executive act or decision arises *incidenter*, that is, in the context and during a specific litigation between parties.[23] In the incidental judicial review, the court rules on the (un)constitutionality of a law or act just as a matter of course alongside all other factual and legal disputes involved in a case pending before it.[24] The effect of the judicial determination of the (un)constitutionality of a dispute is *inter partes*, and its application does not extend to non-parties to the case.[25]

However, as a matter of exception, the effect of (un)constitutionality of a dispute becomes *erga omnes*, binding upon all entities in the country's territory, if the case has been appealed to the Supreme Court and is given a final decision thereby.[26] Since all courts are entitled to rule upon the (un)constitutionality of a law or act just as a matter of course in the determination of concrete factual *cum* legal disputes that come before them from time to time, the issue of referral of constitutional disputes does not normally apply in the diffuse system. To the extent that a concrete litigation before a regular bench requires constitutional interpretation or declaration of unconstitutionality, each court of all tiers is a constitutional court. Conversely, the Supreme Court is just as much a part of the traditional judiciary, adjudicating concrete controversies between litigants, as are the lower federal and state courts.[27]

2. The concentrated system

In the more *centralised* European system of judicial review,[28] the power to pass judgements on the constitutionality of a law or conduct is vested exclusively in a separate body whose sole duty is to act as a constitutional judge.[29] Such an organ could be a Constitutional Court, a Supreme Court or a separate special body such

22 H. Hausmaninger, 'Judicial Referral of Constitutional Questions in Austria, Germany, and Russia', 12 *Tulane European and Civil Law Forum* (1997): 25.

23 *Ibid*.

24 Cappelletti, *supra* note 20.

25 Hausmaninger, *supra* note 22.

26 Cappelletti, *supra* note 20, pp. 85–6; A. R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press (1989), p. 93.

27 H. Schwartz, 'The New East European Constitutional Courts', 13 *Michigan Journal of International Law* (1992): 741, 743.

28 With the solitary exception of Portugal, which has adopted a mix of centralised and decentralised judicial review, all European countries adhere to the decentralised model. *See* A. Alen et al., 'The Relations Between the Constitutional Court and the Other National Courts, Including the Interference in this Area of the Action of the European Courts', 23(8–12) *Human Rights Law Journal* (2002): 304, 308.

29 Brewer-Carías, *supra* note 26, p. 185.

as the French *Conseil Constitutionnel*.[30] The purpose of such special institutions is invariably to judge the validity of a law or act 'with simple and rational logic, completely separate from the need to settle disputes in specific cases and acting as a negative legislator'.[31] Unlike the diffuse system where judicial review takes place in the context of resolving a concrete case that gives rise to it, the primary function of constitutional courts of the concentrated systems is confined to abstract review. This mode of judicial review, therefore, 'is not to adjudicate controversies between individuals or between them and their government, but rather to guide interpretations of that nation's constitution, regardless of how the interpretational issue arises'.[32]

Disputes necessitating direct interpretation of constitutional provisions and testing other legislations and/or executive conduct against the same can be channelled to the special constitutional body either by virtue of a direct action (*principaliter*) by interested parties or through specified state bodies or a referral by the court. Thus, constitutional review can be initiated by government bodies, private parties or a judicial referral requesting the constitutional body to test the constitutionality of the contested legislation, decision or conduct. But the constitutional courts, despite their specific national designations, are an entirely separate institution from the traditional judicial branch of the state. Nor are they part of the executive or legislative arms of the same. As Crisaffuli observes:

> [the European Constitutional Court] is neither part of the judicial order, nor part of the judicial organization in its widest sense … [T]he Constitutional Court remains outside the traditional categories of state power. It is an independent power whose function consists in ensuring that the constitution is respected in all areas.[33]

Judicial referral in the concentrated systems is discretionary, leaving the regular judge to decide whether it is warranted. The constitution-interpreting body does not have the power to initiate a constitutional issue;[34] it renders a decision only when a constitutional issue comes before it, through a referral from a court or via a direct application by private parties. Its decision should be limited to the question of constitutionality of a law or decision, and excludes concrete constitutional adjudication, which remains within the jurisdiction of the courts.[35] Once given,

30 The designations greatly vary from one country to another: constitutional court, constitutional tribunal and constitutional council are a few of the common names. It is generally a *sui generis* court as its constitutional position is positioned 'within the state organization opposite the other, more "traditional" state powers – legislative, executive and judiciary – and therefore does not come under the constitutional title that relates to the latter'. See Alen et al., *supra* note 28, p. 305.

31 Brewer-Carías, *supra* note 26, p. 192.

32 Schwartz, *supra* note 27.

33 Quoted in L. Favoreu, 'American and European Models of Constitutional Justice', in D. S Clark (ed.), *Comparative and Private International Law: Essays in Honour of John Henry Merryman on His Seventieth Birthday*, Duncker and Humblot (1990), p. 105, 112.

34 Brewer-Carías, *supra* note 26, p. 193.

35 *Ibid*., p. 194.

the decision of the constitutional court produces *erga omnes* effects,[36] in the same way as does the decision of the Supreme Court in the diffuse (American) system.

3. The mixed system

The *mixed* systems of judicial review apportion constitutional adjudicating powers between the regular judiciary and a separate constitutional-interpreting body. The mixed system of constitutional judicial review has been principally practised in Latin American countries such as Colombia, Venezuela, Peru and Brazil, and in a few European states, namely Portugal and in a limited form in Switzerland.[37]

Just as in the American system of diffuse judicial review, any party to a civil or criminal proceedings or the court which is a forum thereof can raise the question of constitutionality of legislative or executive acts, and courts of all levels are empowered to rule on the constitutionality of the challenged law, decision or Act.[38] Such cases are thus review *incidenter* and involve concrete review. Like the diffuse judicial review, the regular courts can rule on the (un)constitutionality of a law, but with *inter partes* effects.[39]

However, a party to a concrete judicial proceeding can appeal to the constitutional court (or similar tribunals) to reverse a decision of the regular court upholding or rejecting the (un)constitutionality of a law the content of which potentially affects the outcome of the concrete litigation. Or a sitting judge can refer, *ex officio*, the constitutional issue to the constitutional court for the latter's interpretive guidance, pending which the proceeding before the court stays. Only the decision of the constitutional court has *erga omnes* effects. As in the centralised systems, the proceedings before the constitutional court would be limited to abstract review of constitutionality of a law, pending which the related proceedings (concrete dispute) would be stayed until the outcome of review of constitutionality was handed down. The decision of the concrete dispute would still remain within the exclusive jurisdiction of the regular courts, appealable only to the higher judicial tier in accordance with normal civil or criminal procedures. The jurisdiction to hear final appeal on the concrete aspect of the case would be reserved for the highest regular court (normally the supreme court, or its cassation division).[40]

