

NON-JUDICIAL REVIEW IN ETHIOPIA: CONSTITUTIONAL PARADIGM, PREMISE AND PRECINCT

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I. INTRODUCTION

Ethiopia, at different periods, has experienced imperial (1890–1974) and democratic ways of state governance (initiated in 1991), interrupted by the Italian occupation (1936–41) and military junta (1974–91).¹ In 1995, contemporary Ethiopia, through the Constitution of the Federal Democratic Republic of Ethiopia (hereafter the FDRE Constitution or the Constitution),² has opted for the ‘federal’, ‘democratic’ and ‘republic’ way of governance and polity.³

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1 See, M. Abir, *Ethiopia: The Era of the Princes*, Longmans (1968); J. C. N. Paul and C. Clapham, *Ethiopian Constitutional Development – A Sourcebook*, vol. I, Artistic Printers (1971); F. Nahun, *Constitution for a Nation of Nations: The Ethiopian Prospect*, Red Sea Press (1997), ch. 1.

2 Proclamation No. 1/1995: A Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, *Federal Negarit Gazeta*, No. 1, 21 August 1995, p. 1.

3 In Ethiopia, codification of the Constitution was started during the regime of Emperor Haile Selassie I (1930–74). Prior to 1931, Ethiopia had a complex traditional, unwritten constitution nested in the ideal of the monarchy. During his reign, the Constitution of 1931 and the Revised Constitution of Ethiopia of 1955 were enacted. In 1974, when the Emperor Haile Selassie I was overthrown by the Coordinating Committee of the Armed Forces, Police, and Territorial Army (commonly known as ‘Derg’), a pan-military dictatorship with communist aspirations, the 1955 Constitution was suspended. Ethiopia operated without any constitution for more than twelve years. The military regime enacted in 1987 the Constitution of the People’s Democratic Republic of Ethiopia. The 1931 and 1955 Constitutions prominently legitimised imperialism, while that of 1987 witnessed oppressive Derg rule. See generally J. W. van Doren, ‘Positivism and the Rule of Law, Formal Systems or Concealed Values: A Case Study of Ethiopian Legal System’, 3 *Journal of Transnational Law and Policy* (1994): 165; K. M. Wigger, ‘Ethiopia: A Dichotomy of Despair and Hope’, 5 *Tulsa Journal of Comparative and International Law* (1998): 389. Against the backdrop of these three pre-1995 Constitutions, the FDRE Constitution concretises federalism and democratic polity in Ethiopia. The Ethiopian Federation is constituted by nine ethnically based States (for a list see article 47) and the City Administrations of Addis Ababa and of Dire Dawa. In a democratic polity, wherein people, in essence, are considered as ultimate

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Conventionally, the constitution of a nation occupies the highest place in the hierarchy of its laws. It is the supreme law of the land. It operates as the basic norm in the national legal system. Every state power is derived from the constitution. The legal validity of any law or executive action depends on its derivation from the constitution. A law or an executive action in contravention thereof becomes unconstitutional.⁴

A constitution, with a view to preserving and enforcing its supremacy, confers on a court of law, ordinary or constitutional, the power of judicial review and of the determination of legality of a legislative and executive action. It authorises such a court to declare a law or an action that goes against the letter or spirit of the constitution unconstitutional and thereby of no legal effect.

The FDRE Constitution, in line with this principle, occupies the highest place in the Ethiopian legal system and renders any law in contravention thereof invalid. It also imposes a constitutional duty on all citizens, state organs, political organisations and their officers to observe and obey the Constitution. Article 9(1) of the Constitution reads:

Article 9. Supremacy of the Constitution:

1. 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.
2. All citizens, organs of state, political organizations, other associations as well as their officials have the duty to ensure observance of the Constitution and to obey it.
3. It is prohibited to assume state power in any manner other than that provided under the Constitution.

The FDRE Constitution, however, unlike those of most other countries in the African continent,⁵ neither allows regular courts of Ethiopia nor does it establish

guardians of their interests, a constitution strives for empowerment of the people; however, the FDRE Constitution designs and enforces ethnic federalism. It constitutionalises Ethiopia's ethnic diversity and recognises the various ethnic groups as units of self-government. Representatives of 'Nations, Nationalities and Peoples of Ethiopia' (NN&Ps), which are a group of persons with a common culture, a common language, a common identity, a common psychological make-up and a predominantly contiguous territory, constitute the House of Federation (HoF), the Upper House of the Parliament. Sovereignty of Ethiopia rests with the NN&Ps. They have the right to self-determination and to secede. (See Preamble to the Constitution and articles 8, 39, 61 and 62.) For further comments see Nahun, *supra* note 1, ch. 1; A. G. Selassie, 'Ethnic Federalism: Its Promise and Pitfalls for Africa', 28 *Yale Journal of International Law* (2003): 51; E. A. Baylis, 'Beyond Rights: Legal Process and Ethnic Conflicts', 25 *Michigan Journal of International Law* (2004): 529.

4 See generally, M. D. A. Freeman, *Lloyd's Introduction to Jurisprudence*, Sweet and Maxwell (2008), pp. 305–21; J. Stone, 'Mystery and Mystique in the Basic Norm', 26 *Modern Law Review* (1963): 34; H. Kelsen, 'Professor Stone and the Pure Theory of Law', 17 *Stanford Law Review* (1965): 1130; J. Raz, *the Authority of Law*, Oxford University Press (1979), ch. 7.

5 For example see the Constitutions of Burkina Faso, Cameroon, Chad, Niger, Sudan, Zaire and Zambia, which confer the power of judicial review on respective regular courts, and of Angola,

a constitutional court to interpret the Constitution and decide the constitutional validity of any ‘law’ or ‘decision of an organ of a state or a public official’. It confers the power of judicial review and of the interpretation of the Constitution exclusively on the HoF, which is a representative body of all the NN&Ps.⁶ No court of law, including the highest court of the land, the Federal Supreme Court, is assigned any significant role to play in either the constitutional review or interpretation of the Constitution.⁷ The FDRE Constitution, arguably, strips the courts of their power of judicial review.⁸ The system of non-judicial review seems to be one of the unique features of the FDRE Constitution.⁹

This paper seeks to offer a constitutional perspective on the novel system of non-judicial review designed under the FDRE Constitution, to highlight and assess the rationality of the constitutional premise on which the non-judicial review is based, and to examine whether the courts still have some role to play in the contemporary non-judicial review. After giving a sketch of the constitutional paradigm of non-judicial review, the paper examines the theoretical and constitutional premise thereof. It then delves into a few pertinent issues relating to, or arising from, non-judicial review.