The Ethiopian constitution has apportioned the duties of constitutional interpretation between two bodies: the judiciary and the CCI/HoF. The boundary between the powers of the regular judiciary and those of the HoF, which is an amorphous hybrid of quasi-judicial, semi-executive bodies, has been a subject of rumbling debates. As will be discussed in more detail below, the Ethiopian system of constitutional interpretation *cum* adjudication is more of a mixed system rather than the concentrated or diffuse system *per se.* The interpretation of the

36 *Ibid.*
37 *Ibid.*, p. 263.
38 *Ibid.*, pp. 266–7.
39 *Ibid.*, p. 266.
40 *Ibid.*, pp. 267–9.

constitution has been apportioned between the regular judiciary as a principal organ to adjudicate constitutional issues, and the CCI/HoF which have been given the residual powers to interpret the constitution without rendering a final decision on questions of fact. On the one hand, judicial powers, at both federal and state levels, are vested in the courts *only*.[41] Judicial powers naturally include the power to interpret, apply and ensure the observance of the constitution. Short of this, the grant of judicial powers would add up to little substantive effect. On the other hand, '[a]ll constitutional disputes'[42] that the court *deems necessary* to refer to the CCI/HOF for interpenetrative guide[43] *and* that the CCI/HoF consider as necessitating constitutional interpretation[44] shall be decided by the House of the Federation.

To be sure, both the diffuse system and the concentrated system of judicial review, or the mixed system that is a hybrid of both systems, are compatible with common law and civil law legal systems and have been used in many countries across the globe.[45] Arguably, the mixed system of judicial review is one in which the maximum protection of the constitution (constitutional supremacy) is established.[46]

B. The direct and indirect approaches to ensuring constitutional supremacy

In concentrated and mixed systems of constitutional adjudication, the power to control constitutionality of legislative or executive acts is carried out concomitantly by two constitutionally mandated bodies. On the one hand, the regular courts scrutinise the constitutionality of legislative or executive acts or decisions in the course of adjudicating concrete cases (*incidenter*) with *inter partes* effects. In other words, courts apply laws and uphold acts and decisions of various organs of the state because they are constitutional. On the other hand, there is a constitutional court (or a similar body) mandated to have a final say in abstract interpretation of the constitution. The scope of its powers does not extend to the application of the constitution to factual situations in concrete controversies; it only controls constitutional interpretation in its abstract form. The interpretations that are laid down by such a court or body are binding *erga omnes*.

In the Ethiopian context, regular courts – at both state and federal levels – are organs of the state, and as such, have the 'the duty to ensure observance of the Constitution and to obey it'.[47] The judicial duty of ensuring the observance of the constitution is therefore fulfilled when the judiciary selectively applies only those legislations that are in consonance with the constitution. This means that the

41 FDRE Constitution, article 79(1). The word 'only' in italics comes from the controlling Amharic version of the Constitutional provision.
42 FDRE Constitution, article 83(1).
43 *Ibid*., article 84(2).
44 *Ibid*., article 84(1).
45 Brewer-Carías, *supra* note 26, p. 263.
46 *Ibid*.
47 FDRE Constitution, article 9(2).

judiciary is equally duty bound to deny the application to cases before it of those laws which it deems are outright unconstitutional. It is because they are deemed constitutional that the major codes and proclamations are applied to concrete cases in regular courts. Thus, the constitutionality of the laws is an implied premise in the judge's mind every time he or she applies the law to a concrete case. The testing of the constitutionality of laws is therefore a daily staple of the regular judiciary, which thus controls the constitutionality of laws, actions and decisions in its daily activities.

In other words, courts spend much of their time in *indirect adjudication and application* of the constitution.[48] And the bulk of the constitutional provisions find their application through other more specific constitution-compatible legislation. In the case where the court reaches the conclusion that the law under consideration is clearly unconstitutional, it refuses to apply it to the concrete case before it and renders a decision on the bases of other laws and precedents that are constitutional. The procedure whereby regular courts refuse application of unconstitutional laws, usually referred to as *disapplication* of a law as opposed to *declaration of its unconstitutionality*,[49] is common in other countries.[50] Courts in those jurisdictions do not possess the power to declare legislative acts unconstitutional with *erga omnes* effects. The power to declare laws unconstitutional with *erga omnes* effects is vested in another body with exclusive powers of constitutional interpretation. This is also applicable in Ethiopia, as the declaration of unconstitutionality of a legislation or executive conduct by the HoF has general (*erga omnes*) effects and 'therefore shall have applicability on similar constitutional matters that may arise in the future'.[51]

Indeed, indirect application and adjudication of the constitution is more of the norm, primarily owing to the principle of *avoidance*. At times referred to in some jurisdictions such as South Africa as the 'salutary rule',[52] the principle of avoidance dictates 'that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed'.[53] Thus, as far as practicable, everyday judicial decision-making must rely on ordinary legislations and precedents and avoid direct invocation of constitutional provisions.

48 Indirect constitutional applications occur where the constitutional values are mediated through proclamations, other subordinate laws and decisions. *See* Currie and de Waal, *supra* note 13, p. 64.

49 G. Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance from the United Kingdom', 17 *Public Law Review* (2006): 188, 189.

50 For the experience in the UK and Australia, *see ibid.*; G. Lindell, 'Invalidity, Disapplication and the Construction of Acts of Parliament: Their Relationship with Parliamentary Sovereignty in the Light of the European Communities Act and the Human Rights Act', 2 *The Cambridge Yearbook of European Legal Studies* (1999): 399.

51 Proclamation 251/2001, article 11(1).

52 Currie and de Waal, *supra* note 13.

53 *Ibid*.

Valid justifications for the principle of avoidance are varied. The most compelling reason is the need to give deference to constitutional authority.[54] Thus, as the South African Constitutional Court noted, the principle of avoidance allows the ordinary laws to develop incrementally.[55] As such, direct judicial review and resolution of constitutional issues should only take place as a remedy of last resort.[56]

The principle of avoidance is equally accepted in the USA, for a reason slightly different from – but not mutually exclusive, indeed mutually reinforcing of – that of the South African jurisprudence. In the USA, the principle of avoidance, at times referred to as 'the Last Resort Rule',[57] has long been adopted as a means to assist the court in preventing the framing of an issue bigger than is warranted in the resolution of the concrete case before it. In the USA, therefore, the principle of avoidance implies that a court has 'never to anticipate a question of constitutional law in advance of the necessity of deciding it'.[58] As a result, '[i]f the U.S. Court can resolve the case without deciding any fundamental issues, constitutional or otherwise, it is obliged to do so. Usually, the narrower the basis for the decision, the better'.[59] This is strictly adhered to primarily because the American version of judicial review is based on concrete review, and abstract review is not part of the jurisprudence of the courts. Thus, in the USA, the principle of avoidance is employed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements'.[60] If the judge attaches a meaning to a provision of the constitution in a way that speaks to the specific issue at hand, it might end up narrowing down the constitution's ambit and give rise to an abbreviated meaning of the same. Conversely, if the judge attempts to apply a generous and broad interpretation to the constitutional provision in the adjudication of a specific case, it may lead to a situation where some aspect of the decision has to deal with abstract issues that are broader than is required in the case. This would lead to the formulation of a rule of constitutional law broader than is required by the precise facts, to which it is applied, a concern behind the acceptance of the principle of avoidance in the USA.[61]

In jurisdictions where judicial review of constitutionality takes the form of or involves abstract review, the principle of avoidance is used as a means to minimise the development of abstract jurisprudence.[62] In Canada, for instance, the principle

54 S. Woolman, 'Application', in S. Woolman, T. Roux and M. Bishop (eds), *Constitutional Law of South Africa*, 2nd edn, Juta (2002), p. 1, 91.

55 *Zanomi Peter Zansti v Council of State and Others*, Ciskei 1995 (4) SA 615 (CC) Para 5 and 7 [*Zansti*].

56 I. Currie and J. de Waal, 'Justiciability', in J. de Waal and I. Currie (eds), *The Bill of Rights Handbook*, 5th edn, Juta (2005), p. 79, 79.

57 L. A. Kloppenberg, 'Avoiding Constitutional Questions', 35(5) *Boston College Law Review* (1994): 1003, 1025.

58 *Zansti, supra* note 55, para. 2.

59 Schwartz, *supra* note 27, p. 744.

60 *Abbot Laboratories v Gardner,* 387 US 136, 148 (1967).

61 *Zansit*, *supra* note 55, para 2.

62 B. Stayer, 'Constitutional References', in F. L. Morton (ed.), *Law, Politics and the Judicial Process in Canada*, University of Calgary Press (1989), p. 130, 134.

of avoidance is relied on as a mechanism of suppressing the number of cases that are decided without the benefit of an adequate factual background.[63] The principle of avoidance thus provides a barrier to abstract constitutional adjudication.[64]

Regardless of the underlying justifications, the principle of avoidance produces similar effects both for the parties to a dispute and for the court entertaining the same. Thus, from the litigant parties' perspective, as much as possible, remedies must be sought in ordinary legislations, interpreted in conformity with the constitution, before resorting to constitutional remedies.[65] From the perspective of the court, it has to limit its rulings to the concrete issue before it, instead of handing down a ruling that would involve constitutional interpretation which is more likely to have broader ambit than is warranted in judicial decision-making in a particular concrete case.

In a great deal of analysis of the dividing line between the powers of the regular judiciary on the one hand and the powers of the CCI/HoF on the other, the distinction between the direct and indirect avenues of testing the constitutionality of the laws and the principle of avoidance is overlooked or given a cursory view at best.[66] Consequently, conclusions are reached that the regular judiciary is stripped of its birthright of judicial powers of testing the constitutionality of legislations and executive conduct. This stance is both erroneous and exaggerated.

Indeed, Ethiopian courts and litigants alike have been criticised for not applying the direct provisions of the constitution.[67] However, given the principle of avoidance, the consistent jurisprudence developed by the legal community in shying away from direct invocations of the constitution is correct and does not need to be chastised. Indeed, to expect judges and lawyers to rely on constitutional provisions in every ordinary litigation is misguided. For one, over-reliance on constitutional provisions tends to promote abstract jurisprudence, and judicial decision-making without the benefit of fact-based disputes. For another, it would deny the constitution the normative deference that it should command, and put it on par with other legislations that are called into application in everyday judicial decision-making. Third, the practice of avoidance would allow incremental development of norms, and encourage the development and interpretation of other legislations in conformity with the constitution. Over-reliance on constitutional provisions would mean lesser application and scrutiny of other legislations, and could have prejudicial effects on the normative development of legislations that are compatible with the constitution. Thus, the practice of avoiding direct constitutional provisions is a step in the right direction and needs to be encouraged. It is indeed a blessing in disguise.

Nevertheless, accepting the principle of avoidance is one thing, but the validity of the judicial reasons for the avoidance of constitutional issues is quite another.

63 *Ibid*.
64 Kloppenberg, *supra* note 57, p. 1025.
65 Woolman, *supra* note 54, p. 91.
66 Currie and de Waal, *supra* note 13, p. 75.
67 Fessha, *supra* note 4, p. 79; Yeshanew, 'Constitutional Protection of Economic and Social Rights', *supra* note 4.

Ethiopian judges avoid constitutional provisions not out of the need to follow the principle of avoidance, but due to a genuine belief that article 83 of the constitution, providing for the CCI's powers to investigate constitutional issues, has wiped away the power of the regular judiciary to entertain cases involving constitutional issues.[68]

However, the implications of the principle of avoidance and the judicial role of indirect constitutional adjudication mean that the reach of article 83(1) is not as startling and invasive of judicial powers as some have foreseen. It states: 'All constitutional disputes shall be decided by the House of the Federation.' A quintessential question hinges on the interpretation of the phrase 'constitutional disputes', for this is the only matter the resolution of which is ceded to the CCI/HoF. And 'constitutional disputes' are therefore the only matter that must be referred to the HoF/CCI from the regular courts, with the remainder perfectly falling within the jurisdiction of the regular judiciary. In contradistinction to the indirect application of the constitution, constitutional disputes trigger the power of *direct constitutional application* which leads to the intervention of the HoF/CCI. What does 'constitutional dispute' mean anyway?

III. CONSTITUTIONAL DISPUTE: MEANING AND NORMATIVE CONTENT

The controversy surrounding jurisdictional dilemmas of constitutional adjudication in the main emerges from the provisions of article 83(1) of the constitution. It is entitled 'Interpretation of the Constitution' and reads: 'All constitutional disputes shall be decided by the House of the Federation.' While it is clear that the power to decide on 'all constitutional disputes' has been vested in the HoF, the scope of this power depends upon the meaning implied by the 'constitutional disputes' phrase of article 83(1) of the constitution. If it is taken to mean any and all cases involving invocation of constitutional provisions, the power of the courts to adjudicate any case with a constitutional flavour is wiped away. As Willis observed, '[t]o conclude that each and every decision that implicates a constitutional provision must be brought to the House of the Federation by way of the Council [of Constitutional Inquiry] is not only absurd, but is an absolute nightmare! The practical effect of such a procedure renders the regular judiciary irrelevant and shackles the constitutional process to the point of making it a cruel hoax'.[69] However, contextual reading of the constitution dictates a different and more sensible meaning. First, the provisions of article 83(1) are concerned with constitutional interpretation rather than a factual dispute *per se*. As the title of the provision explicates, the word 'dispute' refers to interpretational dilemmas and disagreements rather than anything else. It certainly is not so much about factual disputes as it is about abstract legal interpretation. The title of article 83 can be used as interpretational signpost, referring only as it does to constitutional interpretation, and serves as a pointer to the intended scope of the text of the provision.