II. THE CONSTITUTIONAL PARADIGM

A. Judicial system – the constitutional outlay

The FDRE Constitution, overhauling the unitary judicial system in the imperial era and the military junta, provides for the establishment of a three-tier ‘regular’¹⁰ court system at the federal and regional (state) levels. The judicial system envisaged at the federal level is comprised of: (1) the Federal First Instance Courts; (2) the Federal High Court; and (3) the Federal Supreme Court. On a regional (state) level, the Constitution envisages a court system composed of: (1) State First Instance Courts (*Woreda* Courts); (2) State High Courts (Zonal Courts); and (3) the State Supreme Court.¹¹

Burundi, the Central African Republic, Equatorial Guinea, Gabon, Madagascar, Mali and Togo, and South Africa, which provide for constitutional review by constitutional courts.

6 FDRE Constitution, *supra* note 1, article 61(1).

7 However, it is argued that courts in Ethiopia have willingly relinquished their jurisdiction over constitutional matters. See T. S. Bulto, ‘Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory’, 19(1) *African Journal of International and Comparative Law* (2011): 99, at 110–11.

8 For further details see part IV of this article.

9 For further details see part II.B of this article.

10 The phrase ‘regular’, it seems, is used in FDRE Constitution, *supra* note 1, article 78(5) to distinguish ‘Regular Courts’ from the Religious Courts (Sharia Courts), which are recognised under, and protected by, its article 34(5), and the Customary Courts (referred to in its article 78(5)).

11 The material part of FDRE Constitution, *supra* note 1, article 78 reads: ‘2. Supreme Federal judicial authority is vested in the Federal Supreme Court. The House of Peoples’ Representatives may, by two-thirds majority vote, establish nationwide, or in some parts of the country only, the Federal High Court and First-Instance courts it deems necessary. Unless decided in this manner, the jurisdictions of the Federal High Court and of the First-Instance Courts are hereby delegated

The Constitution vests the 'judicial power' of the federal government and the regional state governments in the Federal and State Courts, respectively.¹² The Federal Supreme Court, which is the highest court of the land, is vested with 'Supreme Federal Judicial Authority'¹³ and bestowed, *inter alia*, with 'jurisdiction over cases arising under the Constitution'.¹⁴

B. Non-judicial review – the constitutional scheme

In Ethiopia none of the regular courts, including the Federal Supreme Court, has the power of judicial review and of interpretation of the Constitution. The FDRE Constitution confers the power of judicial review and constitutional interpretation and adjudication on the HoF.

Article 62 of the Constitution, which enumerates the 'powers and functions' of the HoF, states in subarticle (1) that 'the House (of the Federation) has the power to interpret the Constitution'. Article 83(1) of the Constitution, with the title 'Interpretation of the Constitution', reads: 'All constitutional disputes shall be decided by the House of the Federation.'¹⁵ The former article deals with the 'interpretive' power of the HoF, while the latter deals with its 'adjudicatory' power.

A plain reading of article 83(1), however, reveals that it refers to both the powers of the HoF. Its title refers to the 'interpretation' of the Constitution by the HoF, while its text explicitly confers on the HoF the power to 'decide' a 'constitutional dispute'. The marginal note, on the face of it, seems to be contextually at odds with, rather unconnected to, its main text. It, however, is contextually proximate to the contents of article 62(1), which confers on the HoF the power to interpret the Constitution.

The expression 'interpretation of the Constitution' used in the marginal note of article 83(1) creates some confusion about the true nature and ambit of the adjudicatory power bestowed on the HoF. 'Interpretation (of the Constitution)' and 'decision (of a constitutional dispute)' operate in different factual settings and are of different natures. The former is of a legislative character, while the latter is (quasi-)judicial in nature. Interpretation of a constitutional provision may be undertaken by the HoF simply to make it more precise or to bring it in tune with the spirit of the Constitution. The settlement of a constitutional dispute, on the

to the State Courts. 3. States shall establish State Supreme, High and First-Instance Courts. Particulars shall be determined by law. 4. Special or *ad hoc* courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures shall not be established.'

12 FDRE Constitution, *supra* note 1, articles 79(1) and 50(7).

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

14 Federal Courts Proclamation 25/1996, article 3.

15 FDRE Constitution, *supra* note 1, article 62(3) confers on the HoF power to 'decide' any issue relating to the right to self-determination and secession of the NN&Ps. Rendering a decision in issues relating to the right to self-determination and secession of the NN&Ps hardly involves 'decision' on a constitutional issue. The right to self-determination and secession is a political, rather than a constitutional, issue.

other hand, involves the interpretation and application of the relevant provisions of the Constitution to a set of asserted and denied facts. The Constitution framers, plausibly with this intent, have used the expression ‘interpretation of the Constitution’ in the title of article 83(1), though it confers on the HoF the power to ‘decide constitutional dispute’. This legislative intent, however, becomes hazy when a case is not a constitutional dispute but its resolution, nevertheless, requires the Court to, directly or indirectly, invoke or place its reliance upon certain provisions of the Constitution. Does article 83(1), by virtue of its marginal note, imply that the HoF, and not the Court, has the power to seize such a case merely because it involves or requires ‘interpretation of the Constitution’? The poser elicits two conflicting responses having equal force. Recalling the mandatory expression ‘*shall*’ used in article 83(1), one may argue that *each and every case* that involves the interpretation of a constitutional provision falls within the domain of the HoF. On the other hand, against the backdrop of the fact that the Constitution confers judicial power on the courts, one may with equal force assert that the HoF does not have the constitutional mandate to decide *each and every case* having constitutional flavour.¹⁶ The former view, in the present submission, seems to be fallacious with far-reaching consequences for the judicial power of the regular courts and their judicial independence. In the ultimate analysis, it wipes away the judicial power of the regular courts to entertain and adjudicate cases having constitutional flavour. Courts and their judicial power would be reduced to a mere constitutional decorum. ‘To conclude that each and every decision that implicates a constitutional provision must be brought to the House of Federation [...] is’, one scholar observed, ‘not only absurd, but is an absolute nightmare!’ ‘The practical effect of such a procedure’, he further commented, ‘renders the regular judiciary irrelevant and shackles the constitutional process to the point of making it a cruel hoax.’¹⁷

Further, article 84(2), by implication, directs a court to refer a case wherein constitutionality of ‘law’ is challenged to the Council of Constitutional Inquiry (CCI) for inquiry and explicitly mandates the CCI to carry out an investigation and submit its recommendations to the HoF for final decision. Article 84(2) says:

where any Federal or State law is contested as being unconstitutional and such a dispute is submitted to it by any court or interested party, the Council shall consider the matter and submit it to the House of the Federation for final decision.