68 Fessha, *supra* note 4, p. 79.
69 Willis, *supra* note 1, p. 34.

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

Third, the interpretation of 'constitutional dispute' as 'constitutional interpretation' is in line with the powers and responsibilities of the HoF under article 62(1) of the constitution. Accordingly, the HoF 'has the power to interpret the Constitution'. It does not vest in the HoF the power of adjudication of constitutional disputes involving concrete factual situations. There is no reason to suggest that article 83(1) sought to expand the power of the HoF to adjudicating factual constitutional disputes beyond the requirements of abstract interpretation of the constitutional provisions. Given the similarity of the wording of article 62(1) and the title of article 83(1), which are both confined to the HoF's interpretive powers, the insertion of the word 'dispute' under the latter provision does not imply the expansion of the jurisdiction of the HoF to constitutional adjudication. This is particularly so when considered in the light of a latter proclamation, which was issued 'to clearly stipulate and specify the fundamental powers and responsibilities of the House [of the Federation]'.[70] Under Proclamation 251/2001, the provision that was designed to clarify the constitutional provisions pertaining to the powers and responsibilities of the HoF states that the HoF's constitutional mandate is to interpret the constitution, and the phrase 'constitutional disputes' is non-existent.[71]

Fourth, to interpret the power of the HoF to include the resolution of each and every constitutional dispute is to usurp the power of the regular judiciary. Under article 79(1) of the constitution, 'all judicial powers are vested in courts'. The controlling Amharic version of article 79 is even more explicit in stating that judicial powers are vested *only* in the regular courts. The core of judicial powers, in Ethiopia or elsewhere, is to adjudicate justiciable claims that arise under the legal system of a country – constitutional or otherwise. If the constitution is placed beyond the reach of the courts, 'there will be nothing left of the court system, and the right of everyone to seek refuge in the courts is illusory at best, the court's judicial power is a farce, and the notion of an independent judiciary as provided under Article 78 is a fantasy'.[72] In the light of the constitution's article 79, such a consequence is not intended or warranted.

The contextual reading of the constitution means that the word 'dispute' that appears only once in article 83(1) of the constitution must be taken to mean 'constitutional interpretation'. If taken to mean what it literally says, the consequence would be to place the power of resolving all constitutional disputes

70 Proclamation 251/2001, preamble, Para 2.
71 *Ibid*., article 4(1), 5, 6 and 7.
72 Willis, *supra* note 1, p. 33.

within the jurisdiction of the CCI/HoF. This not only far exceeds the powers of the latter as defined under article 62(1) of the constitution and article 4(1) of Proclamation 251/2001, it also wipes away the power of the judiciary and their independence as guaranteed under article 78 of the constitution. As Willis forewarned:

> It is one thing to have a superior constitutional body, whether it is the Ethiopian House of the Federation (which meets twice a year), the French *Conseil Constitutionnel* (which entertains cases before they are promulgated), or the U.S. Supreme Court (that accepts one hundred cases out of the twelve to fifteen thousand applications each year) decide now and then an individual case with broad societal implications. Requiring them to decide each and every mundane case that comes down the hike in which the constitutional principle is implicated is irrational – it cannot, it will not be done – in Ethiopia or elsewhere, for that matter.[73]

In conclusion, despite the dilemma created by the usage of the word 'dispute' under article 83(1) of the constitution, the power of the HoF is limited to constitutional interpretation. It is the regular judiciary's proper province of adjudicating concrete cases of mainly indirect but also direct constitutional issues. In order for a case to be referred to the HoF for its final interpretation, there must be a strong justification for direct invocation of constitutional provision. In other words, the principle of avoidance of direct constitutional application will be set aside only when the indirect application of the constitution proves extremely difficult or impossible for the regular judge.

IV. CONSTITUTIONAL REFERRAL: MANDATORY OR DISCRETIONARY?

The only direct constitutional provision of some guidance on the question of judicial referral of cases necessitating constitutional interpretation is article 84(2). It explicates the two ways whereby questions contesting the constitutionality of legislations come to the CCI. On the one hand, any 'interested party' is entitled to dispute the constitutionality of a law or part thereof, and submit the same to the CCI.[74] This would normally require a purely abstract review of constitutionality. On the other hand, the courts of law may similarly refer disputes to the CCI when the need arises in the process of deciding concrete cases before them; or the parties to judicial proceedings may appeal to the CCI against the judge's decision to apply or disapply a law to the concrete case against the opposition of the litigant(s). In either case, the power – more appropriately, the duty – of the CCI is triggered, and it must consider the question so posed and ascertain if constitutional interpretation is needed. Should the need for interpretation arise, the CCI shall channel the case to the HoF alongside its own recommendation as to the preferred line of

73 *Ibid*.

74 The procedure pertaining to this is beyond the scope of the present study.

interpretation.[75] If the need for constitutional interpretation is unnecessary, the CCI can dismiss the case where it comes from individual parties or remand one to the referring court when it comes out of a concrete litigation before the regular courts.

Either way, article 84(2) of the constitution specifies the duty of the CCI when a dispute about the constitutionality of a law is submitted to it. Thus, the CCI cannot refuse to examine contestations of constitutionality of laws by an interested party or referrals by the regular courts. But, more importantly, it cannot initiate the procedure of referral of constitutional interpretation: it merely entertains such a case when one is submitted to it by private parties or referred to it by the courts.

On the other hand, article 84 falls short of stating that the courts have a duty to channel cases to the CCI/HoF in every single case where a question of constitutionality is raised. While it is explicit in placing the duty on the shoulders of the CCI/HoF to examine the cases referred to it from the courts, it is less so regarding the duty, if any, of the regular courts thereto. Questions linger, thus, whether the courts are *allowed* or, alternatively, *required* to submit any and all cases involving invocations of constitutionality of a law.

Naturally, judicial discretion is exercised when a judge has an area of autonomy, within which he or she is legally allowed to make a choice between alternative courses of action.[76] Article 84(2) is basically permissive, allowing regular courts and private parties alike to submit a case questioning the constitutionality of a law. It provides that the CCI must entertain a constitutional issue referred to it by the courts, while it does not impose any duty whatsoever on the courts to refer constitutional disputes in all cases. They are constitutionally bound to exercise judicial powers and should decide concrete cases, including those involving constitutional disputes. Thus, under Proclamation 250/2001, the court *may* (as opposed to *shall* or a similar term)[77] refer a case to the CCI when 'it believes that there is a need for constitutional interpretation in deciding the case' that is pending before it.[78] The court is left at liberty to ascertain whether there is a need to refer a case to the CCI or to dispose of one itself.

It is almost obvious, from article 84(2) of the constitution and article 21 of Proclamation 250/2001, that the court does not have a duty to refer cases to the CCI. It may even refuse, if requested by a litigant, to refer a question of constitutionality of legislation potentially applicable to a case before it as long as the judge is convinced that the law is clearly constitutional or unconstitutional. If the judge has no doubts about constitutionality or unconstitutionality of a law, the need for interpretation is dispensed with and it remains for the judge to apply or disapply the law in question. As is the case in all centralised or mixed systems of judicial review, Ethiopian judges can only seek constitutional interpretation as a

75 Proclamation 250/2001, article 19.

76 W. Lacy, 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere', 5 *Melbourne Journal of International Law* (2004): 108, 110.

77 Proclamation 250/2001, article 21(1).

78 *Ibid*., article 21(2).

matter of exception. As a rule, it is the courts that have an exclusive constitutional mandate and duty to decide concrete constitutional issues, just as they do in run-of-the-mill cases.

Requests for constitutional interpretation can arise from concrete cases pending before the courts in either of two ways. First, in the course of the proceedings before it, a court may come to a conclusion that there is a major doubt as to the (un)constitutionality of a law upon which its decision would eventually be based. Second, a party litigating before the court may appeal to the CCI from a ruling of the court in favour of applying or disapplying a legislation that the party contends to be (un)constitutional.[79] Even so, the party must submit any complaint against or arising from the application or disapplication of legislation to the case to the court before which the related concrete case is being litigated.[80] It is only when the court rejects such an application, and in the context of a grievance arising from such a ruling, that a private party can seize the jurisdiction of the CCI and, through it, the HoF.[81] In such instances, the party must meet the 90-day period of limitation from the date of receipt of the court's ruling within which to appeal against the ruling of (un)constitutionality of a law whose application or disapplication determines or materially influences the outcome of the case pending before the court.[82] If the 90-day period of limitation is not met, the ruling of the court to apply or disapply legislation becomes final and there would be no way to seize the jurisdiction of the CCI/HoF in the case.

As is the situation in Austria, Germany and Russia[83] as well as the rest of Europe in the centralised systems of constitutional adjudication,[84] the referring judge must be satisfied that there are two or more equally forceful interpretative possibilities that emerge from the reading of the legislation it intends to apply to the concrete case before it. All of the competing meanings of a legislation or part thereof must equally be in conformity with the constitution, for an unconstitutional meaning cannot logically or legally compete with a constitutional one. The unconstitutional implication or meaning of legislation can never create a doubt in the judge's mind and should be treated as irrelevant, as the judge has the duty to take the meaning that conforms to the terms of the constitution. The constitutional supremacy clause (article 9(1))[85] means any norm or conduct that runs counter to constitutional provisions is null. Writing about referral of constitutional issues in Italy, authors have asserted that a law the constitutionality of which depends upon an interpretation given to it should not be referred away and should be decided by the regular courts:

79 *Ibid*., article 21(1).
80 *Ibid*., article 22(2).
81 *Ibid*., article 22(3).
82 *Ibid*., article 22(2).
83 *See generally*, Hausmaninger, *supra* note 22.
84 *See generally*, Schwartz, *supra* note 27.
85 Article 9(1) of the FDRE Constitution stipulates: 'The Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect.'

> [i]nterpreted in one way, it is unconstitutional; interpreted in another it is not. Since the legal authority to interpret statutes lies in the system of ordinary courts, with the Supreme Court of Cassation at its apex, not in the Constitutional Court [the HoF in the Ethiopian case], the latter body … does not have the power to combine authoritative interpretation with constitutional judgement.[86]

Consequently, the doubt regarding the possible interpretations must be between equally swaying meanings that are in conformity with the Constitution. In such instances, the judge would have no choice but to refer the case for constitutional interpretation to the CCI. Along the lines of the experiences of the Austrian and German constitutional courts, the Ethiopian system would also demand the judge to make a reasoned submission, detailing the reasons why he or she cannot reach an interpretive solution in conformity with the constitution. The immediate result is that a judicial referral of constitutional dispute is a matter of last resort, and the court must try all interpretative techniques available to it to resolve questions of constitutionality of legislation before resorting to the referral option.

V. THE SUBJECT MATTER OF CONSTITUTIONAL REFERRAL: CONCRETE OR ABSTRACT?

What should be referred to the CCI from the courts anyway? The experience of Ethiopian courts, the CCI and the HoF indicates that once a constitutional issue is referred to the CCI, the court has no longer any role in the outcome of the case. The HoF normally gives binding decisions on both matters of law and issues of fact. While the constitution is silent about the specific content of constitutional referral, the relevant proclamation has precisely defined the exact content and nature and scope of a case that needs to be referred from the courts to the CCI. Regardless of the author of the referral of the constitutional question – be it a private litigant or a court – the referral must *only* be about questions of law as distinct from questions of fact. If the referral is made by the court on its own motion (*ex officio*), '[i]t is *only the legal issue necessary for constitutional interpretation* that the court forwards to the Council of Inquiry'.[87] Quite similarly, 'it is only the legal issue necessary for constitutional interpretation that the party concerned shall submit to the Council [of Constitutional Inquiry]'.[88]

The immediate implication is that the HoF is a final constitutional arbiter in terms of testing of constitutionality of laws, but it is not a trier of fact. Consequently, the court should not send the whole case file to the CCI, nor can the CCI or HoF require one. In order to help the CCI/HoF appreciate the background information, the context may be summarised by the court and sent to the same. In the interest of enhancing the impartiality of the CCI and the HoF – especially given the fact that the latter's impartiality is suspect – it may be wiser for the referring

86 Merryman and Vigoriti, *supra* note 2, p. 668.
87 Proclamation 250/2001, article 21(3) (emphasis added).
88 *Ibid*., article 22(4).

court not to disclose the identity of the parties to the case to the CCI/HoF. Pending a decision on the constitutional issue, the file must stay with the court, and the court must stay its proceedings.[89] At the end of the process, either the CCI or the HoF, as appropriate, must send their decision to the court. Receipt of this decision triggers the stayed proceedings into life once again, after which the court should apply the meaning given by the HoF, if any, to the case.