A reading of articles 62(1), 83(1) and 84(2) in one breath conveys that the HoF is vested with triple powers, namely the power: (1) to ‘interpret the Constitution’;

16 See Bulto, *supra* note 7, at 110–12; A. Fiseha, ‘Some Reflections on the Judiciary in Ethiopia’, *Recht in Afrika 2011* (2011): 1, at 6–8.

17 C. Wells, *Essays on the Modern Ethiopian Constitution: Lectures to Young Lawyers*, unpublished, Addis Ababa University (1997), p. 32, cited in Bulto, *supra* note 7, at 110.

(2) to ‘decide a constitutional dispute’; and (3) to adjudge the constitutionality of ‘law’.

The HoF is required to seek investigation of a constitutional dispute and contested unconstitutionality of a federal or state law through the CCI.¹⁸ Any federal or state court or a party to a dispute can submit a constitutional challenge to a federal or state law to the CCI for investigation. The CCI is constitutionally obligated to carry out such an investigation and to submit its recommendations to the HoF for final decision. If, in opinion of the CCI, it does not require any constitutional interpretation in court, the CCI is required to remand the case to the referral court for disposal. The parties to the dispute, if dissatisfied with the CCI’s ruling, can appeal to the HoF. If it involves any constitutional interpretation, the CCI has to refer it to the HoF, along with its recommendations, for final decision.¹⁹ The CCI cannot, on its own, take up a constitutional dispute or contested unconstitutionality of a federal or state law for investigation and forward its recommendations to the HoF for final interpretation. The HoF cannot, except in the form of appeal from a party to a dispute against the CCI’s ruling, seize a matter for constitutional interpretation.

The constitutional scheme of non-judicial review by the HoF, through the CCI, is further articulated by Proclamation 250/2001²⁰ and Proclamation 251/2001.²¹ Proclamation 250/2001 deals with the structure, powers and duties of the CCI. It is composed of the president and vice-president of the Federal Supreme Court, six legal experts (of proven professional competence and high moral standing) appointed, on recommendation of the House of Peoples’ Representatives (HoPR), by the president of Ethiopia, and three persons designated by the HoF from among its members.²² The CCI is empowered: (1) to receive from a court, a party to dispute²³ or the HoF²⁴ constitutional disputes or cases contesting the constitutionality of a federal or state law; (2) to carry out investigations therein; and (3) to submit recommendations thereon to the HoF for ‘final decision’.²⁵ A constitutional issue referred to the CCI by a court that, in the former’s opinion, does not involve any constitutional interpretation, is, as mentioned earlier, required to remand it back to the concerned court for disposal.²⁶ A party to a case, which is not satisfied with the ruling of the CCI, may, within sixty days from

18 For a structural outlay of the CCI see FDRE Constitution, *supra* note 1, article 82(2).

19 *Ibid.*, article 84(1)–(3).

20 Proclamation No. 250/2001: Council of Constitutional Inquiry Proclamation, *Federal Negarit Gazeta*, No. 40, 6 July 2001, p. 1599.

21 Proclamation No. 251/2001: Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation, *Federal Negarit Gazeta*, No. 41, 6 July 2001, p. 1606.

22 See Proclamation 250/2001, *supra* note 20, article 4. See also FDRE Constitution, *supra* note 1, article 82(2).

23 See Proclamation 250/2001, *supra* note 20, articles 6 and 21. See also FDRE Constitution, *supra* note 1, article 84(2).

24 Proclamation 251/2001, *supra* note 21, article 6.

25 Proclamation 250/2001, *supra* note 20, article 19.

26 *Ibid.*, article 6. It reiterates the provisions of the FDRE Constitution, *supra* note 1, article 84(3).

receipt of the CCI's decision, appeal directly to the HoF.²⁷ If the investigation of the CCI results in a finding that the case involves a matter requiring interpretation of the Constitution, the CCI is required to submit its recommendations to the HoF for its final decision.²⁸

It is interesting to note that Proclamation 250/2001 has expanded the constitutional role of the CCI (and thereby of the HoF) in determining the constitutionality of a federal or state law. Article 84(2) of the FDRE Constitution, as mentioned earlier, mandates the CCI to undertake the investigation of a dispute contesting the constitutionality of a federal or state law when it is submitted to it by a court or a party to the dispute and to submit its recommendations thereon to the HoF for final decision. But it, from the text of article 84(2), is not clear as to whether the term 'law' refers to 'enacted' (primary) or 'enacted and subordinate law' (primary and secondary) law. If the term 'law' is interpreted in the former sense, the expression 'any Federal or State law' used in article 84(2) reads as 'any Federal or State *enacted* law', that is, proclamations enacted by federal or state legislature only. If it is taken in the latter sense, the phrase reads as 'any Federal or State *enacted and sub-ordinate* law', that is, proclamations and regulations/directives issued by executive authorities. However, it is pertinent to note that in the Amharic version of article 84(2), the term 'any Federal or State law' is explicitly equated with 'any Federal or State *enacted law*'.²⁹ And by virtue of article 106 of the Constitution,³⁰ the Amharic version of any constitutional provision carries final legal authority when there is ambiguity between it and its corresponding English version. Against this backdrop, it is further important to note that article 2(5) of Proclamation 250/2001 defines 'law', in the context of the powers of the CCI, to include primary as well as secondary legislation. It takes into its fold: (1) proclamations enacted by the federal or state legislature; (2) regulations issued by any federal or state governmental institutions; and (3) international agreements ratified by Ethiopia.³¹ Article 2(5) of the Proclamation reads: 'Law shall mean the Proclamations and Regulations issued by the Federal Government or the States as well as international agreements Ethiopia has endorsed and accepted.'³²

27 See Proclamation 250/2001, *supra* note 20, article 18 and Proclamation 251/2001, *supra* note 21, article 5(1). However, by virtue of article 5(2) of Proclamation 251/2001, the HoF is not obliged to respond to the appeal. It is only obliged to refer it to the CCI for further inquiry and recommendations.

28 FDRE Constitution, *supra* note 1, article 84(3).

29 The Amharic version uses '*higoch*', which refers to an act of the *legislature* at Federal and State level. Its material part reads: '*be federal mengistim hone be kilil hig awchi akalat ye miwotuhigoch*'.

30 It reads: 'the Amharic version of this Constitution shall have final legal authority'.

31 Agreements ratified by Ethiopia constitute an integral part of its domestic law. See FDRE Constitution, *supra* note 1, article 9(4).

32 Proclamation 251/2001, *supra* note 21, article 2(2) attributes a wider meaning to the term 'law'. It defines 'law' to include in it '*directives* issued by the Federal and States Government institutions' in addition to *Proclamations* issued by the Federal and State Legislative organs and *Regulations* issued by the Federal and State Government institutions.

The definition of 'law', read in the context of judicial review, by necessary implication, leads to three inevitable consequences: (1) the term 'law' takes into its fold virtually *all* legislative acts of the government; (2) mandates a federal or state court, and allows any party to a dispute to submit to the CCI for investigation any dispute arising under any federal or state proclamation, regulation issued by a federal or state governmental agency, and international agreement ratified by Ethiopia, and obligates the CCI to investigate it; and (3) empowers the HoF, through the CCI, to interpret and decide constitutional issues arising from *any* proclamation, regulation and international agreement ratified by Ethiopia. In other words, the HoF, via the CCI, is empowered to adjudicate the constitutional validity of, and constitutional interpretation thereof, virtually *all* primary and secondary legislative acts of the Ethiopian government. A court is required to stay a case at hand and to submit it to the CCI, if it 'believes' that the case involves a legal issue that warrants constitutional interpretation. The court is required to keep the case pending until it receives a communication from the CCI on the issue referred to it.³³ In addition, a party to a case purportedly involving constitutional interpretation is entitled to call upon the court handling its case to submit the issue requiring constitutional interpretation to the CCI, and, on its refusal to do so, to submit it to the CCI.³⁴

Proclamation 251/2001 entrusts the HoF with the task of the interpretation of the Constitution. It, like the FDRE Constitution, mentions that the HoF is required to get the matter investigated by the CCI and to make a final decision on its report. A report of the CCI is merely recommendatory in nature. Neither the findings nor the conclusions of the CCI are binding on the HoF. Before it makes a final decision, the HoF can undertake further investigation in any constitutional issue and collect 'additional information and evidence'³⁵ on its own, or alternatively, order any governmental or non-governmental institution, body or organ to furnish further information and evidence in the dispute.³⁶ The HoF is expected to identify and implement 'principles of constitutional interpretation' that, in its opinion, help it in examining and deciding constitutional cases brought before it. While deciding a constitutional dispute or controversy pertaining to any fundamental right or fundamental freedom guaranteed under the Constitution, the HoF is required to interpret and settle it in conformity with the Universal Declaration of Human Rights, International Covenants on Human Rights, and other international instruments adopted by Ethiopia.³⁷

III. THEORETICAL AND CONSTITUTIONAL PREMISE

The scheme of judicial review and of adjudication of constitutional disputes designed under the Constitution, as outlined above, excludes the courts from

33 Proclamation 250/2001, *supra* note 20, article 21.

34 *Ibid.*, article 22.

35 Proclamation 251/2001, *supra* note 21, article 8.

36 See *ibid.*, articles 9 and 10.

37 *Ibid.*, article 7(2). See also FDRE Constitution, *supra* note 1, article 13(2).

interpreting the Constitution as well as a judicial review of 'law'. The HoF, with recommendations by the CCI, has exclusive powers to interpret the Constitution and to determine the constitutional validity of *any* proclamation as well as of subordinate legislation.

The non-judicial review in Ethiopia is premised on certain theoretical and political considerations. A perusal of the minutes of the Constitutional Commission discloses that the framers of the Constitution were caught in the dilemma of judicial review versus non-judicial review and were convinced to adopt the latter on some theoretical and political considerations.³⁸ They felt that the power of constitutional interpretation and judicial review should be entrusted to the HoF and not to the courts. Judges, they argued, should not be allowed to strike down statutes, which are the 'fruits of the majoritarian branches'. They stressed that the Constitution, which is a document of 'political contract' reflecting 'free will and consent' of the NN&Ps, rather than a mere 'legal document', deserves to be interpreted only by its authors, namely representatives of the NN&Ps who constitute the HoF.³⁹ Divulging the premise of non-judicial review, the Secretary of the Constitutional Commission observed:

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 democratization 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.⁴⁰

Echoing the underlying theorem of non-judicial review and crystallising some of its off-shoots, scholars of constitutional law⁴¹ do see some more justifications for the non-judicial review of the Constitution. A few prominent among them are: (1) the Constitution has its roots in 'ethnic federalism'; (2) the Constitution is intended to be a 'political contract' among the NN&Ps and the ethnic groups of Ethiopia, assuring the former of the right to interpret it to protect their interests; (3) judges lack the requisite professional ability and credibility to handle fundamental or sensitive matters and issues of national or constitutional importance; (4) the

38 At one point in time, the Constitutional Assembly debated the creation of a Constitutional Court, but it ultimately favoured the idea of judicial review by the HoF. See World Bank, *Ethiopia: Legal and Judicial Sector Assessment*, World Bank (2004), p. 19.

39 See 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; A. Fiseha, 'Constitutional Adjudication in Ethiopia: Exploring the Experiences of the House of Federation', 1(1) *Mizan Law Review* (2007): 1.

40 Newsletter of the Constitution Commission No. 3, cited in Fessha, *ibid.*, at 69.

41 See, C. Mgbako, S. Braasch, A. Degol, M. Morgan, F. Segura and T. Tezera, 'Silencing the Ethiopian Courts: Non-judicial Constitutional Review and its Impact on Human Rights', 32(1) *Fordham International Law Journal* (2008): 259; A. Fiseha, 'Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience', 52 *Netherlands International Law Review* (2005): 1; Fiseha, *supra* note 39; Nahun, *supra* note 1, p. 74.

interpretation of the Constitution by the judiciary will culminate in 'judicial activism' or 'judicial adventurism' that will allow judges to override the will of the NN&Ps and to advance their own preferences and policy choices; and (5) the judicial determination of constitutional issues will seek lesser public support and approval as courts in Ethiopia, due to their historical proximity to the centralised executive (during the imperial regime and military junta) and low prestige, lack public trust, respect and confidence in the courts.⁴²

The rationale of the Constitutional Commission for conferring the power of judicial review and interpretation of the Constitution on the HoF and not on the courts is primarily premised on its perception that 'sovereignty' rests in the NN&Ps and the Constitution is the 'expression' of their 'sovereignty', and judicial review is anti-majoritarian as judges, unlike parliamentarians, are neither answerable nor accountable to the people. They apprehended that judges, if the power of judicial review were conferred on them, might use that power to replace the voice of the majority by their own and to inject their own ideology and philosophy into the law. Such a judicial power, they believed, would be at odds with democracy.⁴³ The interpretation of the Constitution is a 'political' function rather than a 'judicial' one. The non-judicial review, thus, finds its justification in the 'undemocratic nature of the judiciary' and the perception that only the 'sovereign' authors (NN&Ps) of the Constitution have the legitimate claim, rather right, to interpret it and to decide constitutional disputes. The judiciary should not be allowed to usurp legislative power, under the guise of judicial review, to determine the constitutional validity of acts of representatives of the people, who, unlike the judges, are elected by, and accountable to, the people. Courts are to be kept at bay from interpretation of the Constitution and the determination of constitutional validity of law, an outcome of 'collective wisdom' of the people's representatives, to honour the 'will' and 'power' of the people.