There is some debate regarding the types and normative hierarchy of laws that should be directed to the CCI by the courts for the latter's recommendation to and the HoF's interpretation. Fiseha argues that 'subordinate legislations issued by the executive and decisions of governmental body other than "laws" were left to the courts'.[90] This is only self-evident, as confirmed by the CCI in the case disputed between *Addis Ababa Taxi Drivers' Union v Addis Ababa City Administration*,[91] where the CCI ruled that questions pertaining to the constitutionality of enabling (subordinate) legislations and executive actions do not entail, *ipso facto*, constitutional interpretation. The reason does not have so much to do with the hierarchy of laws as it does with the principle of avoidance, according to which direct constitutional interpretation is a remedy of last resort, and the court must attempt to resolve the constitutional issues indirectly through the application of proclamations before testing regulations directly against the constitution. If a subordinate legislation is in contravention of a primary legislation (proclamation), it is rendered null and void by that very reason because superior laws prevail over inferior ones. There would be no need or way to test it immediately against the constitution directly, before comparing its normative content with other primary legislations which could offer solutions.

VI. CONSTITUTIONAL REFERRAL: THE PLAYERS AND THEIR CONSTITUTIONAL ROLES

The process of referral of constitutional disputes in the Ethiopian constitutional arrangement involves at least three actors: the referring court, the CCI and (if interpretation is warranted) the HoF, except in cases where such is submitted by a private party outside the courts in which case there could be a fourth element in the picture.

A. The regular courts

As argued above, judicial referral of constitutional issues to the CCI/HoF involves questions of law as opposed to questions of fact. The Court should thus refer 'only the legal issues necessary for constitutional interpretation'[92] and request the CCI/HoF to test the constitutionality of the law in issue. This excludes referral of

89 *Ibid*., article 22(5).
90 A. Fiseha, 'Constitutional Adjudication in Ethiopia: Exploring the Experiences of the House of the Federation', 1(1) *Mizan Law Review* (2007): 1, 16.
91 Decision of the CCI of 17 Tir 1992 (EC) (25 January 2000), unpublished.
92 Proclamation 250/2001, article 21(3).

the factual situation that engendered a constitutional issue at hand. The exclusion of referral of a factual situation (questions of fact) is in line with the respective jurisdictions of the regular courts and the HoF. Obviously, the CCI and the HoF are not adjudicatory bodies, only exercising quasi-judicial powers constitutionally ceded to them and exercisable exceptionally when the constitutionality of a law is at issue. As noted above, judicial powers are vested in courts only, and at the heart of such powers is the adjudication of justiciable cases and the application of law to factual situations. Adjudicative powers are exclusive to the regular judiciary, implying that decision-making over questions of application of law to facts is outside the jurisdictions of the CCI/HoF. Put another way, the power of the CCI/HoF in interpreting constitutional issues is analogous to the cassation jurisdictions of the supreme courts – state or federal.

However, the court seems to have been overly willing to restrict its own jurisdictions, and has referred cases that fell squarely in its own normal adjudicative powers. In some instances, the court has erroneously relinquished its judicial powers and referred the cases to the CCI/HoF despite the parties' opposition, an objection that was in line with the constitution and the relevant proclamations: Proclamation 250/2001 and Proclamation 251/2001. The case litigated between the Coalition for Unity and Democracy (CUD) and the Ethiopian Prime Minister Meles Zenawi (the *CUD* case)[93] provides a stark example. The case involved a contestation of constitutionality of the Prime Minister's ban on outdoor assemblies and demonstrations in Addis Ababa and its vicinities a day before the May 2005 elections. The CUD's claims were partly based on a proclamation that provides for procedures of demonstration and public political meetings.[94] The complainant, the CUD, threw all the legal means it had at its disposal to ensure that the case was tried by the regular courts. It argued that it had the right to be heard by the court under article 37 of the constitution, that the court had the jurisdiction and constitutional duty to entertain a justiciable case of the type, that its claims were primarily proclamation-based, and that the court should not refer the case to the CCI.

Objections of all sorts notwithstanding, the court decided to refer the case to the CCI, which, for its part, saw no reason to play any role in the interpretation of the constitution.[95] The court did not frame any question of law at all, and both of the questions which the court framed and sought CCI/HoF's interpretive assistance with were indeed questions of application of law to a factual situation. It did not make the slightest attempt to avoid direct constitutional invocation and application; nor did it consider whether the ordinary legislation on which the bulk of the complainant's argument was based was sufficient to cover the contested legal ground, or whether it was constitutional. The haste with which the case was referred to the CCI and the questions forwarded to the CCI/HoF borders on judicial abdication of the court's adjudicative powers over justiciable matters.

93 *CUD* case, *supra* note 7.

94 See, Proclamation 3/1991, 'The Proclamation to Provide for Peaceful Demonstration and Public Political Meetings', *Negarit Gazeta*, 50th Year, No. 4, 12 August 1991.

95 *CUD* case, *supra* note 7, p. 6.

The situation surrounding judicial referral of the *CUD* case goes some way to lending credence to the assertion that the courts usually seek an excuse for avoiding politically sensitive cases and take the first opportunity to relieve themselves of adjudicating controversies of the type involved in the *CUD* case. The consequence is judicial violation of the courts' constitutional mandate of adjudicating justiciable matters, and denial of judicial access to private parties.

To make matters worse, the court did not consider the constitutionality of Proclamation 3/1991 whereupon much of the CUD complaint was based; nor did it frame a question of constitutionality of any law. Its referral was rather about the application of the constitution to the facts in the case. It did not test the Prime Minister's ban against any ordinary law, primarily Proclamation 3/1991. It asked the CCI: 'was the directive of the Prime Minister [which banned outdoor meetings and demonstrations for one month] in contravention of the Constitution?' Once this question is answered – it was indeed answered by the CCI, as it turned out – there is nothing left for the court to decide upon. In the end, the court's judicial powers have been taken over by the CCI/HoF – or rather, wilfully relinquished by the court.

This is an erroneous understanding of the procedure of judicial referral of cases to the CCI/HoF. Not only does such a swift and unquestioning approach to judicial referral of constitutional issues represent judicial disinclination to adjudicate politically sensitive issues (which is where litigants seek adjudication of cases by the most impartial of judges), it arguably is a violation of the judicial duty of ensuring and enforcing constitutional supremacy. The approach plays a role in further weakening judicial independence and impartiality as well as negatively impacting upon the level of public confidence in the judicial organ as an institution.

B. The CCI

The CCI is a constitutional body mandated to advise the HoF on matters of constitutional disputes but which has no power of its own to make final decisions.[96] It is a filtering mechanism between referring courts and/or private parties and the HoF. Not all cases referred or submitted to the CCI are channelled to the HoF, and the CCI has the power to reject some of those which do not warrant constitutional interpretation.[97] The right of a private party to appeal against such a rejection to the HoF is guaranteed, subject, of course, to the HoF's decision to interpret the constitution as requested or to reject it likewise.[98] If the HoF decides to reject the appeal, that puts the case to rest, and there is no right of further appeal as the HoF is the final constitutional interpreter. If the HoF decides to interpret the

96 Constitution, article 84 (1).

97 *Ibid*., article 84 (3).