This rationale becomes more convincing if the HoF represents the 'will' as well as the 'power' of the Ethiopians, in the real sense of the terms. The inquiry leads to two fundamental queries and a search for responses thereto. They are: (1) does the HoF, in the context of its power of judicial review and against the backdrop of the other Federal House, namely the HoPR, represent indeed the 'will' of the people of Ethiopia?; and (2) is the HoF or the HoPR accountable to the people of Ethiopia? For articulating the response, one needs to recall the constitutional status of these two Federal Houses. The HoF, as stated above, represents all the NN&Ps in Parliament. Representatives of the NN&Ps are directly or indirectly elected by the State Councils. The 'sovereign power' resides in the NN&Ps and the Constitution is an 'expression' of their sovereignty. NN&Ps, being the depository of the 'sovereign power', have adopted the FDRE Constitution.⁴⁴ However, the

42 The judiciary in Ethiopia indeed lacks public and political trust. See Federal Democratic Republic of Ethiopia, *Comprehensive Justice Reform Program: Baseline Study Report*, Ministry of Capacity Building, Federal Democratic Republic of Ethiopia, PrimaveraQuint (2005), p. 160; World Bank, *supra* note 38, pp. 20–1; Canadian International Development Agency (CIDA), *Independence, Transparency and Accountability in the Judiciary of Ethiopia*, CIDA (2008).

43 For further theoretical analysis see Fessha, *supra* note 39, at 59–67.

44 See FDRE Constitution, *supra* note 1, Preamble.

Constitution states that the HoPR, which is composed of directly elected people's representatives, is the 'highest authority' of the federal government and it is 'responsible to the People'.⁴⁵ Members of the HoPR represent the 'Ethiopian People as a whole' and they are governed by the 'will of the people' and their 'conscience'.⁴⁶

A comparative outlook at the constitutional 'status' of these two Federal Houses and the 'will of the people' reflected therein conveys that the HoPR has a comparatively better claim over the power of judicial review and interpretation of the Constitution. The drafters of the Constitution were influenced not by the mere 'will' of the people but also by the fact that the 'sovereignty' rests with the HoF and the Constitution is the 'expression' of its 'sovereignty' for entrusting the power of judicial review to the HoF. It may, however, be argued that the mere fact that the Constitution vests sovereign power in the HoF does not suffice to either confer the power of judicial review on it or claim that the non-judicial review is a counter-majoritarian measure. But what matters more is the composition of the HoF (vis-à-vis the 'indirect will of the People' reflected therein) and its accountability to the public.⁴⁷ Further, the HoF, as stated earlier, is composed of representatives of each of NN&Ps who are to be 'elected' by the respective State Councils; however, article 61(3) of the Constitution leaves it to a State Council to 'elect' such a representative by the Council itself or by the people (of the state) through direct election. The latter mode, obviously, reflects the direct 'will' of the people in their representatives and in turn, makes the HoF a majoritarian body. But in practice, none of the State Councils, since the Constitution came into operation, has, for undisclosed reasons, either conducted 'elections' (in the respective states) to enable its people to 'elect' their representatives or 'elected' the representatives by themselves for the HoF. By relying on the first mode of election mentioned in article 61(3), State Councils have been 'electing' their representatives for the HoF. But what is more surprising is that the State Councils have developed the practice of 'appointing', rather than 'electing', individuals to represent the state in the HoF. Thus, the HoF is composed of the 'appointed' representatives of the State Councils rather than 'elected' representatives of the NN&Ps. Such a practice, in the ultimate analysis, takes away or dilutes the *raison d'être* of the non-judicial review premised on the preference for the 'democratic' judicial review (by a political unit) over the 'undemocratic' one (by the judiciary). Likening the 'appointed' representatives of the State Councils on the HoF to the 'judges', who are also 'appointed' and confirmed by the 'majoritarian' – the Parliament or regional units – a commentator observed:

[j]udges survive the 'majoritarian process of appointment and confirmation'. Just like judges, members of the House [HoF] are not elected and, thus, not accountable to the people. The fact that

45 *Ibid.*, article 50(3).

46 *Ibid.*, article 54(4).

47 Fessha, *supra* note 39, at 71.

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. [...] [A]s far as the members of the House [HoF] are appointed by the State Councils, the Ethiopian approach to constitutional review cannot escape from the same criticisms that judicial review provokes.

The approach does not represent an adequate response to the counter-majoritarian problem. Its attempt to take the 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.⁴⁸

Further, the rationale given by the Constitutional Commission for incorporating in the Constitution the non-judicial constitutional review, in the present submission, ostensibly faces four theoretical and pragmatic challenges. First, the non-judicial review goes against the spirit of the doctrine of separation of powers. The HoF is structurally as well as operationally proximate to the executive wing of the State. Most of its members, in one way or another, are closely associated with the regional executive or council. The HoF closely operates within the context of the federal government. It is an executive *cum* legislative hybrid body. Second, such a political and functional proximity clouds its impartiality as an interpreter of the Constitution, an adjudicator of constitutional disputes and of the constitutional validity of an executive act. Third, it is a matter of our experience that determination of constitutional *vires* of impugned acts and interpretation of constitution do invariably involve complex questions having equally competing but conflicting socio-politico-legal dimensions and choices. Finding a viable and constitutionally appealing way out from the web of these three-dimensional issues obviously requires a sound background of the Constitution (a politico-legal document) and constitutionalism (which advocates for limited government and perceives judicial review of legislation as a prerequisite). The task demands apt expertise and professional background. Against this backdrop, a mere look at the general profile of the members of the HoF, who mostly come through nomination from the executive wing of the state government or of the State Council, reveals that the HoF, as an institution, lacks the requisite expertise, legal or otherwise, to undertake penetrating constitutional analysis of the issue, controversy or act at hand and to decide it. However, one may be quick to argue that the CCI, which, as outlined in the FDRE Constitution and the Proclamation 250/2001, is a blend of individuals with legal background and politics chaired by none other than the President of the Federal Supreme Court, as an institutional component of the non-judicial review scheme designed under the FDRE Constitution, undertakes the requisite politico-legal analysis of the constitutional issues and feeds it to the HoF. The legal professionals give the requisite legal expertise while the members

48 *Ibid.*, at 72–3.

representing the Hof ensure that the former do not inject too many legal norms and niceties in the constitutional inquiry in the matter at hand. But one needs to recall here that the findings of the CCI are in the form of mere recommendations. They do not bind the HoF; it can adopt or discard them. But in either case members of the HoF need to have a sound background of the issue at hand and of its varied socio-politico-legal dimensions and the possible constitutional consequences thereof for appreciating (or not) the recommendations of the CCI and taking a final decision on the issue. The debate in the HoF inevitably revolves around the CCI's recommendations and issues arising therefrom. Members of the HoF, therefore, can hardly escape from having the requisite professional expertise and ability. The HoF, even if it is inclined to undertake a thorough constitutional analysis of the issue at hand before taking a decision, faces further pragmatic constraints. The HoF has a variety of other constitutional tasks to perform.⁴⁹ Further, the limited number of (two) annual 'sittings'⁵⁰ prevents it from indulging in thorough analysis and discussion of the constitutional issue (highlighted in the CCI's report along with the issues of constitutional significance incidental thereto or arising therefrom) at hand. Fourth, the 'decision' of the HoF,⁵¹ howsoever politically motivated or incompatible with the rules of constitutional interpretation and constitutionalism,⁵² is 'final' and operates as a precedent in similar cases in future.⁵³

The rationale for the 'democratic' constitutional review (by the HoF), in preference over the 'undemocratic' (judicial) review, reflected in the scheme of non-judicial review designed under the FDRE Constitution, therefore, needs to be appreciated in the light of the theoretical and pragmatic reservations mentioned above. The HoF, against this backdrop, seems to be structurally, functionally and professionally inapt to handle its task of the interpretation of the Constitution, deciding constitutional issues, and ascertaining the constitutional validity of an act in an effective and impartial manner.

IV. THE DOCTRINE OF HANDS-OFF OF THE JUDICIARY: A CONSTITUTIONAL MYTH OR REALITY?

The FDRE Constitution, as explained earlier, confers the power of judicial review and of interpretation of the Constitution, not on the courts but on the HoF. It takes away the power of judicial review of any federal or state 'law' from the courts. Subsequently, the two post-constitutional proclamations of 2001, under the guise of further clarifying the powers and responsibilities of the CCI and of the HoF, have stripped the courts of their (pre-proclamations) constitutional power of judicial review of secondary legislation (in the form of regulations or

49 See FDRE Constitution, *supra* note 1, article 62.

50 Proclamation 251/2001, *supra* note 21, article 46(1).

51 The decision is taken by approval of the majority vote of its members. See FDRE Constitution, *supra* note 1, article 64; Proclamation 251/2001, *supra* note 21, article 46(3).

52 For further analysis and illustrative cases see Fiseha, *supra* note 39.

53 See Proclamation 251/2001, *supra* note 21, articles 5(1) and 11(1).

directives) and international treaties (ratified by Ethiopia). These proclamations, via the CCI, confer the power of judicial review of *any* regulation of the federal or state government and international agreement ratified by Ethiopia on the HoF. They mandate the courts to distance themselves from any judicial scrutiny of, and inquiry into, constitutional validity of *any* proclamation, regulation or international agreement ratified by Ethiopia and to refer it to the HoF, via the CCI, for 'final' decision. Courts are, thus, required to be hands-off when they are called upon or required to adjudge the constitutionality of *any* legislative or executive act or to entertain constitutional issues, disputes or controversies arising thereunder or therefrom.

The exclusion of judicial review of subordinate legislation by the two proclamations of 2001, however, raises three pertinent inter-related questions: (1) are the two post-Constitution proclamations compatible with the FDRE Constitution?; (2) do the courts, in spite of the legislative bar, still retain with them the constitutional power of judicial review of secondary legislation and executive action?; and (3) is the so-called doctrine of judicial hands-off a constitutional reality or a mere judicial timidity? Let us now address, in brief, each one of these questions.

A. Are the post-constitution proclamations compatible with the FDRE constitution?

With a view to appreciating the (in)compatibility of the two proclamations with the Constitution it becomes necessary to recall at least seven basic constitutional facts pertaining to the HoF and the CCI. First, the HoF is the depository of 'all sovereign power' and the Constitution is the 'expression' of its sovereign power. Second, the 'powers and responsibilities' of the HoF, being a constitutional entity, are elaborately enumerated in the Constitution itself. Third, the HoF is entrusted with the responsibility of overall maintaining and preserving the 'constitutional order' in Ethiopia.⁵⁴ Fourth, the HoF, via the CCI, is, *inter alia*, entrusted with the task of deciding the constitutionality of the 'laws', including proclamations enacted by the HoPR. Fifth, the Constitution empowers the HoF to 'adopt' its own 'rules of procedure and internal administration' for discharging its constitutional responsibilities and tasks. Sixth, the 'powers and functions' of the CCI enumerated in the Constitution and those listed in Proclamation 250/2001 are couched in the same phraseology. Seventh, Proclamation 250/2001, through a definitional clause, brings the determination of the constitutional validity of any regulation, directive and international treaty adopted by Ethiopia within the ambit of the CCI, and through it, within the purview of the HoF. Against the backdrop of these constitutional facts, the constitutional propriety of the HoPR to alter, through proclamations, the well-defined power of judicial review of the HoF, through the CCI, becomes doubtful. It also raises a question of constitutional significance, namely is the HoPR constitutionally empowered to (re)define the

54 See FDRE Constitution, *supra* note 1, article 62.

'powers and responsibilities' of the HoF, which happens to be the depository of 'sovereignty' of Ethiopia, whose 'expressions' are embodied in the Constitution, and which is entrusted with the power of ascertaining the constitutionality of the 'laws' that emanate from the HoPR? It is indeed difficult to trace a positive answer to this question in the Constitution. Reading such a power into the HoPR will not only lead to unconvincingly stretching constitutional provisions but also to serious consequences which the drafters of the Constitution might have hardly anticipated, desired or thought about. A commentator has rightly questioned: can '[s]uch power, if it existed at all, lead to a conclusion that the HoPR may in the process limit, extend or even take away the competence of the HoF?'⁵⁵

Further, an ordinary statute (that is, a proclamation), according to hitherto accepted canons of constitutional supremacy and judicial review, cannot rewrite the Constitution. Both the proclamations, which extend the power of judicial review of the HoF, through the CCI, to secondary legislation, without any convincing constitutional premise or justification, are, therefore, seemingly incompatible with the constitutional scheme and spirit of non-judicial review designed under the Constitution.