98 It appears that the right to appeal against the ruling of the CCI is exclusively available to private parties, and the referring court whose request for constitutional interpretation is rejected by the CCI does not seem to have the same right to appeal to the HoF against such rejection. *See* FDRE Constitution, article 84 (3); Proclamation 250/2001, article 18.

constitution, it might refer the case back to the CCI for the latter to submit a recommendation, but there is nothing in the law that prevents it from deciding the case itself without seeking the former's recommendation.[99]

As a filtering mechanism, the CCI must satisfy itself that the case referred to it by the courts indeed involves (requires) constitutional interpretation. Nevertheless, it very rarely, if at all, does consider a preliminary issue of whether a case judicially referred to it indeed involves a 'constitutional issue'.[100] The HoF also has a duty to ascertain the necessity of constitutional interpretation in a given case, and similar justifications should be given by the HoF as part of its final decision to show that there was sufficient reason for constitutional interpretation.[101]

Where the CCI sees no need for constitutional interpretation, it will remand the case back to the referring court, thus putting an end to the constitutionality 'dispute'. It does not necessarily imply that the CCI, by remanding the case back to the referring regular court, has categorically confirmed the (un)constitutionality of the contested law; it could mean that in the view of the CCI, the contested law is clear and that there was not a need for the court to refer the case to the CCI in the first place. It is for the court then to look for an interpretation of the legislation so implicated in a manner that conforms to the constitution. If no such interpretation is possible, the court needs to discard the legislation as unconstitutional *inter partes* and disapply the legislation for the purpose of the case before it on the bases of other laws and principles or directly on the basis of the constitution.

While the advisory role of the CCI is limited to either recommending interpretation of the constitution to the HoF, or alternatively to remand the referral back to the court referring the case, there have been instances where the CCI has acted in three capacities: one within its jurisdiction, and two others *ultra vires*. The *CUD* case is a case in point. In the course of examining the referral case, the CCI reached the conclusion that there was no apparent need for constitutional interpretation. This is its proper role and function. Quite strangely, however, it interpreted and applied the constitution to the factual situation and ruled that there was nothing in the Prime Minister's declaration of a ban on political demonstrations and meetings to suggest that it was unconstitutional.[102] This is a decision that merely requires an application of the ordinary proclamation or the constitution to the factual issue at hand, a matter which is within the jurisdiction of the regular courts but beyond the jurisdiction of the CCI or the HoF.

On the other hand, the CCI does not have any power to make a final decision on the merit of a case. The jurisdiction of the CCI is limited to confirming or rejecting the necessity for constitutional interpretation by the HoF, and, if confirmed, relaying a plausible, persuasive albeit not binding interpretation of a constitutional provision to the HoF. The final decision is for the HoF to make. In

99 When a case is directly submitted to the HoF by a private party, however, the HoF must refer the case to the CCI for the latter's recommendation. See Proclamation 251/2001, article 6.

100 Yeshanew, 'Justiciability of Human Rights', *supra* note 12, p. 280.

101 Proclamation 251/2001, article 15.

102 *CUD* case, *supra* note 7, p. 6.

the *CUD* case, the CCI never sent the case to the HoF, and went out of the way and exceeded its jurisdictional limits to confirm the constitutionality of the Prime Minister's ban. The CCI has thus at once stepped on the toes of both the regular courts and the HoF.

In any case, the CCI does not have the jurisdiction to entertain questions of application of a law to a factual situation. For one, this is clear from the wording of the constitution that limits its powers and duties to constitutional interpretation, and this falls short of constitutional application to a factual situation. For another, and more importantly, the CCI can consider a case on its merits only in cases where it is satisfied that there is a need to refer it to the HoF for final interpretation. The court should send 'questions of law' only to the CCI, and the CCI does not have the power to coerce the court to hand over the whole case file. As such, questions of application of the law to facts are beyond the jurisdictions of the CCI/HoF, and remain within judicial powers.

C. The HoF

The HoF is a specialist body whose powers are not unlimited. The powers of the HoF are analogous to the cassation powers of state and federal supreme courts, where the court almost exclusively entertains questions of law as opposed to questions of fact, scrutinising whether a fundamental error has been made in legal interpretation. For reasons outlined above in relation to the powers of the CCI, the HoF does not have the power to apply the Constitution or other legislation to factual situations. The legal application of the law to the factual situation is an exclusive jurisdiction of the referring court, which must stay its proceedings on a related case pending the authoritative interpretation of the constitution by the HoF.[103]

However, the HoF's consistent practice has been to make decisions on the final outcome of cases. It sends its final decision, having disposed of both the constitutional issue and the application of the preferred constitutional meaning to the factual situation. This is in gross excess of its jurisdictional competence.

The ensuing situation has met with numerous problems. In some instances, the practice may violate elementary principles of justice, as it could put the HoF in the awkward position of judging a case to which it is also a party. The *President* case[104] was to be an embarrassing example for the HoF, where the HoF would have acted as a judge in its own case. In this case, the former president, Dr Negasso Gidada, challenged the joint decisions of the Speakers of the HoF and the House of Peoples' Representatives (Federal Parliament) terminating his presidential benefits due to his involvement in 'partisan politics' in contravention of a law that was issued just hours before he left office to prohibit an outgoing president from any involvement in any political party or activity. Interestingly,

103 Proclamation 250/2001, article 21(4).

104 *Former President, Dr Negasso Gidada v Speaker of the HoF and Speaker of House of Peoples' Representatives of Federal Democratic Republic of Ethiopia* (Decision of CCI of 25 February 2005, Unreported).

he is the only outgoing president that is alive and in Ethiopia today, all his predecessors having been killed by their respective successors or fled the country for fear of their lives. One of the defendants in the *President* case is the Speaker of the HoF, who legally represents the HoF. For the HoF to have heard a case in which its own Speaker was a defendant would have meant that it became a judge in its own case, its Speaker being its representative. The CCI saved the day by rejecting the application, holding that there was no need to interpret the constitution.

Unlike constitutional courts of other countries, which are independent from any of the three organs, the HoF is a political body – an executive *cum* legislative hybrid – that is more of the proverbial priest than a prophet. It commands little trust among the legal community, and many a lawyer avoids invoking constitutional provisions in order to avoid referral of their cases[105] to this rather political body, lacking independence and impartiality.[106]

VII. REFERRAL, JURISDICTIONAL DILEMMAS AND IMPACTS ON FUNDAMENTAL RIGHTS

The questions of referral and who of the actors – the court, or the CCI/HoF – renders the final decision on the factual situation involved has wide-ranging implications for procedural justice and individuals' and groups' substantive rights. There are numerous fundamental rights at stake which should be carefully considered before the court cedes its adjudicative powers over questions of the application of law to facts. The same reasons justify the need for careful consideration of the extent of CCI/HoF jurisdictions in each particular case. In cases of doubt, the jurisdictional dilemmas should be interpreted in favour of the regular judiciary's resolution of the problem instead of referral.