In light of articles 9(1) and 84(2) of the Constitution, it may also be argued that both the 2001 proclamations, to the extent of conferring the power of judicial review of subordinate law on the HoF, via the CCI, are *ultra vires* to the Constitution. By virtue of article 9(1), the Constitution is the 'supreme law of the land' and 'any law or a decision of an organ of a state or a public official' contrary thereto has 'no effect'. And article 84(2) obligates the CCI to 'consider' a dispute 'contesting' the unconstitutionality of 'any Federal or State law' and to 'submit' its recommendations to the HoF for 'final decision'. The Constitution restricts the power of judicial review of the Hof, through the CCI, to only 'Federal and State Law'. The term 'law', as mentioned earlier, refers to the 'law' '*enacted*' by the federal or state legislative organs. It is, thus, evident that the Constitutional Commission intended to confine the power of judicial review of the HoF to the 'laws' '*enacted*' by the federal and state legislative wings. The Constitution, even by implication, does not refer to regulations, directives and decisions of the executive as 'law' for the purpose of non-judicial review. It is, therefore, clear that the Constitution keeps secondary law beyond the purview of non-judicial review by the CCI, and thereby of the HoF, and leaves it to the regular courts. But the two proclamations, by defining the term 'law' too broadly to include in it 'Proclamations, Regulations and Directives' issued by the federal or state government and 'international agreements' accepted by Ethiopia, have widened the scope of non-judicial review by the CCI (and of the HoF). Such a wider connotation of 'law' given under ordinary proclamations that significantly alters and contravenes the one given under the Constitution, the supreme law of the land, is, by virtue of article 9(1) of the Constitution, 'of no effect'. The exclusion of judicial review of *all* laws through the two post-Constitution proclamations, therefore, suffers from serious constitutional infirmity. Both the proclamations,

55 Fiseha, *supra* note 39, at 15.

to this extent, are unconstitutional as the Constitution explicitly limits the HoF's power of judicial review to 'laws enacted by the Federal and State Legislature'. Further, the HoPR, like any other constitutional institution, derives its power from the Constitution and is legitimately expected to operate within the orbit set by the Constitution. It is duty-bound to obey the Constitution.

B. Do the courts retain the constitutional power of judicial review of subordinate legislation?

In light of the plea of unconstitutionality of both the proclamations, to the extent of excluding judicial review of secondary legislation, articulated in the preceding paragraphs, a court still retains the constitutional mandate to judicially scrutinise and determine constitutional *vires* of any subordinate legislative instrument (issued by the executive) and decision of government bodies. The judiciary, in the present submission, is not completely stripped of its power of judicial review even though the two post-Constitution proclamations have (purportedly) wiped it out as they are *ultra vires* to the Constitution. Article 9(1) of Proclamation 251/2001 also lends indirect support to the argument. It restricts the presumption of constitutionality, until it is proved otherwise, only to the 'enacted law', thereby leaving out administrative legislation and executive decisions or actions of the presumption of constitutionality. Constitutionality of administrative decisions and actions, therefore, can still be put to judicial scrutiny and determination. (Non-)conformity of a regulation or directive with the parent statute and the Constitution, in the present submission, can (only) be questioned in a regular court and the court need not refer it to the CCI as its determination does not involve the constitutional validity of the subordinate legislation. It revolves around the judicial inquiry of the regulation's consistency with the laws and the Constitution. Judicial review of an administrative action or decision hardly involves constitutional interpretation.⁵⁶ It is simply a matter of testing its legality on the canons of the enabling legislation, and thereby subjecting the concerned authority to rule of law. Regular courts, thus, do retain their constitutional (residual) power of judicial review of subordinate legislation and executive actions.

C. Is the doctrine of judicial hands-off a constitutional reality or a mere judicial timidity?

The realisation of this constitutional power of residual judicial review of the courts obviously depends upon their will and courage to ascertain and exercise it. To put it differently, the exercise of the restrictive constitutional power of judicial review

⁵⁶ In *Biyadiglin Meles et al. v Amhara National Regional State* (decided on 8 May 1997, unpublished) and *Addis Ababa Taxi Drivers' Union v Addis Ababa City Administration* (decided on 25 January 2000, unpublished), the CCI gave a ruling to this effect. It ruled that a question pertaining to the constitutionality of subordinate legislation and executive action is left to the courts and not to the CCI. For further comments see Bulto, *supra* note 7, at 116; Fiseha, *supra* note 39; Fiseha, *supra* note 16.

depends upon the courts' attitude and will to assert their 'constitutional power' of judicial review of subordinate legislation and not to merely surrender the power of restrictive judicial review to the HoF, via the CCI, by readily 'believing' that such a determination involves a constitutional issue requiring constitutional interpretation.⁵⁷

It seems, however, that the courts are willing to prefer the second alternative. *Coalition for Unity and Democracy v Prime Minister Meles Zenawi Asres*,⁵⁸ popularly known as the *CUD case*, exhibits such a judicial preference. A day before the May 2005 parliamentary elections, the prime minister, through a directive, imposed a ban for a month on any outdoor assemblies and public demonstrations in Addis Ababa and its vicinities. Nevertheless, political opponents belonging to the Coalition for Unity and Democracy (CUD), the leading coalition of four opposition parties in Ethiopia, organised assemblies and carried out demonstrations thereby getting arrested and prosecuted. Their argument, *inter alia*, was that their assembly was in consonance with the Constitution and Proclamation 3/1991 (dealing with the procedures for carrying out peaceful demonstrations and public political meetings). Their major contentions before the Federal Court of First Instance were that: (1) their demonstration was peaceful as provided in the Constitution and Proclamation 3/1991; (2) their claim was based on the 1991 proclamation, and the trial court, therefore, had the jurisdiction and constitutional duty to conduct, like any other justiciable claim, the trial and not to refer it to the CCI for constitutional inquiry; (3) they had the constitutional right to access to justice as guaranteed under article 37 of the Constitution; and (4) the notification banning outdoor assemblies for a month issued by the prime minister was contrary to the proclamation of 1991. The trial court, however, failed to see any merit in any of the contentions of the CUD. It, therefore, referred the matter to the CCI. Interestingly, the Court did not specify the provisions that, in its opinion, needed constitutional interpretation. It also did not consider the constitutional validity of either Proclamation 3/1991, on which the claim of the CUD was partly based, or of the prime minister's directive (in the backdrop of the proclamation of 1991 or any other relevant law). In its referral, the Court simply asked the CCI: 'was the directive of the Prime Minister (which banned outdoor meetings and demonstrations for one month) in contravention of the Constitution?' The CCI, without further referring it to the HoF, remanded the matter to the Court of First Instance with a ruling that the prime minister, while issuing the directive, did not overstep his constitutional authority, and the directive, therefore, was not contrary to the Constitution. The Court passed its ruling against the CUD in terms similar to that of the CCI's communication. The Federal High Court, on appeal by the CUD, approved the dictum of the Federal Court of First Instance.

57 More than 50 per cent of the judges at the Federal and Regional levels, including judges of the Federal and Regional Supreme Courts, believe that they have little or no role to play in interpretation of the Constitution. See Fiseha, *supra* note 16, at 13.

58 *Coalition for Unity and Democracy v Prime Minister Meles Zenawi Asres*, Federal First Instance Court, File 54024, Ruling of 3 June 2005.

It needs to be stressed here, however, that both the judicial referral of the trial court and the CCI's response thereto suffer from two noteworthy flaws.⁵⁹ First, a court of law handling a case is required to submit it to the CCI *only when it believes* that there is a *need for constitutional interpretation* in deciding the case at hand.⁶⁰ It is required to refer to the CCI only 'legal issues' (and not factual issues or questions of fact) that, in its opinion, warrant 'constitutional interpretation'. The Federal Court of First Instance, for reasons known best to itself, has neither framed any specific questions of law nor indicated any certain provisions that, in its '*belief*', required constitutional interpretation. Its referral was rather about the application of the Constitution to the facts of the case. Second, the CCI, by virtue of article 84 of the Constitution and article 21(2) of Proclamation 250/2001, is required to '*investigate*' the legal issue referred to it by the Court and to remand it back to the Court when it finds that the issue does not require any constitutional interpretation. It in no way has the power to '*decide*' the issue referred to it. But in the *CUD case*, the CCI 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'.⁶¹ The CCI, thus, with no legal authority, usurped the judicial power (of applying law to a question of fact) in the guise of 'investigating' a 'constitutional interpretation' of the issue referred to it by the Court. The Constitution authorises the HoF, and not the CCI, to interpret the Constitution. It may, therefore, be argued that the communication of the CCI to the referral court, and the decision of the referral court based on the CCI's communication as well as of the Federal High Court in appeal therefrom, in no way forecloses the proposition that courts in Ethiopia do still retain with them the power of judicial review of subordinate legislation and administrative decisions.

Regardless of the observations made in this paper on the referral scheme designed under the Constitution, supplemented by the two post-Constitution proclamations and the ostensible flaws of the *CUD case*, the *CUD dictum* and the CCI's communication, as they stand today, inevitably lead to four propositions as future pointers. They are: (1) courts need to refer a case involving constitutional interpretation to the CCI; (2) courts (though unjustifiably) are barred from inquiring into constitutional *vires of all laws* (primary and secondary) as well as of administrative decisions of a non-legal character and they, thereby, are stripped of their power of judicial review; (3) courts are generally reluctant, by taking shelter behind the judicial referral provisions of the Constitution and of the two post-Constitution proclamations, to interpret or apply constitutional provisions to concrete case or question(s) of fact at hand or to do anything that might make it seem that they are engaged in constitutional interpretation or involved in

59 See also Bulto, *supra* note 7, at 116–19.

60 Proclamation 250/2001, *supra* note 20, article 21(3) (emphasis added).

61 Federal First Instance Court, *supra* note 58, p. 6.

politically sensitive issues that are likely to trigger constitutional disputes;⁶² and (4) courts are readily willing to relinquish, rather abdicate, their constitutional power of judicial review of subordinate legislation and administrative decisions or actions and thereby to allow the CCI, and through it, the HoF, to seize it, even though the CCI and the HoF seemingly do not have any constitutional claim over it. The *CUD case* not only appears to be a trend-setter but also a classic example of the lack of required judicial will and courage, rather a telling testimony of twinkling judicial timidity, to handle cases of political implications and to assert for what (the restrictive power of judicial review) constitutionally ‘belongs’ to them and the over-enthusiasm of the CCI to act as an arbiter rather than an investigator. The CCI indeed has usurped the role of the courts as well as that of the HoF. It may be recalled that all the constitutional institutions, including the courts, the CCI and the HoF, are under the constitutional duty to ensure the observance of the Constitution and to obey it.⁶³ In this sense, both the courts (the Federal First Instance Court and the Federal High Court) and the CCI, in the present submission, have ostensibly breached their constitutional duty.

V. CONCLUSION

The non-judicial review and interpretation of the Constitution by the HoF, assisted by the CCI, is premised on the perception of the Constitutional Commission that judicial review is non-democratic and the idea that the Constitution, being a political document, deserves to be interpreted by none other than its authors, the HoF. The drafters of the Constitution also apprehended that judges, who are neither elected by, nor accountable to, the people, might use the power of judicial review to inject their own philosophy and reasoning into the laws enacted by representatives of the people to whom they are accountable. However, the rationale of the non-judicial review, on certain theoretical and pragmatic considerations discussed in the paper, does not appear to be fully convincing.

The Constitution restricts the power of the CCI and the HoF to interpretation of the Constitution, settlement of constitutional disputes, and determination of constitutionality of any federal or state law. However, the two post-Constitution proclamations (250/2001 and 251/2001), contrary to the will of the Constitutional Commission and the scheme of the non-judicial review outlined under the Constitution, intend to wipe out the judicial review of subordinate legislation as well as of administrative action and to bestow it on the HoF, through the CCI. Both the proclamations, as argued in this article, are *ultra vires* to the Constitution. They, therefore, are of ‘no effect’. Hence, the courts are not totally stripped of the power of judicial review; they do retain the power of judicial review of secondary legislation and administrative actions and decisions. They, on the contrary, do have the constitutional mandate to invoke their judicial power to determine the

62 See Mgbako et al., *supra* note 41, at 267–8; Fessha, *supra* note 39; 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; Fiseha, *supra* note 16.

63 FDRE Constitution, *supra* note 1, article 9(2).

constitutional *vires* of subordinate legislation and administrative acts. While doing so, they, in fact, do not *interpret* the Constitution but do merely *apply* it. However, courts, plausibly out of judicial timidity, do not exhibit the requisite judicial will and courage to assert their power of (restrictive) judicial review. It seems that they are more willing to use their referral power and thereby to easily surrender the power of judicial review to the CCI, and thereby to the HoF, which is, though unjustifiably, willing to usurp it. The easy 'giving away attitude' of the courts amounts to abdication of their constitutional power of restrictive judicial review. And the willingness of the CCI and the HoF to usurp, for whatever reasons, the constitutional power of the judiciary to determine the constitutional *vires* of secondary legislation and executive decisions, when both the proclamations, in this context, are ostensibly unconstitutional, in a broader sense, not merely seems to be at odds with their operational orbit drawn under the Constitution but also amounts to a sort of constitutional trespass.