First, a final decision on a constitutional issue by the HoF means that the losing party automatically loses the right to appeal against the decision because the decisions of the HoF have *erga omnes* effects, binding on any other similarly situated party, as they constitute precedents for similar cases.[107] As such, the decision binds the parties to the dispute, the courts of all tiers, as well as other state organs. Thus, once a final decision is given by the HoF on a constitutional issue, the right to appeal against a final decision as guaranteed under article 20(6) of the constitution is no longer available to the parties involved in the case.

Second, decision-making by the HoF does not have an in-built mechanism for ensuring the right to be heard for a private party contesting the law's or decision's constitutionality. As the procedure before the CCI/HoF does not involve a mandatory duty on the CCI/HoF to hear the complainant parties,[108] a case could be decided without directly hearing the parties thereto. This wipes out the

105 Yeshanew, 'Justiciability of Human Rights', *supra* note 12, p. 282.

106 See Fessha, *supra* note 4.

107 Proclamation 251/2001, article 11(1).

108 The HoF 'may' call upon the parties involved to give their opinion, and is permitted to do so when it deems fit to hear the parties. But this falls short of imposing on the HoF any duty to be hear the parties involved. See Proclamation 251/2001, article 10.

parties' right to be heard in public which would otherwise be guaranteed in the proceedings of the regular judiciary.

Third, a final decision by the HoF on a constitutional application to the facts of a case could jeopardise the right to be heard by an impartial and competent tribunal. It goes without saying that the HoF is not a judicial body, nor does its impartiality depict a semblance of the impartiality that is the defining characteristic of the regular courts. Elected as they are on their party or political allegiances, the members are more executive-minded than those of any constitutional interpreting body in the centralised or mixed systems of judicial review elsewhere. A writer has likened them to a priest, as opposed to a judge of a regular court who would represent a prophet. He argues:

> [w]hile priests, on the one hand, are institutionally ordained to the sacerdotal office, part and parcel of the organizational hierarchy from whence their leadership authority emanates, prophets, on the other, are leaders whose authority solely rests on the merits of their message rather than on any institutional blessing.[109]

In the end, members of the HoF are politicians, most of them representing the executive branches of the regional states and their role as a constitutional arbiter would be clouded by reasonable suspicions of partiality. Their loyalty may well be divided between their own parties' interests and the interests of their constituencies on the one hand and the dictates of the constitution on the other. If strictly followed, the constitutional meaning may in some cases lead to unpleasant results against their parties or constituencies.[110] Besides, many of the members of the HoF have significant executive roles in their respective regional states, and would have interests in the outcome of the case.

Finally, the competence of the individual HoF members to understand and interpret the constitution in a manner sensitive to due process guarantees and substantive human rights is also suspect. Authors, including the present author, have shown elsewhere that constitutional interpretation by the HoF has demonstrated misunderstandings of the constitutional guarantees involved (such as group rights, the right to equality, the right to self-determination, and so on) and set dangerous precedents.[111] The question of referral of constitutional issues by the regular courts to the CCI/HoF thus entails the need for a nuanced analysis of the ramifications of the hearing by the HoF.

109 Willis, *supra* note 1, p. 31.

110 *See* Fessha, *supra* note 4, pp. 77–8.

111 G. Assefa, 'Federalism and Legal Pluralism in Ethiopia: Reflections on Their Impacts on the Protection of Human Rights', in G. Alemu and S. Alemahu (eds), *The Constitutional Protection of Human Rights in Ethiopia: Challenges and Prospects*, Vol. 2, Addis Ababa University Press (2008), p. 1; T. S. Bulto, 'The Interplay of the Equality Clause and Affirmatuive Action Measures under the Ethiopian Constitution: The Benishangul Gumuz Case and Beyond', in G. Alemu and S. Alemahu (eds), *The Constitutional Protection of Human Rights in Ethiopia: Challenges and Prospects*, Vol. 2, Addis Ababa University Press (2008), p. 59.

VIII. CONCLUSION

While judicial review seeks to judicialise politics, subjecting political processes to constitutional procedures, in Ethiopia the constitution seems to have been overly politicised. The regular courts have used the procedure of referral as a handy tool to avoid adjudication of constitutionally sensitive cases. Moreover, article 83 of the constitution, whose sole aim is to define the duty of the CCI to receive referrals from the court, has been misunderstood in academic and judicial circles as well as by the CCI and HoF. It has been taken to imply that any and all cases that involve an invocation of the constitutional provisions should be channelled to the CCI and then to the HoF. As outlined above, the jurisdiction for the adjudication of constitution disputes has been constitutionally assigned to the courts, whose daily duty it is to interpret the constitution, usually indirectly but also directly, to factual situations involving concrete disputes. It is in the exceptional cases where the judge finds it impossible to apply an ordinary law without an authoritative interpretation of the constitution that referrals should be made.

Thus, it is a misnomer to speak of constitutional ouster of judicial jurisdiction in Ethiopia. The courts have not been silenced, but they seem to have retreated and acquiesced their own territory. The CCI and HoF, deliberately or inadvertently, have embraced the ensuing situation with both arms and have stretched their roles and powers to breaking point in matters involving constitutional interpretation. As seen in the *CUD* case, the CCI usurped the role of the courts as well as that of the HoF, making a final decision on its own without either referring, as it should have, the case to the HoF for final decision or remanding it to the courts. The CCI, whose role is merely advisory, instead went to the extent of disposing of a case itself. For its part, the HoF has repeatedly decided on questions of fact, in apparent excess of its constitutionally knit powers of interpreting the constitution.

More than anything else, therefore, it is the judicial acquiescence of its own proper role of concrete review, coupled with the willingness of the CCI/HoF to overstep their respective constitutional powers of abstract constitutional review that has given the impression that the regular courts have been stripped of their power to adjudicate constitutional disputes. Thus, it is the practice rather than any inherent constitutional flaw that has been at the heart of the problem of jurisdictional dilemmas surrounding judicial referral of constitutional issues to the CCI/HoF. Unless such flaws are remedied, the prevailing jurisdictional dilemmas and trespasses will continue to trample over some of the constitutionally consecrated substantive and procedural human rights guarantees. The greater part of the remedy lies in the proper delineation and understanding of the respective territories of the courts, the CCI and the HoF in the interpretation and application of the constitution.